102d Congress, 1st Session - - - - - - - - - - House Document 102-58

PROPOSED LEGISLATION, ENTITLED THE "COMPREHENSIVE VIOLENT CRIME CONTROL ACT OF 1991"

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A DRAFT OF PROPOSED LEGISLATION TO RESTORE AN ENFORCEABLE FEDERAL DEATH PENALTY, TO CURB THE ABUSE OF HABEAS CORPUS, TO REFORM THE EXCLUSIONARY RULE, TO COMBAT CRIMINAL VIOLENCE INVOLVING FIREARMS, TO PROTECT WITNESSES AND OTHER PARTICIPANTS IN THE CRIMINAL JUSTICE SYSTEM FROM VIOLENCE AND INTIMIDATION, TO ADDRESS THE PROBLEM OF GANGS AND SERIOUS JUVENILE OFFENDERS, TO COMBAT TERRORISM, TO COMBAT SEXUAL VIOLENCE AND CHILD ABUSE, TO PROVIDE FOR DRUG TESTING OF OFFENDERS IN THE CRIMINAL JUSTICE PROCESS

MARCH 12, 1991.—Message and accompanying papers referred to the Committees on the Judiciary, Ways and Means, Public Works and Transportation, Energy and Commerce, and Banking, Finance and Urban Affairs and ordered to be printed

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To the Congress of the United States:

I am pleased to transmit this Administration's primary legislative initiative addressing the continuing threat of violent crime in this country. This proposal, entitled the "Comprehensive Violent Crime Control Act of 1991," contains a broad spectrum of critically needed reforms to the criminal justice system, as well as new offenses and penalties for various acts of life-threatening criminal behavior. Also transmitted is a section-by-section analysis. I urge that congressional action on this initiative be completed within the next 100 days.

The enormous danger posed by violent criminals in our midst today is totally unacceptable. In 1990, more than 20,000 Americans were murdered. Our citizens are rightly demanding that elected officials act with resolve to reduce substantially the threat violent crime poses to their families and communities. The dramatic victory achieved by our military forces in the Persian Gulf serves as a model for what can be accomplished by leaders and citizens committed to achieving a common goal. It is time for all Americans to work together to take back the streets and liberate our neighborhoods from the tyranny of fear.

This legislative package is designed to address comprehensively the failures of the current criminal justice system. There must be a clear understanding on the streets of America that anyone who threatens the lives of others will be held accountable. To this end, it is essential that we have swift and certain apprehension, prosecution, and incarceration. Too many times, in too many cases, criminals go free because the scales of justice are unfairly loaded against dedicated law enforcement officials.

The core elements of my proposal are:

Restoration of the Federal Death Penalty by establishing constitutionally sound procedures and adequate standards for imposing Federal death penalties that are already on the books (including mail bombing and murder of Federal officials); and authorizing the death penalty for drug kingpins and for certain heinous acts such as terrorist murders of American nationals abroad, killing of hostages, and murder for hire.

Habeas Corpus Reform to stop the often frivolous and repetitive appeals that clog our criminal justice system, and in many cases effectively nullify State death penalties, by limiting the ability of Federal and State prisoners to file repetitive habeas corpus petitions.

Exclusionary Rule Reform to limit the release of violent criminals due to legal technicalities by permitting the use of evidence that has been seized by Federal or State law enforcement officials acting in "good faith," or a firearm seized from dangerous criminals by a Federal law enforcement officer. This proposal also includes a system for punishing Federal officers

who violate Fourth Amendment standards, as well as a means for compensating victims of unlawful searches.

Increased Firearms Offenses and Penalties including a 10-year mandatory prison term for the use of a semiautomatic firearm in a drug trafficking offense or violent felony, a 5-year mandatory sentence for possession of a firearm by dangerous felons, new offenses involving theft of firearms and smuggling firearms in furtherance of drug trafficking or violent crimes, and a general ban on gun clips and magazines that enable a firearm to fire more than 15 rounds without reloading.

In addition to these proposals, my initiative contains elements designed to curb terrorism, racial injustice, sexual violence, and juvenile crime, and to support appropriate drug testing as a condition of post-conviction release for Federal prisoners.

I look forward to working with the Congress during the next 100 days on this necessary legislation.

GEORGE BUSH.

THE WHITE HOUSE, *March 11, 1991.*

A BILL

To restore an enforceable federal death penalty, to curb the abuse of habeas corpus, to reform the exclusionary rule, to combat criminal violence involving firearms, to protect witnesses and other participants in the criminal justice system from violence and intimidation, to address the problem of gangs and serious juvenile offenders, to combat terrorism, to combat sexual violence and child abuse, to provide for drug testing of offenders in the criminal justice process, to secure the right of victims and defendants to equal justice without regard to race or color, to enhance the rights of crime victims, and for other purposes.

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

Section 1. SHORT TITLE AND TABLE OF CONTENTS

(a) SHORT TITLE. -- This Act may be cited as the "Comprehensive Violent Crime Control Act of 1991".

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

TITLE I -- DEATH PENALTY

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Sec. 101. SHORT TITLE.

This title may be cited as the "Capital Punishment Procedures Act of 1991."

Sec. 102. DEATH PENALTY PROCEDURES.

Title 18 of the United States Code is amended --

(a) by adding the following new chapter after chapter 227:

"CHAPTER 228 -- DEATH PENALTY PROCEDURES

"Sec.

"§ 3591. Sentence of death

"A defendant who has been found guilty of --

"(a) an offense described in section 794 or section 2381 of this title;

"(b) an offense described in section 1751(c) of this title

if the offense, as determined beyond a reasonable doubt at a hearing under section 3593, constitutes an attempt to murder the President of the United States and results in bodily injury to the President or comes dangerously close to causing the death of the President;

"(c) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under the conditions described in subsection (b) of that section;

"(d) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under that section, where the defendant is a principal administrator, organizer or leader of such an enterprise, and the defendant, in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to attempt to kill any public officer, juror, witness, or member of the family or household of such a person;

"(e) an offense constituting a felony violation of the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), where the defendant, acting with a state of mind described in subsection (f), engages in such a violation, and the death of another person results in the course of the violation or from the

use of the controlled substance involved in the violation; or

"(f) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at a hearing under section 3593, caused the death of a person intentionally, knowingly, or through recklessness manifesting extreme indifference to human life, or caused the death of a person through the intentional infliction of serious bodily injury;

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified: Provided, That no person may be sentenced to death who was less than eighteen years of age at the time of the offense.

"§ 3592. Factors to be considered in determining whether a sentence of death is justified

"(a) MITIGATING FACTORS. -- In determining whether a sentence of death is justified for any offense, the jury, or if there is no jury, the court, shall consider each of the following mitigating factors and determine which, if any, exist:

"(1) MENTAL CAPACITY. -- The defendant's mental capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

"(2) DURESS. -- The defendant was under unusual and

substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

"(3) PARTICIPATION IN OFFENSE MINOR. -- The defendant's participation in the offense, which was committed by another, was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

The jury, or if there is no jury, the court, shall consider whether any other aspect of the defendant's background, character or record or any other circumstance of the offense that the defendant may proffer as a mitigating factor exists.

"(b) AGGRAVATING FACTORS FOR ESPIONAGE AND TREASON. -- In determining whether a sentence of death is justified for an offense described in section 3591(a), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any, exist:

"(1) PREVIOUS ESPIONAGE OR TREASON CONVICTION. -- The defendant has previously been convicted of another offense involving espionage or treason for which a sentence of life imprisonment or death was authorized by statute.

"(2) RISK OF SUBSTANTIAL DANGER TO NATIONAL SECURITY. -- In the commission of the offense the defendant knowingly created a grave risk to the national security.

"(3) RISK OF DEATH TO ANOTHER. -- In the commission of the offense the defendant knowingly created a grave risk of death to another person.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

"(c) AGGRAVATING FACTORS FOR HOMICIDE AND FOR ATTEMPTED MURDER OF THE PRESIDENT. -- In determining whether a sentence of death is justified for an offense described in section 3591(b) or (f), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any, exist:

"(1) CONDUCT OCCURRED DURING COMMISSION OF SPECIFIED CRIMES. -- The conduct resulting in death occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 32 (destruction of aircraft or aircraft facilities), section 33 (destruction of motor vehicles or motor vehicle facilities), section 36 (violence at international airports), section 351 (violence against Members of Congress, Cabinet officers, or Supreme Court Justices), section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property by explosives), section 844(i) (destruction of property affecting interstate commerce by explosives), section 1116 (killing or attempted killing of diplomats), section 1118 (prisoners serving life term), section 1201 (kidnapping), section 1203 (hostage taking), section 1751 (violence against the President or Presidential staff), section

1992 (wrecking trains), section 2280 (maritime violence), section 2281 (maritime platform violence), section 2332 (terrorist acts abroad against United States nationals), section 2339 (use of weapons of mass destruction), or section 2381 (treason) of this title, section 1826 of Title 28 (persons in custody as recalcitrant witnesses or hospitalized following insanity acquittal), or section 902(i) or (n) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472(i) or (n) (aircraft piracy)).

"(2) INVOLVEMENT OF FIREARM OR PREVIOUS CONVICTION OF VIOLENT FELONY INVOLVING FIREARM. -- The defendant --

"(A) during and in relation to the commission of the offense or in escaping or attempting to escape apprehension used or possessed a firearm as defined in section 921 of this title; or

"(B) has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than one year, involving the use or attempted or threatened use of a firearm, as defined in section 921 of this title, against another person.

"(3) PREVIOUS CONVICTION OF OFFENSE FOR WHICH A SENTENCE OF DEATH OR LIFE IMPRISONMENT WAS AUTHORIZED. -- The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute.

"(4) PREVIOUS CONVICTION OF OTHER SERIOUS OFFENSES. -- The defendant has previously been convicted of two or more Federal or

State offenses, each punishable by a term of imprisonment of more than one year, committed on different occasions, involving the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) or the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

"(5) GRAVE RISK OF DEATH TO ADDITIONAL PERSONS. -- The defendant, in the commission of the offense or in escaping or attempting to escape apprehension, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense.

"(6) HEINOUS, CRUEL, OR DEPRAVED MANNER OF COMMISSION. -- The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

"(7) PROCUREMENT OF OFFENSE BY PAYMENT. -- The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

"(8) COMMISSION OF THE OFFENSE FOR PECUNIARY GAIN. -- The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

"(9) SUBSTANTIAL PLANNING AND PREMEDITATION. -- The defendant committed the offense after substantial planning and premeditation.

"(10) VULNERABILITY OF VICTIM. -- The victim was particularly vulnerable due to old age, youth, or infirmity.

"(11) TYPE OF VICTIM. -- The defendant committed the offense against --

"(A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there was no Vice President, the officer next in order of succession to the office of the President of the United States, or any person acting as President under the Constitution and laws of the United States;

"(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

"(C) a foreign official listed in section 1116(b)(3)(A) of this title, if that official was in the United States on official business; or

"(D) a Federal public servant who was outside of the United States or who was a Federal judge, a Federal law enforcement officer, an employee (including a volunteer or contract employee) of a Federal prison, or an official of the Federal Bureau of Prisons --

"(i) while such public servant was engaged in the performance of his official duties;

"(ii) because of the performance of such public servant's official duties; or

"(iii) because of such public servant's status as a public servant.

For purposes of this paragraph, the terms 'President-elect' and 'Vice President-elect' mean such persons as are the apparent successful candidates for the offices of President and Vice President, respectively, as ascertained from the results of the general elections held to determine the electors of President and Vice President in accordance with title 3, United States Code, sections 1 and 2; a 'Federal law enforcement officer' is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution of an offense; 'Federal prison' means a Federal correctional, detention, or penal facility, Federal community treatment center, or Federal halfway house, or any such prison operated under contract with the Federal government; and 'Federal judge' means any judicial officer of the United States, and includes a justice of the Supreme Court and a United States magistrate judge.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

"(d) AGGRAVATING FACTORS FOR DRUG OFFENSE DEATH PENALTY. -- In determining whether a sentence of death is justified for an offense described in section 3591(c)-(e), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any, exist --

"(1) PREVIOUS CONVICTION OF OFFENSE FOR WHICH A SENTENCE OF DEATH OR LIFE IMPRISONMENT WAS AUTHORIZED. -- The defendant has previously been convicted of another Federal or State offense

resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute.

"(2) PREVIOUS CONVICTION OF OTHER SERIOUS OFFENSES. -- The defendant has previously been convicted of two or more Federal or State offenses, each punishable by a term of imprisonment of more than one year, committed on different occasions, involving the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) or the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

"(3) PREVIOUS SERIOUS DRUG FELONY CONVICTION. -- The defendant has previously been convicted of another Federal or State offense involving the manufacture, distribution, importation, or possession of a controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802)) for which a sentence of five or more years of imprisonment was authorized by statute.

"(4) USE OF FIREARM. -- In committing the offense, or in furtherance of a continuing criminal enterprise of which the offense was a part, the defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm, as defined in section 921 of this title, to threaten, intimidate, assault, or injure a person.

"(5) DISTRIBUTION TO PERSONS UNDER TWENTY-ONE. -- The offense, or a continuing criminal enterprise of which the offense

was a part, involved conduct proscribed by section 418 of the Controlled Substances Act which was committed directly by the defendant or for which the defendant would be liable under section 2 of this title.

"(6) DISTRIBUTION NEAR SCHOOLS. -- The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 419 of the Controlled Substances Act which was committed directly by the defendant or for which the defendant would be liable under section 2 of this title.

"(7) USING MINORS IN TRAFFICKING. -- The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 420 of the Controlled Substances Act which was committed directly by the defendant or for which the defendant would be liable under section 2 of this title.

"(8) LETHAL ADULTERANT. -- The offense involved the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), mixed with a potentially lethal adulterant, and the defendant was aware of the presence of the adulterant. The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

"§ 3593. Special hearing to determine whether a sentence of death is justified

"(a) NOTICE BY THE GOVERNMENT. -- Whenever the Government

intends to seek the death penalty for an offense described in section 3591, the attorney for the government, a reasonable time before the trial, or before acceptance by the court of a plea of guilty, or at such time thereafter as the court may permit upon a showing of good cause, shall sign and file with the court, and serve on the defendant, a notice that the Government in the event of conviction will seek the sentence of death. The notice shall set forth the aggravating factor or factors enumerated in section 3592, and any other aggravating factor not specifically enumerated in section 3592, that the Government, if the defendant is convicted, will seek to prove as the basis for the death penalty. The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

"(b) HEARING BEFORE A COURT OR JURY. -- When the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty of an offense described in section 3591, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. Prior to such a hearing, no presentence report shall be prepared by the United States Probation Service, notwithstanding the provisions of the Federal Rules of Criminal Procedure. The hearing shall be

conducted --

"(1) before the jury that determined the defendant's guilt;

"(2) before a jury impaneled for the purpose of the hearing if --

"(A) the defendant was convicted upon a plea of guilty;

"(B) the defendant was convicted after a trial before the court sitting without a jury;

"(C) the jury that determined the defendant's guilt was discharged for good cause; or

"(D) after initial imposition of a sentence under this section, reconsideration of the sentence under the section is necessary; or

"(3) before the court alone, upon motion of the defendant and with the approval of the attorney for the government.

A jury impaneled pursuant to paragraph (2) shall consist of twelve members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.

"(c) PROOF OF MITIGATING AND AGGRAVATING FACTORS. -- At the hearing, information may be presented as to --

"(1) any matter relating to any mitigating factor listed in section 3592 and any other mitigating factor; and

"(2) any matter relating to any aggravating factor

listed in section 3592 for which notice has been provided under subsection (a) and (if information is presented relating to such a listed factor) any other aggravating factor for which notice has been so provided.

The information presented may include the trial transcript and exhibits. Any other information relevant to such mitigating or aggravating factors may be presented by either the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The attorney for the government and for the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in that case of imposing a sentence of death. The attorney for the government shall open the argument. The defendant shall be permitted to reply. The government shall then be permitted to reply in rebuttal. The burden of establishing the existence of an aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the evidence.

"(d) RETURN OF SPECIAL FINDINGS. -- The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist. A finding with respect to a mitigating factor may be made by one or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.

"(e) RETURN OF A FINDING CONCERNING A SENTENCE OF DEATH. -- If, in the case of --

"(1) an offense described in section 3591(a), an aggravating factor required to be considered under section 3592(b) is found to exist;

"(2) an offense described in section 3591(b) or (f), an aggravating factor required to be considered under section 3592(c) is found to exist; or

"(3) an offense described in section 3591(c)-(e), an aggravating factor required to be considered under section 3592(d) is found to exist;

the jury, or if there is no jury, the court, shall then consider whether the aggravating factor or factors found to exist under subsection (d) outweigh any mitigating factor or factors. The jury, or if there is no jury, the court shall recommend a sentence of death if it unanimously finds at least one aggravating factor and no mitigating factor or if it finds one or more aggravating factors which outweigh any mitigating factors. In any other case, it shall not recommend a sentence of death. The jury shall be instructed that it must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factors in its decision, and should make such a recommendation as the information warrants.

"(f) SPECIAL PRECAUTION TO ASSURE AGAINST DISCRIMINATION. -- In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not be influenced by prejudice or bias relating to the race, color, religion, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religion, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that prejudice or bias relating to the race, color, religion, national origin, or sex of

the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religion, national origin, or sex of the defendant or any victim may be.

"§ 3594. Imposition of a sentence of death

"Upon the recommendation under section 3593(e) that a sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law. Notwithstanding any other provision of law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without the possibility of release.

"§ 3595. Review of a sentence of death

"(a) APPEAL. -- In a case in which a sentence of death is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal of the sentence must be filed within the time specified for the filing of a notice of appeal of the judgment of conviction. An appeal of the sentence under this section may be consolidated with an appeal of the judgment of conviction and shall have priority over all other cases.

"(b) REVIEW. -- The court of appeals shall review the entire record in the case, including --

"(1) the evidence submitted during the trial;

"(2) the information submitted during the sentencing

hearing;

"(3) the procedures employed in the sentencing hearing; and

"(4) the special findings returned under section 3593(d).

"(c) DECISION AND DISPOSITION. --

"(1) If the court of appeals determines that --

"(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor;

"(B) the evidence and information support the special findings of the existence of an aggravating factor or factors; and

"(C) the proceedings did not involve any other prejudicial error requiring reversal of the sentence that was properly preserved for and raised on appeal; it shall affirm the sentence.

"(2) In any other case, the court of appeals shall remand the case for reconsideration under section 3593 or for imposition of another authorized sentence as appropriate.

"(3) The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

"§ 3596. Implementation of a sentence of death

"(a) IN GENERAL. -- A person who has been sentenced to death

pursuant to the provisions of this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States Marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of such State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does so provide, and the sentence shall be implemented in the manner prescribed by such law.

"(b) SPECIAL BARS TO EXECUTION. -- A sentence of death shall not be carried out upon a person who lacks the mental capacity to understand the death penalty and why it was imposed on that person, or upon a woman while she is pregnant.

"(c) EMPLOYEES MAY DECLINE TO PARTICIPATE. -- No employee of any State department of corrections, the Federal Bureau of Prisons, or the United States Marshals Service, and no employee providing services to that department, bureau, or service under contract shall be required, as a condition of that employment or contractual obligation, to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term 'participate in any execution' includes personal preparation of

the condemned individual and the apparatus used for the execution, and supervision of the activities of other personnel in carrying out such activities.

"§ 3597. Use of State facilities

"A United States Marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a person such an official employs for the purpose, and shall pay the costs thereof in an amount approved by the Attorney General.

"§ 3598. Appointment of counsel

"(a) REPRESENTATION of INDIGENT DEFENDANTS. -- Notwithstanding any other provision of law, this section shall govern the appointment of counsel for any defendant against whom a sentence of death is sought, or on whom a sentence of death has been imposed, for an offense against the United States, where the defendant is or becomes financially unable to obtain adequate representation. Such a defendant shall be entitled to appointment of counsel from the commencement of trial proceedings until one of the conditions specified in section 3599(b) of this title has occurred.

"(b) REPRESENTATION BEFORE FINALITY OF JUDGMENT. -- A defendant within the scope of this section shall have

counsel appointed for trial representation as provided in section 3005 of this title. At least one counsel so appointed shall continue to represent the defendant until the conclusion of direct review of the judgment, unless replaced by the court with other qualified counsel.

"(c) REPRESENTATION AFTER FINALITY OF JUDGMENT. -- When a judgment imposing a sentence of death has become final through affirmance by the Supreme Court on direct review, denial of certiorari by the Supreme Court on direct review, or expiration of the time for seeking direct review in the court of appeals or the Supreme Court, the government shall promptly notify the district court that imposed the sentence. Within 10 days of receipt of such notice, the district court shall proceed to make a determination whether the defendant is eligible under this section for appointment of counsel for subsequent proceedings. On the basis of the determination, the court shall issue an order: (1) appointing one or more counsel to represent the defendant upon a finding that the defendant is financially unable to obtain adequate representation and wishes to have counsel appointed or is unable competently to decide whether to accept or reject appointment of counsel; (2) finding, after a hearing if necessary, that the defendant rejected appointment of counsel and made the decision with an understanding of its legal consequences; or (3) denying the appointment of counsel upon a finding that the defendant is

financially able to obtain adequate representation. Counsel appointed pursuant to this subsection shall be different from the counsel who represented the defendant at trial and on direct review unless the defendant and counsel request a continuation or renewal of the earlier representation.

"(d) STANDARDS FOR COMPETENCE OF COUNSEL. -- In relation to a defendant who is entitled to appointment of counsel under this section, at least one counsel appointed for trial representation must have been admitted to the bar for at least five years and have at least three years of experience in the trial of felony cases in the federal district courts. If new counsel is appointed after judgment, at least one counsel so appointed must have been admitted to the bar for at least five years and have at least three years of experience in the litigation of felony cases in the federal courts of appeals or the Supreme Court. The court, for good cause, may appoint counsel who does not meet these standards, but whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration of the seriousness of the penalty and the nature of the litigation.

"(e) APPLICABILITY OF CRIMINAL JUSTICE ACT. -- Except as otherwise provided in this section, the provisions of section 3006A of this title shall apply to appointments under this section.

"(f) CLAIMS OF INEFFECTIVENESS OF COUNSEL. -- The

ineffectiveness or incompetence of counsel during proceedings on a motion under section 2255 of title 28, United States Code, in a capital case shall not be a ground for relief from the judgment or sentence in any proceeding. This limitation shall not preclude the appointment of different counsel at any stage of the proceedings.

"§ 3599. Collateral Attack on Judgment Imposing Sentence of Death

"(a) TIME FOR MAKING SECTION 2255 MOTION. -- In a case in which a sentence of death has been imposed, and the judgment has become final as described in section 3598(c) of this title, a motion in the case under section 2255 of title 28, United States Code, must be filed within 90 days of the issuance of the order relating to appointment of counsel under section 3598(c) of this title. The court in which the motion is filed, for good cause shown, may extend the time for filing for a period not exceeding 60 days. A motion described in this section shall have priority over all non-capital matters in the district court, and in the court of appeals on review of the district court's decision.

"(b) STAY OF EXECUTION. -- The execution of a sentence of death shall be stayed in the course of direct review of the judgment and during the litigation of an initial motion in the case under section 2255 of title 28, United States Code. The stay shall run continuously following imposition of the sentence, and shall expire if --

"(1) the defendant fails to file a motion under section 2255 of title 28, United States Code, within the time specified in subsection (a), or fails to make a timely application for court of appeals review following the denial of such a motion by a district court; or

"(2) upon completion of district court and court of appeals review under section 2255 of title 28, United States Code, the motion under that section is denied and (A) the time for filing a petition for certiorari has expired and no petition has been filed; (B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or (C) a timely petition for certiorari was filed and upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

"(3) before a district court, in the presence of counsel and after having been advised of the consequences of his decision, the defendant waives the right to file a motion under section 2255 of title 28, United States Code.

"(c) FINALITY OF THE DECISION ON REVIEW. -- If one of the conditions specified in subsection (b) has occurred, no court thereafter shall have the authority to enter a stay of execution or grant relief in the case unless --

"(1) the basis for the stay and request for relief is a claim not presented in earlier proceedings;

"(2) the failure to raise the claim was (A) the result

40-812 0 - 91 - 2

of governmental action in violation of the Constitution or laws of the United States; (B) the result of the Supreme Court recognition of a new federal right that is retroactively applicable; or (C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim in earlier proceedings; and

"(3) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the determination of guilt on the offense or offenses for which the death penalty was imposed."; and

(b) in the chapter analysis of part II, by adding the following new item after the item relating to chapter 227:

"228. Death penalty procedures .....3591".

Sec. 103. CONFORMING AMENDMENT RELATING TO DESTRUCTION OF AIRCRAFT OR AIRCRAFT FACILITIES.

Section 34 of title 18 of the United States Code is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the section.

Sec. 104. CONFORMING AMENDMENT RELATING TO ESPIONAGE.

Section 794(a) of title 18 of the United States Code is amended by changing the period at the end of the section to a comma and by adding immediately thereafter the words "except that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, further finds beyond a reasonable

doubt at a hearing under section 3593 of this title that the offense directly concerned nuclear weaponry, military spacecraft and satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; sources or methods of intelligence or counterintelligence operations; or any other major weapons system or major element of defense strategy.".

Sec. 105. CONFORMING AMENDMENT RELATING TO TRANSPORTING EXPLOSIVES.

Section 844(d) of title 18 of the United States Code is amended by striking the words "as provided in section 34 of this title".

Sec. 106. CONFORMING AMENDMENT RELATING TO MALICIOUS DESTRUCTION OF FEDERAL PROPERTY BY EXPLOSIVES.

Section 844(f) of title 18 of the United States Code is amended by striking the words "as provided in section 34 of this title".

Sec. 107. CONFORMING AMENDMENT RELATING TO MALICIOUS DESTRUCTION OF INTERSTATE PROPERTY BY EXPLOSIVES.

Section 844(i) of title 18 of the United States Code is amended by striking the words "as provided in section 34 of this title".

Sec. 108. CONFORMING AMENDMENT RELATING TO MURDER.

The second paragraph of section 1111(b) of title 18 of the

United States Code is amended to read as follows:

"Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;".

Sec. 109. CONFORMING AMENDMENT RELATING TO KILLING OFFICIAL GUESTS OR INTERNATIONALLY PROTECTED PERSONS.

Section 1116(a) of title 18 of the United States Code is amended by striking the words "any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and".

Sec. 110. MURDER BY FEDERAL PRISONER.

Chapter 51 of title 18 of the United States Code is amended --

(a) by adding at the end thereof the following:

"§ 1118. Murder by a federal prisoner

"(a) Whoever, while confined in a Federal prison under a sentence for a term of life imprisonment, murders another shall be punished by death or by life imprisonment without the possibility of release.

"(b) For purposes of this section --

"(1) 'Federal prison' means any Federal correctional, detention, or penal facility, Federal community treatment center, or Federal halfway house, or any such prison operated under contract with the Federal Government;

"(2) 'term of life imprisonment' means a sentence for the term of natural life, a sentence commuted to natural life, an indeterminate term of a minimum of at least fifteen

years and a maximum of life, or an unexecuted sentence of death."; and

(b) by amending the section analysis to add:

"1118. Murder by a Federal prisoner.".

Sec. 111. CONFORMING AMENDMENT RELATING TO KIDNAPPING.

Section 1201 of title 18 of the United States Code is amended by inserting after the words "or for life" in subsection (a) the words "and, if the death of any person results, shall be punished by death or life imprisonment".

Sec. 112. CONFORMING AMENDMENT RELATING TO HOSTAGE TAKING.

Section 1203 of title 18 of the United States Code is amended by inserting after the words "or for life" in subsection (a) the words "and, if the death of any person results, shall be punished by death or life imprisonment".

Sec. 113. CONFORMING AMENDMENT RELATING TO MAILABILITY OF INJURIOUS ARTICLES.

The last paragraph of section 1716 of title 18 of the United States Code is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the paragraph.

Sec. 114. CONFORMING AMENDMENT RELATING TO PRESIDENTIAL ASSASSINATION.

Subsection (c) of section 1751 of title 18 of the United States Code is amended to read as follows:

"(c) Whoever attempts to murder or kidnap any individual designated in subsection (a) of this section shall be punished

(1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if the conduct constitutes an attempt to murder the President of the United States and results in bodily injury to the President or otherwise comes dangerously close to causing the death of the President.".

Sec. 115. CONFORMING AMENDMENT RELATING TO MURDER FOR HIRE.

Subsection (a) of section 1958 of title 18 of the United States Code is amended by deleting the words "and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both" and inserting in lieu thereof "and if death results, shall be punished by death or life imprisonment, or shall be fined in accordance with this title, or both".

Sec. 116. CONFORMING AMENDMENT RELATING TO VIOLENT CRIMES IN AID OF RACKETEERING ACTIVITY.

Paragraph (1) of subsection (a) of section 1959 of title 18 of the United States Code is amended to read as follows: "for murder, by death or life imprisonment, or a fine in accordance with this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine in accordance with this title, or both";

Sec. 117. CONFORMING AMENDMENT RELATING TO WRECKING TRAINS.

The second to the last paragraph of section 1992 of title 18 of the United States Code is amended by changing the comma after the words "imprisonment for life" to a period and deleting the

remainder of the section.

Sec. 118. CONFORMING AMENDMENT RELATING TO BANK ROBBERY.

Section 2113(e) of title 18 of the United States Code is amended by striking the words "or punished by death if the verdict of the jury shall so direct" and inserting in lieu thereof "or if death results shall be punished by death or life imprisonment".

Sec. 119. CONFORMING AMENDMENT RELATING TO TERRORIST ACTS.

Section 2332(a)(1) of title 18 of the United States Code is amended to read as follows:

"(1) (A) if the killing is murder as defined in section 1111(a) of this title, be fined under this title, punished by death or imprisonment for any term of years or for life, or both;".

Sec. 120. CONFORMING AMENDMENT RELATING TO AIRCRAFT HIJACKING.

Section 903 of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. 1473), is amended by striking subsection (c).

Sec. 121. CONFORMING AMENDMENT TO CONTROLLED SUBSTANCES ACT

Section 408 of the Controlled Substances Act is amended by striking subsections (g)-(r).

Sec. 122. CONFORMING AMENDMENT RELATING TO GENOCIDE.

Section 1091(b)(1) of title 18 of the United States Code is amended by striking "a fine of not more than $1,000,000 and imprisonment for life;" and inserting in lieu thereof "by death or imprisonment for life, or a fine of not more than $1,000,000,

or both;".

Sec. 123. INAPPLICABILITY TO UNIFORM CODE OF MILITARY JUSTICE.

The provisions of chapter 228 of title 18 of the United States Code, as added by this Act, shall not apply to prosecutions under the Uniform Code of Military Justice (10 U.S.C. 801 et seq.).

TITLE II - HABEAS CORPUS REFORM

SUBTITLE A -- GENERAL HABEAS CORPUS REFORM

Sec. 201. SHORT TITLE FOR SUBTITLE A.

This subtitle may be cited as the "Habeas Corpus Reform Act of 1991".

Sec. 202. PERIOD OF LIMITATION.

Section 2244 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the following times:

"(1) the time at which State remedies are exhausted;

"(2) the time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State

action;

"(3) the time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

Sec. 203. APPEAL.

Section 2253 of title 28, United States Code, is amended to read as follows:

"§ 2253. Appeal

"In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of

probable cause.".

Sec. 204. AMENDMENT TO RULES OF APPELLATE PROCEDURE.

Federal Rule of Appellate Procedure 22 is amended to read as follows:

"RULE 22.

"HABEAS CORPUS AND § 2255 PROCEEDINGS

"(a) Application for an Original Writ of Habeas Corpus. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

"(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, and in a motion proceeding pursuant to section 2255 of title 28, United States Code, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to

constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or the government or its representative, a certificate of probable cause is not required.".

Sec. 205. SECTION 2254 AMENDMENTS.

Section 2254 of title 28, United States Code, is amended by redesignating subsections "(e)" and "(f)" as subsections "(f)" and "(g)", respectively, and is further amended --

(1) by amending subsection (b) to read as follows:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the applicant. An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.";

(2) by redesignating subsection "(d)" as subsection "(e)", and amending it to read as follows:

"(e) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a full and fair determination of a factual issue made in the case by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting this

presumption by clear and convincing evidence.";

(3) by adding a new subsection (d) reading as follows:

"(d) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings."; and

(4) by adding a new subsection (h) reading as follows:

"(h) In all proceedings brought under this section, and any subsequent proceedings on review, appointment of counsel for a petitioner who is or becomes financially unable to afford counsel shall be in the discretion of the court, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by the provisions of section 3006A of title 18, United States Code.".

Sec. 206. SECTION 2255 AMENDMENTS.

Section 2255 of title 28, United States Code, is amended by deleting the second paragraph and the penultimate paragraph thereof, and by adding at the end thereof the following new paragraphs:

"A two-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:

"(1) the time at which the judgment of conviction becomes final;

"(2) the time at which the impediment to making a

motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action;

"(3) the time at which the right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

"In all proceedings brought under this section, and any subsequent proceedings on review, appointment of counsel for a movant who is or becomes financially unable to afford counsel shall be in the discretion of the court, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by the provisions of section 3006A of title 18, United States Code."

SUBTITLE B -- DEATH PENALTY LITIGATION PROCEDURES

SEC. 210. SHORT TITLE FOR SUBTITLE B.

This subtitle may be cited as the "Death Penalty Litigation Procedures Act of 1991."

SEC. 211. DEATH PENALTY LITIGATION PROCEDURES

Title 28, United States Code, is amended by inserting the following new chapter immediately following chapter 153:

"CHAPTER 154-SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES.

"Sec.

Section 2256. Prisoners in state custody subject to capital sentence; appointment of counsel; requirement of

rule of court or statute; procedures for appointment.

"(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in state custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

"(b) This chapter is applicable if a State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for state law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(c) Any mechanism for the appointment, compensation and reimbursement of counsel as provided in subsection (b) must offer counsel to all state prisoners under capital sentence and must provide for the entry of an order by a court of record: (1) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer; (2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (3) denying the

appointment of counsel upon a finding that the prisoner is not indigent.

"(d) No counsel appointed pursuant to subsections (b) and (c) to represent a state prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(e) The ineffectiveness or incompetence of counsel during state or federal collateral post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254 or this chapter. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of state or federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

"Section 2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.

"(a) Upon the entry in the appropriate state court of record of an order under section 2256(c), a warrant or order setting an execution date for a state prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application must recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is

subject to stay.

"(b) A stay of execution granted pursuant to subsection (a) shall expire if:

"(1) a state prisoner fails to file a habeas corpus petition under section 2254 within the time required in section 2258, or fails to make a timely application for court of appeals review following the denial of such a petition by a district court; or

"(2) upon completion of district court and court of appeals review under section 2254 the petition for relief is denied and (A) the time for filing a petition for certiorari has expired and no petition has been filed; (B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or (C) a timely petition for certiorari was filed and upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

"(3) before a court of competent jurisdiction, in the presence of counsel and after having been advised of the consequences of his decision, a state prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254.

"(c) If one of the conditions in subsection (b) has occurred, no federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless:

"(1) the basis for the stay and request for relief is

a claim not previously presented in the state or federal courts;

"(2) the failure to raise the claim is (A) the result of state action in violation of the Constitution or laws of the United States; (B) the result of the Supreme Court recognition of a new federal right that is retroactively applicable; or (C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for state or federal post-conviction review; and

"(3) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the determination of guilt on the offense or offenses for which the death penalty was imposed.

"Section 2258. Filing of habeas corpus petition; time requirements; tolling rules.

"Any petition for habeas corpus relief under section 2254 must be filed in the appropriate district court within 180 days from the filing in the appropriate state court of record of an order under section 2256(c). The time requirements established by this section shall be tolled --

"(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a state prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the state or other

final state court decision on direct review;

"(2) during any period in which a state prisoner under capital sentence has a properly filed request for post-conviction review pending before a state court of competent jurisdiction; if all state filing rules are met in a timely manner, this period shall run continuously from the date that the state prisoner initially files for post-conviction review until final disposition of the case by the highest court of the State, but the time requirements established by this section are not tolled during the pendency of a petition for certiorari before the Supreme Court except as provided in paragraph (1); and

"(3) during an additional period not to exceed 60 days, if (A) a motion for an extension of time is filed in the federal district court that would have proper jurisdiction over the case upon the filing of a habeas corpus petition under section 2254; and (B) a showing of good cause is made for the failure to file the habeas corpus petition within the time period established by this section.

"Section 2259. Evidentiary hearings; scope of federal review; district court adjudication.

"(a) Whenever a state prisoner under a capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall:

"(1) determine the sufficiency of the record for habeas corpus review based on the claims actually presented and litigated in the state courts except when the prisoner

can show that the failure to raise or develop a claim in the state courts is (A) the result of state action in violation of the Constitution or laws of the United States; (B) the result of the Supreme Court recognition of a new federal right that is retroactively applicable; or (C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for state post-conviction review; and

"(2) conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review.

"(b) Upon the development of a complete evidentiary record, the district court shall rule on the claims that are properly before it, but the court shall not grant relief from a judgment of conviction or sentence on the basis of any claim that was fully and fairly adjudicated in state proceedings.

"Section 2260. Certificate of probable cause inapplicable.

"The requirement of a certificate of probable cause in order to appeal from the district court to the court of appeals does not apply to habeas corpus cases subject to the provisions of this chapter except when a second or successive petition is filed.

"Section 2261. Application to state unitary review procedures.

"(a) For purposes of this section, a "unitary review"

procedure means a state procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. The provisions of this chapter shall apply, as provided in this section, in relation to a state unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(b) A unitary review procedure, to qualify under this section, must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2256(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(c) The provisions of sections 2257, 2258, 2259, 2260, and 2262 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to state "post-

conviction review" and "direct review" in those sections shall be understood as referring to unitary review under the state procedure. The references in sections 2257(a) and 2258 to "an order under section 2256(c)" shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate state court, then the start of the 180 day limitation period under section 2258 shall be deferred until a transcript is made available to the prisoner or his counsel.

"SEC. 2262. LIMITATION PERIODS FOR DETERMINING PETITIONS.

"(a) The adjudication of any petition under section 2254 of title 28, United States Code, that is subject to this chapter, and the adjudication of any motion under section 2255 of title 28, United States Code, by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all non-capital matters. The adjudication of such a petition or motion shall be subject to the following time limitations:

"(1) The district court shall determine such a petition or motion within 180 days of the filing of the petition or motion.

"(2) The court of appeals shall determine an appeal relating to such a petition or motion within 180 days of the

filing of the record in the court of appeals. If the court of appeals grants en banc consideration, the en banc court shall determine the appeal within 180 days of the decision to grant such consideration.

"(b) The time limitations under subsection (a) shall apply to an inital petition or motion, and to any second or successive petition or motion. The same limitations shall also apply to the re-determination of a petition or motion or related appeal following a remand by the court of appeals or the Supreme Court for further proceedings, and in such a case the limitation period shall run from the date of the remand.

"(c) The time limitations under this section shall not be construed to entitle a petitioner or movant to a stay of execution, to which the petitioner or movant would otherwise not be entitled, for the purpose of litigating any petition, motion, or appeal.

"(d) The failure of a court to meet or comply with the time limitations under this section shall not be a ground for granting relief from a judgment of conviction or sentence. The state or government may enforce the time limitations under this section by applying to the court of appeals or the Supreme Court for a writ of mandamus.

"SEC. 2263. RULE OF CONSTRUCTION.

"The provisions of this chapter shall be construed to promote the expeditious conduct and conclusion of state and

federal court review in capital cases.".

TITLE III -- EXCLUSIONARY RULE

SEC. 301. ADMISSIBILITY OF CERTAIN EVIDENCE

(a) IN GENERAL. -- Chapter 223 of title 18, United States Code, is amended by adding at the end the following:

"§ 3509. Admissibility of evidence obtained by search or seizure

"(a) EVIDENCE OBTAINED BY OBJECTIVELY REASONABLE SEARCH OR SEIZURE. --

"(1) FEDERAL PROCEEDINGS. -- Evidence which is obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the fourth amendment to the Constitution of the United States, if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the fourth amendment. The fact that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of the existence of such circumstances.

"(2) STATE PROCEEDINGS. -- The law of the United States does not require the exclusion of evidence in a proceeding in any court under circumstances in which the evidence would be admissible in a proceeding in a court of the United States pursuant to paragraph (1) of this subsection.

"(b) FIREARMS SEIZED AS EVIDENCE BY FEDERAL LAW ENFORCEMENT OFFICERS. --

(1) ADMISSIBILITY OF EVIDENCE. -- In addition to the limitations on the exclusion of evidence set forth in subsections (a) and (c) of this section, a firearm obtained as a result of a search or seizure shall not be excluded as evidence in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the fourth amendment to the Constitution of the United States, if the search or seizure was carried out by a Federal law enforcement officer, and the firearm will be used as evidence against a defendant who --

"(A) is being prosecuted for a crime of violence or a serious drug offense; or

"(B) is ineligible to possess such firearm pursuant to section 922(g) of this title.

"(2) RULES FOR CONDUCT AND SANCTIONS. -- The Attorney General shall promulgate rules and regulations relating to compliance by law enforcement officers of the Department of Justice with the fourth amendment to the Constitution. Such rules and regulations shall include specifications concerning --

"(A) the training of such officers in the law of search and seizure;

"(B) procedures and standards of conduct to be

observed in carrying out searches and seizures;

"(C) procedures for reporting and investigating incidents involving possible violations of legal or administrative requirements relating to searches and seizures;

"(D) sanctions to be imposed when such violations are determined to have occurred; and

"(E) standards and procedures for settling claims for damages by victims of unlawful searches or seizures that are presented under section 2675 of title 28, United States Code.

"(3) RULES FOR CONDUCT AND SANCTIONS BY OTHER DEPARTMENTS AND AGENCIES. -- The head of any other department or agency, following consultation with the Attorney General, may promulgate rules and regulations relating to compliance with the fourth amendment by law enforcement officers of such department or agency. Such rules and regulations shall meet the specifications set forth in paragraph (2) of this subsection.

"(4) REVIEW BOARDS. -- The Attorney General, and any other head of a department or agency that promulgates rules and regulations pursuant to paragraph (3) of this subsection, shall establish a review board to consider all allegations of violations of the fourth amendment by law enforcement officers of the department or agency, and to recommend or impose appropriate sanctions in cases where

violations are determined to have occurred. A review board so constituted may also be charged with recommending the settlement of claims for damages by victims of unlawful searches and seizures that are presented under section 2675 of title 28, United States Code.

"(5) REPORTS TO CONGRESS. -- The Attorney General, and any other head of a department or agency that promulgates rules and regulations pursuant to paragraph (3) of this subsection, shall report annually to Congress concerning --

"(A) allegations received by the review board established under paragraph (4) of this subsection, and claims presented under section 2675 of title 28, United States Code, that relate to search or seizure violations by law enforcement officers of the department or agency;

"(B) the actions taken on such allegations and claims; and

"(C) the bases for such actions.

"(6) DEFINITIONS. -- As used in this subsection, the term --

"(A) 'firearm' has the meaning given such term in section 921(a)(3) of this title and also includes ammunition for such firearm;

"(B) 'law enforcement officer' has the meaning given such term in section 408(e)(2) of the Controlled Substances Act (21 U.S.C. 848(e)(2));

"(C) 'crime of violence' has the meaning given such term in section 924(c)(3) of this title; and

"(D) 'serious drug offense' has the meaning given such term in section 924(e)(2)(A) of this title.

"(7) EFFECTIVE DATE. -- Paragraph (1) of this subsection shall take effect with respect to searches and seizures conducted by law enforcement officers of a department or agency following the promulgation of the regulations required under paragraph (2) or (3) of this subsection and the establishment of a review board pursuant to paragraph (4) of this subsection.

"(c) EVIDENCE NOT EXCLUDABLE BY STATUTE OR RULE. -- Evidence shall not be excluded in a proceeding in a court of the United States on the ground that it was obtained in violation of a statute, an administrative rule or regulation, or a rule of procedure unless exclusion is expressly authorized by statute or by a rule prescribed by the Supreme Court pursuant to statutory authority.

"(d) RULE OF CONSTRUCTION. -- This section shall not be construed to require or authorize the exclusion of evidence in any proceeding.".

(b) CLERICAL AMENDMENT. -- The table of sections at the beginning of chapter 223 of title 18, United States Code, is

amended by adding at the end the following:

"3509. Admissibility of evidence obtained by search or seizure.".

TITLE IV -- FIREARMS

SUBTITLE A -- FIREARMS AND RELATED AMENDMENTS

SEC. 401. ENHANCED PENALTY FOR USE OF SEMIAUTOMATIC FIREARM DURING A CRIME OF VIOLENCE OR DRUG TRAFFICKING OFFENSE.

(a) Section 924(c) of title 18, United States Code, is amended by inserting ", or semiautomatic firearm," after "short barreled shotgun".

(b) Section 921(a) of title 18, United States Code, is amended by adding at the end the following:

"(26) the term 'semiautomatic firearm' means any repeating firearm which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge.".

SEC. 402. POSSESSION OF A FIREARM OR AN EXPLOSIVE DURING THE COMMISSION OF A FELONY. (a) Section 924(c) of title 18, United States Code, is amended by striking "uses or carries a firearm" and inserting in lieu thereof "uses, carries, or otherwise possesses a firearm", and by striking "used or carried" and inserting in lieu thereof "used, carried, or possessed".

(b) Section 844(h) of title 18, United States Code, is amended by striking "carries an explosive during" and inserting in lieu thereof "uses, carries, or otherwise possesses an explosive during", and by striking "used or carried" and inserting in lieu therof "used, carried or possessed".

SEC. 403. CONFORMING AMENDMENT PROVIDING INCREASED PENALTY

FOR SECOND OFFENSE OF USING AN EXPLOSIVE TO COMMIT A FELONY. Section 844(h) of title 18, United States Code, is amended by striking out "ten years" and inserting in lieu thereof "twenty years".

SEC. 404. CLARIFICATION OF DEFINITION OF CONVICTION. Section 921(a)(20) of title 18, United States Code, is amended by adding at the end the following:

"Notwithstanding the previous sentence, if the conviction was for a violent felony involving the threatened or actual use of a firearm or explosive or was for a serious drug offense, as defined in section 924(e) of this title, the person shall be considered convicted for purposes of this chapter irrespective of any pardon, setting aside, expunction or restoration of civil rights."

SEC. 405. PERMITTING CONSIDERATION OF PRETRIAL DETENTION FOR CERTAIN FIREARMS AND EXPLOSIVES OFFENSES. Section 3142(f)(1) of title 18, United States Code, is amended by --

(1) striking "or" before subparagraph (D);

(2) redesignating subparagraph (D) as subparagraph (E); and

(3) inserting a new subparagraph (D) as follows:

"(D) an offense under 18 U.S.C. 844(a) that is a violation of 18 U.S.C. 842(d), (h), or (i), or an offense under 18 U.S.C. 924(a) that is a violation of 18 U.S.C. 922(d), (g), (h), (i), (j) or (o), or an offense under section 844(d), or 924(b), (g), (h), or (i) (as added by this Act) of this title; or".

SEC. 406. SMUGGLING FIREARMS IN AID OF DRUG TRAFFICKING.

Section 924 of title 18, United States Code, is amended by adding at the end thereof the following:

"(i) Whoever, with the intent to engage in or to promote conduct which --

"(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);

"(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

"(3) constitutes a crime of violence (as defined in subsection (c)(3);

smuggles or knowingly brings into the United States a firearm, or attempts to so, shall be imprisoned for not more than ten years, fined under this title, or both.".

SEC. 407. THEFT OF FIREARMS AND EXPLOSIVES. (a) Section 924 of title 18, United States Code, is amended by adding at the end the following:

"(j) Whoever steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not less than two or more than ten years, and may be fined under this title.".

(b) Section 844 of title 18, United States Code, is amended by adding at the end the following:

"(k) Whoever steals any explosive materials which are moving

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as, or are a part of, or which have moved in, interstate or foreign commerce shall be imprisoned for not less than two or more than ten years, and may be fined under this title.".

SEC. 408. CONFORMING AMENDMENT PROVIDING MANDATORY REVOCATION OF SUPERVISED RELEASE FOR POSSESSION OF A FIREARM. Section 3583 of title 18, United States Code is amended by adding at the end thereof the following new subsection:

"(h) Mandatory revocation for possession of a firearm. -- If the court has provided, as a condition of supervised release, that the defendant refrain from possessing a firearm, and if the defendant is in actual possession of a firearm, as that term is defined in section 921 of this title, at any time prior to the expiration or termination of the term of supervised release, the court shall, after a hearing pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation, revoke the term of supervised release and, subject to the limitations of paragraph (e)(3) of this section, require the defendant to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision.".

SEC. 409. INCREASED PENALTY FOR KNOWINGLY FALSE, MATERIAL STATEMENT IN CONNECTION WITH THE ACQUISITION OF A FIREARM FROM A LICENSED DEALER. Section 924(a) of title 18, United States Code, is amended -- (1) in paragraph (a)(1)(B), by striking out "(a)(6),"; and

(2) in subsection (a)(2), by inserting "(a)(6)," after "subsections".

SEC. 410. STATUTE OF LIMITATIONS FOR CERTAIN GANGSTER WEAPON OFFENSES. Section 6531 of the Internal Revenue Code of 1986 (26 U.S.C. 6531, relating to periods of limitation of criminal prosecutions) is amended by striking "except that the period of limitation shall be 6 years" and inserting in lieu thereof "except that the period of limitation shall be five years for offenses described in section 5861 (relating to firearms) and the period of limitation shall be 6 years".

SEC. 411. POSSESSION OF EXPLOSIVES BY FELONS AND OTHERS. Section 842(i) of title 18, United States Code, is amended by inserting "or possess" after "to receive".

SEC. 412. SUMMARY DESTRUCTION OF EXPLOSIVES SUBJECT TO FORFEITURE. Section 844(c) of title 18, United States Code, is amended by redesignating subsection (c) as subsection (c)(1) and by adding paragraphs (2) and (3) as follows:

"(2) Notwithstanding the provisions of paragraph (1), in the case of the seizure of any explosive materials for any offense for which the materials would be subject to forfeiture where it is impracticable or unsafe to remove the materials to a place of storage, or where it is unsafe to store them, the seizing officer is authorized to destroy the explosive materials forthwith. Any destruction under this paragraph shall be in the presence of at least one credible witness. The seizing officer shall make a report of the seizure and take samples as the

Secretary may by regulation prescribe.

"(3) Within 60 days after any destruction made pursuant to paragraph (2), the owner of, including any person having an interest in, the property so destroyed may make application to the Secretary for reimbursement of the value of the property. If the claimant establishes to the satisfaction of the Secretary that--

(A) the property has not been used or involved in a violation of law; or

(B) any unlawful involvement or use of the property was without the claimant's knowledge, consent, or willful blindness,

the Secretary shall make an allowance to the claimant not exceeding the value of the property destroyed.".

SEC. 413. SUMMARY FORFEITURE OF UNREGISTERED NATIONAL FIREARMS ACT WEAPONS. Section 5872 of title 26, United States Code, is amended by redesignating subsection (a) as subsection (a)(1) and by adding paragraphs (2) and (3) to read as follows:

"(2) Unregistered National Firearms Act weapons. -- Notwithstanding the provisions of paragraph (1), the provisions of sections 7323 and 7325 shall not apply to any firearm which is not registered in the National Firearms Registration and Transfer Record pursuant to section 5841. No property rights shall exist in any such unregistered firearm and it shall be summarily forfeited to the United States.

"(3) Rights of innocent owners. -- Within one year after the summary forfeiture made pursuant to paragraph (2) the owner of, including any person having an interest in, the property seized may make application to the Secretary for reimbursement of the value of such property. If the claimant establishes to the satisfaction of the Secretary that --

(A) such property has not been involved or used in a violation of law; or

(B) any unlawful involvement or use of such property had been without the claimant's consent, knowledge, or willful blindness,

the Secretary shall make an allowance to such claimant not exceeding the value of the property so forfeited.".

SEC. 414. DISPOSITION OF FORFEITED FIREARMS. Subsection 5872(b) of title 26, United States Code, is amended to read as follows:

"(b) Disposal. -- In the case of the forfeiture of any firearm, where there is no remission or mitigation of forfeiture thereof --

"(1) The Secretary may retain the firearm for official use of the Department of the Treasury or, if not so retained, offer to transfer the weapon without charge to any other executive department or independent establishment of the Government for official use by it and, if the offer is accepted, so transfer the firearm;

"(2) If the firearm is not disposed of pursuant to paragraph (1), is a firearm other than a machinegun or a firearm forfeited for a violation of this chapter, is a firearm that in the opinion of the Secretary is not so defective that its disposition pursuant to this paragraph would created an unreasonable risk of a malfunction likely to result in death or bodily injury, and is a firearm which (in the judgment of the Secretary, taking into consideration evidence of present value and evidence that like firearms are not available except as collector's items, or that the value of like firearms available in ordinary commercial channels is substantially less) derives a substantial part of its monetary value from the fact that it is novel, rare, or because of its association with some historical figure, period, or event the Secretary may sell such firearm, after public notice, at public sale to a dealer licensed under the provisions of chapter 44 of title 18, United States Code;

"(3) If the firearm has not been disposed of pursuant to paragraphs (1) or (2), the Secretary shall transfer the firearm to the Administrator of General Services, General Services Administration, who shall destroy or provide for the destruction of such firearm; and

"(4) No decision or action of the Secretary pursuant to this subsection shall be subject to judicial review.".

SEC. 415. ELIMINATION OF OUTMODED LANGUAGE RELATING TO PAROLE. (a) Section 924(e)(1) of title 18, United States Code, is amended by striking ", and such person shall not be eligible

for parole with respect to the sentence imposed under this subsection".

(b) Section 924(c)(1) of title 18, United States Code is amended by striking "No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.".

SEC. 416. POSSESSION OF STOLEN FIREARMS. Section 922(j) of title 18, United States Code, is amended by inserting "possess," before "receive,".

SEC. 417. USING A FIREARM IN THE COMMISSION OF COUNTERFEITING OR FORGERY. Section 924(c)(1) of title 18, United States Code, is amended by inserting "or during and in relation to any felony punishable under chapter 25 (relating to counterfeiting and forgery) of this title" after "for which he may be prosecuted in a court of the United States,".

SEC. 418. MANDATORY PENALTY FOR FIREARMS POSSESSION BY VIOLENT FELONS AND SERIOUS DRUG OFFENDERS.

Section 924(a)(2) of title 18, United States Code, is amended by inserting a comma before "or both" and by inserting before the period at the end thereof the following: ", and if the violation is a violation of subsection (g)(1) of section 922 by a person who has a previous conviction for a violent felony or a serious drug offense as defined in subsection (e)(2) of this section, a sentence imposed under this paragraph shall include a term of imprisonment of not less than five years.".

SEC. 419. REPORTING OF MULTIPLE FIREARMS SALES

Subsection 923(g)(1)(D)(3) of title 18, United States Code, is amended --

(1) by deleting the phrase "five consecutive business days" and inserting in lieu thereof "thirty consecutive days"; and

(2) by adding a new sentence at the end thereof as follows:

"Each licensee shall forward a copy of the report to the chief law enforcement officer of the place of residence of the unlicensed person not later than the close of business on the day that the multiple sale or disposition occurs.".

SEC. 420. POSSESSION OF STOLEN FIREARMS AND EXPLOSIVES

(a) FIREARMS. -- Section 922(j) of title 18, United States Code, is amended by inserting "possess," before "conceal";

(b) EXPLOSIVES. -- Section 842(h) of title 18, United States Code, is amended by inserting "possess," before "conceal".

SEC. 421. RECEIPT OF FIREARMS BY NONRESIDENTS

Section 922(a) of title 18, United States Code, is amended --

(1) in paragraph (7) by striking "and" at the end thereof;

(2) in paragraph (8) by striking the period at the end thereof and inserting "; and"; and

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

"(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearm.".

SEC. 422. FIREARMS AND EXPLOSIVES CONSPIRACY

(a) FIREARMS. -- Section 924 of title 18, United States Code, is amended by adding at the end thereof the following new subsection:

"(j) Whoever conspires to commit any offense defined in this chapter shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

(b) EXPLOSIVES. -- Section 844 of title 18, Unied States Code, is amended by adding at the end thereof the following new subsection:

"(l) Whoever conspires to commit any offense defined in this chapter shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

SEC. 423. THEFT OF FIREARMS OR EXPLOSIVES FROM LICENSEE

(a) FIREARMS. -- Section 924 of title 18, United States Code, is amended by adding at the end thereof the following new subsection:

"(k) Whoever steals any firearm from a licensed importer, licensed manufacturer, licensed dealer or licensed collector shall be fined in accordance with this title, imprisoned not more than ten years, or both.".

(b) EXPLOSIVES. -- Section 844 of title 18, United States Code, is amended by adding at the end thereof the following new subsection:

"(m) Whoever steals any explosive material from a licensed

importer, licensed manufacturer or licensed dealer, or from any permittee shall be fined in accordance with this title, imprisoned not more than ten years, or both.".

SEC. 424. DISPOSING OF EXPLOSIVES TO PROHIBITED PERSONS

Section 842(d) of title 18, United States Code, is amended by striking "licensee" and inserting in lieu thereof "person".

SUBTITLE B -- PROHIBITED GUN CLIPS AND MAGAZINES

SEC. 431. FINDINGS.

The Congress finds that --

(1) Offenses involving firearms equipped with magazines, belts, drums, feed strips, and other similar devices that enable such firearms to fire more than fifteen rounds without reloading, and particularly drug offenses, with their attendant loss of life and the generation of illegal profits, affect interstate and foreign commerce; and

(2) Such devices are themselves sold in interstate and foreign commerce, and are moved in commerce for the purpose of use in violent crimes.

SEC. 432. CERTAIN AMMUNITION CLIPS AND MAGAZINES DEFINED AS FIREARMS.

Section 921(a)(3) of title 18, United States Code, is amended by striking out "or" before "(D)", and by striking out the period after the word "device" and inserting in lieu thereof "; or (E) any ammunition feeding device.".

SEC. 433. DEFINITION OF AMMUNITION FEEDING DEVICE.

Section 921(a) of title 18, United States Code, is amended

by adding a new paragraph at the end thereof as follows:

"(27) The term "ammunition feeding device" means a detachable magazine, belt, drum, feed strip, or similar device which has a capacity of, or which can be readily restored or converted to accept, more than 15 rounds of ammunition. The term also includes any combination of parts from which such a device can be assembled. Notwithstanding the foregoing, such term shall not include any attached tubular device deigned to accept and capable of operating with only .22 rim-fire caliber ammunition."

SEC. 434. PROHIBITIONS APPLICABLE TO AMMUNITION FEEDING DEVICES.

Section 922 of title 18, United States Code, is amended by adding new subsections (t), (u), and (v), as follows:

"(t) It shall be unlawful for any person to import, manufacture, transport, ship, transfer, receive, or possess an ammunition feeding device, except that this subsection shall not apply to --

"(1) any importation or manufacture of such a device for sale or distribution by a licensed importer or licensed manufacturer to the United States or any department or agency thereof or to any State or any department, agency, or political subdivision thereof;

"(2) any possession, shipment, transportation of or transfer (in accordance with the provisions of subsections (u) and (v)) of such a device that was lawfully possessed before this subsection takes effect; or

"(3) any manufacture of such a device for the purpose

of exportation.

"(u) The Secretary shall maintain a central registry of all ammunition feeding devices transferred after the effective date of this subsection which, after such transfer, are not in the possession or under the control of the United States, or any department or agency thereof or any department, agency, or political subdivision thereof. This registry shall be known as the National Ammunition Feeding Device Registry. The registry shall include --

"(1) identification of the device;

"(2) date of registration;

"(3) identification and address of the person entitled to possess the device; and

"(4) such other information as may be required by regulations promulgated by the Secretary.

"(v) Each transferor of an ammunition feeding device that was lawfully possessed before the effective date of subsection (t) shall (except in the case of a transfer to the United States, or any department or agency thereof or any State or any department, agency, or political subdivision thereof) register the device to the transferee in accordance with regulations promulgated by the Secretary. Any information or evidence required to be provided in the course of such registration by a natural person shall be subject to the use-restriction provisions of section 5848 of title 26, United States Code. The transferor shall, contemporaneously with the

registration of the device, pay a fee of $25 to the Secretary. A transferee of an ammunition feeding device required to be registered as required by this subsection shall retain proof of such registration which shall be made available to the Secretary upon request.".

SEC. 435. IDENTIFICATION MARKINGS FOR AMMUNITION FEEDING DEVICES.

Section 923(i) of title 18, United States Code, is amended by adding at the end thereof a new sentence as follows: "An ammunition feeding device shall be identified by a serial number and such other identification as the Secretary may by regulations prescribe.".

SEC. 436. CRIMINAL PENALTIES.

Subsection 924(a)(2) of title 18, United States Code, is amended by striking out "or (o)" and inserting in lieu thereof "(o), or (t)".

SEC. 437. NONINTERRUPTION OF BUSINESS FOR PERSONS IN THE BUSINESS OF IMPORTING OR MANUFACTURING AMMUNITION FEEDING DEVICES.

Any person engaging in the business of manufacturing or importing ammunition feeding devices requiring a license under the provisions of chapter 44 of title 18, United States Code, who was engaged in such business on the date of enactment of this Act, and who files an application for a license under the provisions of section 923 of title 18, United States Code, within 30 days after the date of enactment, may continue such business pending final action on the application. All provisions of

chapter 44 of title 18, United States Code, shall apply to such applicant in the same manner and to the same extent as if the applicant were a holder of a license under chapter 44.

TITLE V -- OBSTRUCTION OF JUSTICE

SEC. 501. PROTECTION OF COURT OFFICERS AND JURORS. Section 1503 of title 18, United States Code, is amended --

(1) by designating the current text as subsection (a);

(2) by striking the words "fined not more than $5,000 or imprisoned not more than five years, or both." and inserting in lieu thereof "punished as provided in subsection (b).";

(3) by adding at the end thereof a new subsection (b) as follows:

"(b) The punishment for an offense under this section is --

"(1) in the case of a killing, the punishment provided in sections 1111 and 1112 of this title;

"(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than twenty years; and

"(3) in any other case, imprisonment for not more than ten years."; and

"(4) in subsection (a), as designated by this section, by striking "commissioner" each place it appears and inserting in lieu thereof "magistrate judge".

SEC. 502. PROHIBITION OF RETALIATORY KILLINGS OF WITNESSES, VICTIMS AND INFORMANTS. Section 1513 of title 18, United States

Code, is amended --

(1) by redesignating subsections (a) and (b) as subsections (b) and (c), respectively; and

(2) by inserting a new subsection (a) as follows:

"(a)(1) Whoever kills or attempts to kill another person with intent to retaliate against any person for --

"(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

"(B) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole or release pending judicial proceedings given by a person to a law enforcement officer;

shall be punished as provided in paragraph (2).

"(2) The punishment for an offense under this subsection is --

"(A) in the case of a killing, the punishment provided in sections 1111 and 1112 of this title; and

"(B) in the case of an attempt, imprisonment for not more than twenty years.".

SEC. 503. PROTECTION OF STATE OR LOCAL LAW ENFORCEMENT OFFICERS PROVIDING ASSISTANCE TO FEDERAL LAW ENFORCEMENT OFFICERS. Section 1114 of title 18, United States Code, is

amended by inserting ", or any state or local law enforcement officer while assisting, or on account of his or her assistance of, any federal officer or employee covered by this section in the performance of duties," before "shall be punished".

TITLE VI -- GANGS AND JUVENILE OFFENDERS

SEC. 601. AMENDMENTS CONCERNING RECORDS OF CRIMES COMMITTED BY JUVENILES.

(a) Section 5038 of title 18, United States Code, is amended by striking subsections (d) and (f), redesignating subsection (e) as subsection (d), and adding at the end thereof new subsections (e) and (f) as follows:

"(e) Whenever a juvenile has been found guilty of committing an act which if committed by an adult would be an offense described in clause (3) of the first paragraph of section 5032 of this title, the juvenile shall be fingerprinted and photographed, and the fingerprints and photograph shall be sent to the Federal Bureau of Investigation, Identification Division. The court shall also transmit to the Federal Bureau of Investigation, Identification Division, the information concerning the adjudication, including name, date of adjudication, court, offenses, and sentence, along with the notation that the matter was a juvenile adjudication. The fingerprints, photograph, and other records and information relating to a juvenile described in this subsection, or to a juvenile who is prosecuted as an adult, shall be made available in the manner applicable to adult defendants.

"(f) In addition to any other authorization under this section for the reporting, retention, disclosure or availability of records or information, if the law of the

state in which a federal juvenile delinquency proceeding takes place permits or requires the reporting, retention, disclosure or availability of records or information relating to a juvenile or to a juvenile delinquency proceeding or adjudication in certain circumstances, then such reporting, retention, disclosure or availability is permitted under this section whenever the same circumstances exist.".

(b) Section 3607 of Title 18, United States Code, is repealed, and the corresponding reference in the section analysis for chapter 229 of Title 18 is deleted.

(c) Section 401(b)(4) of the Controlled Substances Act (21 U.S.C. 841(b)(4)) is amended by striking the words "and section 3607 of Title 18".

SEC. 602. ADULT PROSECUTION OF SERIOUS JUVENILE OFFENDERS.

Section 5032 of title 18, United States Code, is amended --

(1) in the first undesignated paragraph --

(A) by striking "an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), or section 1002(a), 1003, 1005, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 955, 959, 960(b)(1), (2), (3))," and inserting in lieu thereof "an offense (or a conspiracy or attempt to commit an offense) described in section 401, or 404 (insofar as the violation involves more than 5 grams of a mixture or substance

which contains cocaine base), of the Controlled Substances Act (21 U.S.C. 841, 844, or 846), section 1002(a), 1003, 1005, 1009, 1010(b)(1), (2), or (3), of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 955, 959, 960(b)(1), (2), or (3), or 963),"; and

(B) by striking "922(p)" and inserting in lieu thereof "924(b), (g), or (h)";

(2) in the fourth undesignated paragraph --

(A) by striking "an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), or section 1002(a), 1005, or 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, 959)" and inserting in lieu thereof "an offense (or a conspiracy or attempt to commit an offense) described in section 401, or 404 (insofar as the violation involves more than 5 grams of a mixture or substance which contains cocaine base), of the Controlled Substances Act (21 U.S.C. 841, 844 or 846), section 1002(a), 1005, 1009, 1010(b)(1), (2), or (3), of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, 959, 960(b)(1), (2), or (3), or 963), or section 924(b), (g), or (h) of this title,"; and

(B) by striking "subsection (b)(1)(A), (B), or (C), (d), or (e) of section 401 of the Controlled Substances Act, or section 1002(a), 1003, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 959, 960(b)(1), (2), (3))" and inserting in lieu thereof "or an offense (or conspiracy or attempt to commit an offense)

described in section 401(b)(1)(A), (B), or (C), (d), or (e), or 404 (insofar as the violation involves more than 5 grams of a mixture or substance which contains cocaine base), of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), (B), or (C), (d), or (e), 844 or 846) or section 1002(a), 1003, 1009, 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 959, 960(b)(1), (2), or (3), or 963)"; and

(3) in the fifth undesignated paragraph by adding at the end the following: "In considering the nature of the offense, as required by this paragraph, the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh heavily in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer.".

SEC. 603. SERIOUS DRUG OFFENSES BY JUVENILES AS ARMED CAREER CRIMINAL ACT PREDICATES.

Section 924(e)(2)(A) of title 18, United States Code, is amended --

(1) by striking "or" at the end of clause (i);

(2) by striking "and" at the end of clause (ii) and inserting in lieu thereof "or"; and

(3) by adding at the end the following:

"(iii) any act of juvenile delinquency that if committed by an adult would be a serious drug offense described in this paragraph; and".

SEC. 604. INCREASED PENALTY FOR TRAVEL ACT CRIMES INVOLVING VIOLENCE.

Section 1952(a) of title 18, United States Code, is amended by striking "and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both" and inserting in lieu thereof "and thereafter performs or attempts to perform (A) any of the acts specified in subparagraphs (1) and (3) shall be fined under this title or imprisoned for not more than five years, or both, or (B) any of the acts specified in subparagraph (2) shall be fined under this title or imprisoned for not more than twenty years, or both, and if death results shall be imprisoned for any term of years or for life".

SEC. 605. INCREASED PENALTY FOR CONSPIRACY TO COMMIT MURDER FOR HIRE.

Section 1958(a) of title 18, United States Code, is amended by inserting "or who conspires to do so" before "shall be fined" the first place it appears.

TITLE VII -- TERRORISM

SUBTITLE A -- AVIATION TERRORISM

SEC. 701. IMPLEMENTATION OF THE 1988 PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS OF VIOLENCE AT AIRPORTS SERVING INTERNATIONAL CIVIL AVIATION

(a) OFFENSE.-- Chapter 2 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§36. Violence at international airports

"(a) Whoever unlawfully and intentionally, using any device, substance or weapon, --

"(1) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or

"(2) destroys or seriously damages the facilities of an airport serving international civil aviation or a civil aircraft not in service located thereon or disrupts the services of the airport;

if such an act endangers or is likely to endanger safety at that airport, or attempts to do such an act, shall be fined under this title or imprisoned not more than twenty years, or both; and if the death of any person results from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

"(b) There is jurisdiction over the prohibited activity in subsection (a) if (1) the prohibited activity takes place in the United States or (2) the prohibited activity takes place outside

of the United States and the offender is later found in the United States.".

(b) CLERICAL AMENDMENT -- The analysis for chapter 2 of title 18, United States Code, is amended by adding at the end thereof the following:

"36. Violence at international airports.".

(c) EFFECTIVE DATE. -- This section shall take effect on the later of --

(1) the date of the enactment of this subtitle; or

(2) the date the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971, has come into force and the United States has become a party to the Protocol.

SEC. 702. AMENDMENT TO FEDERAL AVIATION ACT

Section 902(n) of the Federal Aviation Act of 1958 (49 U.S.C. App. 1472(n)) is amended by --

(1) striking out paragraph (3); and

(2) renumbering paragraph (4) as paragraph (3).

SUBTITLE B -- MARITIME TERRORISM

SEC. 711. SHORT TITLE FOR SUBTITLE B.

This subtitle may be cited as the "Act for the Prevention and Punishment of Violence Against Maritime Navigation and Fixed

Platforms".

SEC. 712. FINDINGS

The Congress finds that --

(1) the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation requires each contracting State to establish its jurisdiction over certain offenses affecting the safety of maritime navigation;

(2) the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, which accompanies the aforementioned Convention, requires that each contracting State to the Protocol establish its jurisdiction over certain offenses affecting the safety of fixed platforms;

(3) such offenses place innocent lives and property in jeopardy, endanger national security, affect domestic tranquility, gravely affect interstate and foreign commerce, and are offenses against the law of nations;

(4) on December 27, 1988, the President of the United States issued Proclamation 5928 proclaiming that the territorial sea of the United States henceforth extended to 12 nautical miles from the baselines of the United States determined in accordance with international law; and

(5) on November 5, 1989, the Senate gave its advice and consent to ratification of the Convention and its Protocol.

SEC. 713. STATEMENT OF PURPOSE

The purpose of this Act is to --

(1) implement fully the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf;

(2) clarify federal criminal jurisdiction over the territorial sea of the United States; and

(3) establish federal criminal jurisdiction over certain acts committed by or against a national of the United States while upon a foreign vessel during a voyage having a scheduled departure from or arrival in the United States.

SEC. 714. OFFENSES OF VIOLENCE AGAINST MARITIME NAVIGATION OR FIXED PLATFORMS

Chapter 111 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 2280. Violence against maritime navigation

"(a) Whoever unlawfully and intentionally --

"(1) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;

"(2) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;

"(3) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that

ship;

"(4) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship;

"(5) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such act is likely to endanger the safe navigation of a ship;

"(6) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safe navigation of a ship;

"(7) injures or kills any person in connection with the commission or the attempted commission of any of the offenses set forth in paragraphs (1) to (6); or

"(8) attempts to do any act prohibited under paragraphs (1)-(7);

shall be fined under this title or imprisoned not more than twenty years, or both; and if the death of any person results from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

"(b) Whoever threatens to do any act prohibited under paragraphs (2), (3) or (5) of subsection (a), with apparent determination and will to carry the threat into execution, if the threatened act is likely to endanger the safe navigation of the ship in question, shall be fined under this title or imprisoned

not more than five years, or both.

"(c) There is jurisdiction over the prohibited activity in subsections (a) and (b) --

"(1) in the case of a covered ship, if --

"(A) such activity is committed --

"(i) against or on board a ship flying the flag of the United States at the time the prohibited activity is committed;

"(ii) in the United States; or

"(iii) by a national of the United States or by a stateless person whose habitual residence is in the United States;

"(B) during the commission of such activity, a national of the United States is seized, threatened, injured or killed; or

"(C) the offender is later found in the United States after such activity is committed;

"(2) in the case of a ship navigating or scheduled to navigate solely within the territorial sea or internal waters of a country other than the United States, if the offender is later found in the United States after such activity is committed; and

"(3) in the case of any vessel, if such activity is committed in an attempt to compel the United States to do or abstain from doing any act.

"(d) The master of a covered ship flying the flag of the United States who has reasonable grounds to believe that he has

on board his ship any person who has committed an offense under Article 3 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation may deliver such person to the authorities of a State Party to that Convention. Before delivering such person to the authorities of another country, the master shall notify in an appropriate manner the Attorney General of the United States of the alleged offense and await instructions from the Attorney General as to what action he should take. When delivering the person to a country which is a State Party to the Convention, the master shall, whenever practicable, and if possible before entering the territorial sea of such country, notify the authorities of such country of his intention to deliver such person and the reasons therefor. If the master delivers such person, he shall furnish the authorities of such country with the evidence in the master's possession that pertains to the alleged offense.

"(e) As used in this section, the term --

"(1) 'ship' means a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles or any other floating craft; Provided, the term does not include a warship, a ship owned or operated by a government when being used as a naval auxiliary or for customs or police purposes, or a ship which has been withdrawn from navigation or laid up;

"(2) 'covered ship' means a ship that is navigating or is scheduled to navigate into, through or from waters beyond

the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country;

"(3) 'national of the United States' has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(4) 'territorial sea of the United States' means all waters extending seaward to 12 nautical miles from the baselines of the United States determined in accordance with international law; and

"(5) 'United States', when used in a geographical sense, includes the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas Islands and all territories and possessions of the United States.

"§ 2281. Violence against maritime fixed platforms

"(a) Whoever unlawfully and intentionally --

"(1) seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation;

"(2) performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety;

"(3) destroys a fixed platform or causes damage to it which is likely to endanger its safety;

"(4) places or causes to be placed on a fixed platform,

by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety;

"(5) injures or kills any person in connection with the commission or the attempted commission of any of the offenses set forth in paragraphs (1) to (4); or

"(6) attempts to do anything prohibited under paragraphs (1)-(5);

shall be fined under this title or imprisoned not more than twenty years, or both; and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

"(b) Whoever threatens to do anything prohibited under paragraphs (2) or (3) of subsection (a), with apparent determination and will to carry the threat into execution, if the threatened act is likely to endanger the safety of the fixed platform, shall be fined under this title or imprisoned not more than five years, or both.

"(c) There is jurisdiction over the prohibited activity in subsections (a) and (b) if --

"(1) such activity is committed against or on board a fixed platform --

"(A) that is located on the continental shelf of the United States;

"(B) that is located on the continental shelf of

another country, by a national of the United States or by a stateless person whose habitual residence is in the United States; or

"(C) in an attempt to compel the United States to do or abstain from doing any act;

"(2) during the commission of such activity against or on board a fixed platform located on a continental shelf, a national of the United States is seized, threatened, injured or killed; or

"(3) such activity is committed against or on board a fixed platform located outside the United States and beyond the continental shelf of the United States and the offender is later found in the United States.

"(d) As used in this section, the term --

"(1) 'continental shelf' means the sea-bed and subsoil of the submarine areas that extend beyond a country's territorial sea to the limits provided by customary international law as reflected in Article 76 of the 1982 Convention on the Law of the Sea;

"(2) 'fixed platform' means an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes;

"(3) 'national of the United States' has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a) (22));

"(4) 'territorial sea of the United States' means all waters extending seaward to 12 nautical miles from the baselines of the United States determined in accordance with international law; and

"(5) 'United States', when used in a geographical sense, includes the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas Islands and all territories and possessions of the United States.".

SEC. 715. CLERICAL AMENDMENTS.

The analysis for chapter 111 of title 18, United States Code, is amended by adding at the end thereof the following:

"2280. Violence against maritime navigation.

"2281. Violence against maritime fixed platforms."

SEC. 716. EFFECTIVE DATES

Section 714 of this Act shall take effect on the later of --

(1) the date of the enactment of this Act; or

(2)(A) in the case of section 2280 of title 18, United States Code, the date the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation has come into force and the United States has become a party to that Convention; and

(B) in the case of section 2281 of title 18, United States Code, the date the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on

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the Continental Shelf has come into force and the United States has become a party to that Protocol.

SEC. 717. TERRITORIAL SEA EXTENDING TO TWELVE MILES INCLUDED IN SPECIAL MARITIME AND TERRITORIAL JURISDICTION.

The Congress hereby declares that all the territorial sea of the United States, as defined by Presidential Proclamation 5928 of December 27, 1988, is part of the United States, subject to its sovereignty, and, for purposes of federal criminal jurisdiction, is within the special maritime and territorial jurisdiction of the United States wherever that term is used in title 18, United States Code.

SEC. 718. ASSIMILATED CRIMES IN EXTENDED TERRITORIAL SEA.

Section 13 of title 18, United States Code (relating to the adoption of State laws for areas within Federal jurisdiction), is amended by inserting after "title" in subsection (a) the phrase "or on, above, or below any portion of the territorial sea of the United States not within the territory of any State, Territory, Possession, or District", and by inserting the following new subsection (c) at the end thereof:

> "(c) Whenever any waters of the territorial sea of the United States lie outside the territory of any State, Territory, Possession, or District, such waters (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon)

shall be deemed for purposes of subsection (a) to lie within the area of that State, Territory, Possession, or District it would lie within if the boundaries of such State, Territory, Possession, or District were extended seaward to the outer limit of the territorial sea of the United States.".

SEC. 719. JURISDICTION OVER CRIMES AGAINST UNITED STATES NATIONALS ON CERTAIN FOREIGN SHIPS.

Section 7 of title 18, United States Code (relating to the special maritime and territorial jurisdiction of the United States), is amended by inserting at the end thereof the following new paragraph:

"(8) Any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.".

SUBTITLE C -- TERRORIST ALIEN REMOVAL

SECTION 721. SHORT TITLE FOR SUBTITLE C.

This subtitle may be cited as the "Terrorist Alien Removal Act of 1991".

SEC. 722. FINDINGS

The Congress finds the following:

(1) Terrorist groups have been able to create significant infrastructures and cells in the United States among

persons who are in the United States either temporarily, as students or in other capacities, or as permanent resident aliens.

(2) International terrorist groups that sponsor these infrastructures were responsible for --

(A) conspiring to bomb the Turkish Honorary Consulate in Philadelphia, Pennsylvania in 1982;

(B) bombing of a Pan Am airline flight enroute to Honolulu in 1982;

(C) hijacking of a Royal Jordanian airliner in Beirut, Lebanon with two U.S. nationals on board in 1985;

(D) hijacking TWA Flight 847 during which a United States Navy diver was murdered in 1985;

(E) hijacking Egypt Air Flight 648 during which three Americans were killed in 1985;

(F) murder of four members of the U.S. Marine Corps in El Salvador in 1985;

(G) murdering an American citizen aboard the Achille Lauro cruise liner in 1985;

(H) hijacking Pan Am Flight 73 in Karachi, Pakistan, in which 44 Americans were held hostage and two were killed in 1986;

(I) conspiring to bomb an Air India aircraft in New York City in 1986;

(J) attempting to bomb the Air Canada cargo facility at the Los Angeles International Airport in 1986;

(K) murder of the U.S. Naval attache in Athens,

Greece, in 1988;

(L) terrorist attack on the Greek cruise ship "City of Poros" in 1988;

(M) bombing of Pan Am flight 103 resuling in 279 deaths in 1988;

(N) murder of U.S. Marine Corps officers assigned to the U.N. Truce Supervisory Organization in Lebanon, in 1989;

(O) murder of U.S. Army officer in Manila in 1984; and

(P) numerous bombings and murders in Northern Ireland over the past decade.

(3) Certain governments and organizations have directed their assets in the United States to take measures in preparation for the commission of terrorist acts in this country.

(4) Present immigration laws have not been used to any significant degree by law enforcement officials to deport alien terrorists because compliance with these laws with respect to such aliens would compromise classified intelligence sources and information. Moreover, appellate procedures routinely afforded aliens following a deportation hearing frequently extend over several years resulting in an inability to effect the expeditious removal of aliens engaging in terrorist activity.

(5) Present immigration laws are inadequate to protect the national security of the United States from terrorist attacks by certain aliens. Therefore, new procedures are needed to remove alien terrorists from the United States and thus reduce

the threat that such aliens pose to the national security and other vital interests of the United States.

SEC. 723. TERRORIST ACTIVITIES DEFINED

For purposes of this Act, the terms "terrorist activity" and "engage in terrorist activity" shall be defined as provided in Section 601(a) of Public Law 101-649.

SEC. 724. PROCEDURES FOR REMOVAL OF ALIEN TERRORISTS

The Immigration and Nationality Act is amended --

(1) by adding at the end of the table of contents the following:

"TITLE V -- REMOVAL OF ALIEN TERRORISTS

"Sec. 501. Applicability
"Sec. 502. Special removal hearing
"Sec. 503. Designation of judges
"Sec. 504. Miscellaneous provisions"; and

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

"TITLE V -- REMOVAL OF ALIEN TERRORISTS

"Applicability

"Sec. 501. (a) The provisions of this title may be followed in the discretion of the Department of Justice whenever the Department of Justice has information that an alien described in paragraph 4(B) of section 241(a), as amended, is subject to deportation because of such section.

"(b) Whenever an official of the Department of Justice files, under section 502, an application with the court established under section 503 for authorization to seek removal pursuant to the provisions of this title, the alien's rights regarding removal and expulsion shall be governed solely by the

provisions of this title. Except as they are specifically referenced, no other provisions of the Immigration and Nationality Act shall be applicable. An alien subject to removal under these provisions shall have no right of discovery of information derived from electronic surveillance authorized under the Foreign Intelligence Surveillance Act or otherwise for national security purposes, nor shall such alien have the right to seek suppression of evidence derived in this manner. Further, the government is authorized to use, in the removal proceedings, the fruits of electronic surveillance authorized under the Foreign Intelligence Surveillance Act without regard to subsections 106(c), (e), (f), (g), and (h) of that Act.

"(c) This title is enacted in response to findings of Congress that aliens described in paragraph 4(B) of section 241(a), as amended, represent a unique threat to the security of the United States. It is the intention of Congress that such aliens be promptly removed from the United States following --

"(1) a judicial determination of probable cause to believe that such person is such an alien; and

"(2) a judicial determination pursuant to the provisions of this title that an alien is removable on the grounds that he is an alien described in paragraph 4(B) of section 241(a), as amended;

and that such aliens not be given a deportation hearing and are ineligible for any discretionary relief from deportation and for relief under section 243(h).

"Special Removal Hearing

"Sec. 502. (a) Whenever removal of an alien is sought pursuant to the provisions of this title, a written application upon oath or affirmation shall be submitted in camera and ex parte to the court established under section 503 for an order authorizing such a procedure. Each application shall require the approval of the Attorney General or the Deputy Attorney General based upon his finding that it satisfies the criteria and requirement of such application as set forth in this title. Each application shall include --

"(1) the identity of the Department of Justice attorney making the application;

"(2) the approval of the Attorney General or the Deputy Attorney General for the making of the application;

"(3) the identity of the alien for whom authorization for the special removal procedure is sought; and

"(4) a statement of the facts and circumstances relied on by the Department of Justice to establish that --

"(A) an alien as described in paragraph 4(B) of section 241(a), as amended, is physically present in the United States; and

"(B) with respect to such alien, adherence to the provisions of title II regarding the deportation of aliens would pose a risk to the national security of the United States, adversely affect foreign relations, reveal an investigative technique important to

efficient law enforcement, or disclose a confidential source of information.

"(b) The application shall be filed under seal with the court established under section 503. The Attorney General may take into custody any alien with respect to whom such an application has been filed and, notwithstanding any other provision of law, may retain such an alien in custody in accordance with the procedures authorized by this title.

"(c) In accordance with the rules of the court established under section 503, the judge shall consider the application and may consider other information presented under oath or affirmation at an in camera and ex parte hearing on the application. A verbatim record shall be maintained of such a hearing. The application and any other evidence shall be considered by a single judge of that court who shall enter an ex parte order as requested if he finds, on the basis of the facts submitted in the application and any other information provided by the Department of Justice at the in camera and ex parte hearing, there is probable cause to believe that --

"(1) the alien who is the subject of the application has been correctly identified and is an alien as described in paragraph 4(B) of section 241(a), as amended; and

"(2) adherence to the provisions of title II regarding the deportation of the identified alien would pose a risk to the national security of the United States, adversely affect foreign relations, reveal an investigative technique

important to efficient law enforcement, or disclose a confidential source of information.

"(d)(1) In any case in which the application for the order is denied, the judge shall prepare a written statement of his reasons for the denial and the Department of Justice may seek a review of the denial by the court of appeals for the Federal Circuit by notice of appeal which must be filed within 20 days. In such a case the entire record of the proceeding shall be transmitted to the court of appeals under seal and the Court of Appeals shall hear the matter ex parte.

"(2) If the Department of Justice does not seek review, the alien shall be released from custody, unless such alien may be arrested and taken into custody pursuant to title II as an alien subject to deportation, in which case such alien shall be treated in accordance with the provisions of this Act concerning the deportation of aliens.

"(3) If the application for the order is denied because the judge has not found probable cause to believe that the alien who is the subject of the application has been correctly identified or is an alien as described in paragraph 4(B) of section 241(a), as amended, and the Department of Justice seeks review, the alien shall be released from custody unless such alien may be arrested and taken into custody pursuant to title II as an alien subject to deportation, in which case such alien shall be treated in accordance with the provisions of this Act concerning the deportation of aliens simultaneously with the application of this

title.

"(4) If the application for the order is denied because, although the judge found probable cause to believe that the alien who is the subject of the application has been correctly identified and is an alien as described in paragraph 4(B) of section 241(a), as amended, the judge has found that there is not probable cause to believe that adherence to the provisions of title II regarding the deportation of the identified alien would pose a risk to the national security of the United States, adversely affect foreign relations, reveal an investigative technique important to efficient law enforcement, or disclose a confidential source of information, the judge shall release the alien from custody subject to the least restrictive condition or combination of conditions of release described in section 3142(b) and (c)(1)(B)(i) through (xiv) of title 18, United States Code, that will reasonably assure the appearance of the alien at any future proceeding pursuant to this title and will not endanger the safety of any other person or the community; but if the judge finds no such condition or combination of conditions the alien shall remain in custody until the completion of any appeal authorized by this title. The provisions of sections 3145 through 3148 of title 18, United States Code, pertaining to review and appeal of a release or detention order, penalties for failure to appear, penalties for an offense committed while on release, and sanctions for violation of a release condition shall apply to an alien to whom the previous sentence applies and --

"(A) for purposes of section 3145 of such title an appeal shall be taken to the Court of Appeals for the Federal Circuit; and

"(B) for purposes of section 3146 of such title the alien shall be considered released in connection with a charge of an offense punishable by life imprisonment.

"(e)(1) In any case in which the application for the order authorizing the special procedures of this title is approved, the judge who granted the order shall consider separately each item of evidence the Department of Justice proposes to introduce in camera and ex parte at the special removal hearing. The judge shall authorize the introduction in camera and ex parte of any item of evidence for which the judge determines that the introduction other than in camera and ex parte would pose a risk to the national security of the United States, adversely affect foreign relations, reveal an investigative technique important to efficient law enforcement, or disclose a confidential source of information. With respect to any evidence which the judge authorizes to be introduced in camera and ex parte, the judge shall cause to be prepared and shall sign, and the Department of Justice shall cause to be delivered to the alien, either --

"(A) a written summary which shall be sufficient to inform the alien of the general nature of the evidence that he is an alien as described in paragraph 4(B) of section 241(a), as amended, and to permit the alien to marshal the facts and prepare a defense, but which shall not pose a risk

to national security, adversely affect foreign relations, reveal an investigative technique important to efficient law enforcement, or disclose a confidential source of information; or

"(B) if necessary to prevent serious harm to the national security or death or serious bodily injury to any person, a statement informing the alien that no such summary is possible.

"(2) The Department of Justice may take an interlocutory appeal to the United States Court of Appeals for the Federal Circuit of any determination by the judge pursuant to paragraph (1) --

"(A) concerning whether an item of evidence may be introduced in camera and ex parte;

"(B) concerning the contents of any summary of evidence to be introduced in camera and ex parte prepared pursuant to paragraph (1)(A); or

"(C) concerning whether a summary of evidence to be introduced in camera and ex parte is possible pursuant to paragraph (1)(B).

In any interlocutory appeal taken pursuant to this paragraph, the entire record, including any proposed order of the judge or summary of evidence, shall be transmitted to the court of appeals under seal and the matter shall be heard ex parte. The court of appeals shall consider the appeal as expeditiously as possible.

"(f) In any case in which the application for the order is

approved, the special removal hearing authorized by this section shall be conducted for the purpose of determining if the alien to whom the order pertains should be removed from the United States on the grounds that he is an alien as described in paragraph 4(B) of section 241(a), as amended. In accordance with subsection (e), the alien shall be given reasonable notice of the nature of the charges against him. The alien shall be given notice, reasonable under all the circumstances, of the time and place at which the hearing will be held. The hearing shall be held as expeditiously as possible.

"(g) The special removal hearing shall be held before the same judge who granted the order pursuant to subsection (e) unless that judge is deemed unavailable due to illness or disability by the chief judge of the court established pursuant to section 503, or has died, in which case the chief judge shall assign another judge to conduct the special removal hearing. A decision by the chief judge pursuant to the preceding sentence shall not be subject to review by either the alien or the Department of Justice.

"(h) The special removal hearing shall be open to the public. The alien shall have a right to be present at such hearing and to be represented by counsel. Any alien financially unable to obtain counsel shall be entitled to have counsel assigned to represent him. Such counsel shall be appointed by the judge pursuant to the plan for furnishing representation for any person financially unable to obtain adequate representation

for the district in which the hearing is conducted, as provided for in section 3006A of title 18, United States Code. All provisions of that section shall apply and, for purposes of determining the maximum amount of compensation, the matter shall be treated as if a felony was charged. The alien may be called as a witness by the Department of Justice. The alien shall have a right to introduce evidence on his own behalf. Except as provided in subsection (j), the alien shall have a reasonable opportunity to examine the evidence against him and to cross-examine any witness. A verbatim record of the proceedings and of all testimony and evidence offered or produced at such a hearing shall be kept. The decision of the judge shall be based only on the evidence introduced at the hearing, including evidence introduced under subsection (j).

"(i) At any time prior to the conclusion of the special removal hearing, either the alien or the Department of Justice may request the judge to issue a subpoena for the presence of a named witness (which subpoena may also command the person to whom it is directed to produce books, papers, documents, or other objects designated therein) upon a satisfactory showing that the presence of the witness is necessary for the determination of any material matter. Such a request may be made ex parte except that the judge shall inform the Department of Justice of any request for a subpoena by the alien for a witness or material if compliance with such a subpoena would reveal evidence or the source of evidence which has been introduced, or which the

Department of Justice has received permission to introduce, in camera and ex parte pursuant to subsection (j), and the Department of Justice shall be given a reasonable opportunity to oppose the issuance of such a subpoena. If an application for a subpoena by the alien also makes a showing that the alien is financially unable to pay for the attendance of a witness so requested, the court may order the costs incurred by the process and the fees of the witness so subpoenaed to be paid for from funds appropriated for the enforcement of title II. A subpoena under this subsection may be served anywhere in the United States. A witness subpoenaed under this subsection shall receive the same fees and expenses as a witness subpoenaed in connection with a civil proceeding in a court of the United States. Nothing in this subsection is intended to allow an alien to have access to classified information.

"(j) Evidence which has either been summarized pursuant to subsection (e)(1)(A) or for which no summary has been deemed possible pursuant to subsection (e)(1)(B) shall be introduced (either in writing or through testimony) in camera and ex parte and neither the alien nor the public shall be informed of such evidence or its sources other than through reference to the summary provided pursuant to subsection (e)(1)(A) or to the explanation that no summary could be provided pursuant to subsection (e)(1)(B). Notwithstanding the previous sentence, the Department of Justice may, in its discretion, elect to introduce such evidence in open session.

"(k) Evidence introduced at the special removal hearing, either in open session or in camera and ex parte, may, in the discretion of the Department of Justice, include all or part of the information presented under subsections (a) through (c) used to obtain the order for the hearing under this section.

"(l) Following the receipt of evidence, the attorneys for the Department of Justice and for the alien shall be given fair opportunity to present argument as to whether the evidence is sufficient to justify the removal of the alien. The attorney for the Department of Justice shall open the argument. The attorney for the alien shall be permitted to reply. The attorney for the Department of Justice shall then be permitted to reply in rebuttal. The judge may allow any part of the argument that refers to evidence received in camera and ex parte to be heard in camera and ex parte.

"(m) The Department of Justice has the burden of showing by clear and convincing evidence that the alien is subject to removal because he is an alien as described in paragraph 4(B) of subsection 241(a) of this Act (8 U.S.C. 1251(a)(4)(B)), as amended. If the judge finds that the Department of Justice has met this burden, the judge shall order the alien removed.

"(n)(1) At the time of rendering a decision as to whether the alien shall be removed, the judge shall prepare a written order containing a statement of facts found and conclusions of law. Any portion of the order that would reveal the substance or source of information received in camera and ex parte pursuant to

subsection (j) shall not be made available to the alien or the public.

"(2) The decision of the judge may be appealed by either the alien or the Department of Justice to the Court of Appeals for the Federal Circuit by notice of appeal which must be filed within 20 days, during which time such order shall not be executed. In any case appealed pursuant to this subsection, the entire record shall be transmitted to the Court of Appeals and information received pursuant to subsection (j), and any portion of the judge's order that would reveal the substance or source of such information shall be transmitted under seal. The Court of Appeals shall consider the case as expeditiously as possible.

"(3) In an appeal to the Court of Appeals pursuant to either subsections (d) or (e) of this section, the Court of Appeals shall review questions of law de novo, but a prior finding on any question of fact shall not be set aside unless such finding was clearly erroneous.

"(o) If the judge decides pursuant to subsection (n) that the alien should not be removed, the alien shall be released from custody unless such alien may be arrested and taken into custody pursuant to title II of this Act as an alien subject to deportation, in which case, for purposes of detention, such alien may be treated in accordance with the provisions of this Act concerning the deportation of aliens.

"(p) Following a decision by the Court of Appeals pursuant to either subsection (d) or (n), either the alien or the

Department of Justice may petition the Supreme Court for a writ of certiorari. In any such case, any information transmitted to the Court of Appeals under seal shall, if such information is also submitted to the Supreme Court, be transmitted under seal. Any order of removal shall not be stayed pending disposition of a writ of certiorari except as provided by the Court of Appeals or a Justice of the Supreme Court.

"Designation of Judges

"Sec. 503. (a) The Chief Justice of the United States shall publicly designate five district court judges from five of the United States judicial circuits who shall constitute a court which shall have jurisdiction to conduct all matters and proceedings authorized by section 502. The Chief Justice shall publicly designate one of the judges so appointed as the chief judge. The chief judge shall promulgate rules to facilitate the functioning of the court and shall be responsible for assigning the consideration of cases to the various judges.

"(b) Proceedings under section 502 shall be conducted as expeditiously as possible. The Chief Justice, in consultation with the Attorney General and other appropriate federal officials, shall, consistent with the objectives of this title, provide for the maintenance of appropriate security measures for applications for ex parte orders to conduct the special removal hearings authorized by section 502, the orders themselves, and evidence received in camera and ex parte, and for such other actions as are necessary to protect information concerning

matters before the court from harming the national security of the United States, adversely affecting foreign relations, revealing investigative techniques, or disclosing confidential sources of information.

"(c) Each judge designated under this section shall serve for a term of five years and shall be eligible for redesignation, except that the four associate judges first designated under subsection (a) shall be designated for terms of from one to four years so that the term of one judge shall expire each year.

"Miscellaneous Provisions

"Sec. 504. (a)(1) Following a determination pursuant to this title that an alien shall be removed, and after the conclusion of any judicial review thereof, the Attorney General may retain the alien in custody or, if the alien was released pursuant to subsection 502(o), may return the alien to custody, and shall cause the alien to be transported to any country which the alien shall designate provided the Attorney General determines based on consultation with the Secretary of State that transportation to such country would not impair the obligation of the United States under any treaty (including a treaty pertaining to extradition) or otherwise adversely affect the foreign policy of the United States.

"(2) If the alien refuses to choose a country to which he wishes to be transported, or if the Attorney General determines pursuant to paragraph (1) that removal of the alien to the country so selected would impair a treaty obligation or adversely

affect United States foreign policy, the Attorney General shall cause the alien to be transported to any country willing to receive such alien.

"(3) Before an alien is transported out of the United States pursuant to paragraph (1) or (2) or pursuant to an order of exclusion because such alien is excludable under paragraph 212(a)(3)(B) of this Act (8 U.S.C. 1182(a)(3)(B)), as amended, he shall be photographed and fingerprinted, and shall be advised of the provisions of subsection 276(b) of this Act (8 U.S.C. 1326(b)).

"(4) If no country is willing to receive such an alien, the Attorney General may, notwithstanding any other provision of law, retain the alien in custody. The Attorney General shall make periodic efforts to reach agreement with other countries to accept such an alien and at least every six months shall provide to the alien a written report on his efforts. Any alien in custody pursuant to this subsection shall be released from custody solely at the discretion of the Attorney General and subject to such conditions as the Attorney General shall deem appropriate. The determinations and actions of the Attorney General pursuant to this subsection shall not be subject to judicial review, including application for a writ of habeas corpus, except for a claim by the alien that continued detention violates his rights under the Constitution. Jurisdiction over any such challenge shall lie exclusively in the Court of Appeals for the Federal Circuit.

"(b)(1) Notwithstanding the provisions of subsection (a), the Attorney General may hold in abeyance the removal of an alien who has been ordered removed pursuant to this title to allow the trial of such alien on any federal or State criminal charge and the service of any sentence of confinement resulting from such a trial.

"(2) Pending the commencement of any service of a sentence of confinement by an alien described in paragraph (1), such an alien shall remain in the custody of the Attorney General, unless the Attorney General determines that temporary release of the alien to the custody of State authorities for confinement in a State facility is appropriate and would not endanger national security or public safety.

"(3) Following the completion of a sentence of confinement by an alien described in paragraph (1) or following the completion of State criminal proceedings which do not result in a sentence of confinement of an alien released to the custody of State authorities pursuant to paragraph (2), such an alien shall be returned to the custody of the Attorney General who shall proceed to carry out the provisions of subsection (a) concerning removal of the alien.

"(c) For purposes of section 751 and 752 of title 18, United States Code, an alien in the custody of the Attorney General pursuant to this title shall be subject to the penalties provided by those sections in relation to a person committed to the custody of the Attorney General by virtue of an arrest on a

charge of felony.

"(d)(1) An alien in the custody of the Attorney General pursuant to this title shall be given reasonable opportunity to communicate with and receive visits from members of his family, and to contact, retain, and communicate with an attorney.

"(2) An alien in the custody of the Attorney General pursuant to this title shall have the right to contact an appropriate diplomatic or consular official of the alien's country of citizenship or nationality or of any country providing representation services therefor. The Attorney General shall notify the appropriate embassy, mission, or consular office of the alien's detention.

SEC. 725. CONFORMING AMENDMENTS

The Immigration and Nationality Act is amended as follows --

(1) Subsection 106(b) (8 U.S.C. 1105a(b)) is amended by adding at the end thereof the following sentence: "Jurisdiction to review an order entered pursuant to the provisions of section 235(c) of this Act concerning an alien excludable under paragraph 3(B) of subsection 212(a) (8 U.S.C. 1182(a)), as amended, shall rest exclusively in the United States Court of Appeals for the Federal Circuit.".

(2) Section 276(b) (8 U.S.C. 1326(b)) is amended by deleting the word "or" at the end of subparagraph (b)(1), by replacing the period at the end of subparagraph (b)(2) with a semicolon followed by the word "or", and by adding at the end of paragraph (b) the following subparagraph: "(3) who has been

excluded from the United States pursuant to subsection 235(c) of this Act (8 U.S.C. 1225(c)) because such alien was excludable under paragraph 3(B) of subsection 212(a) thereof (8 U.S.C. 1182(a)(3)(B)), as amended, or who has been removed from the United States pursuant to the provisions of title V of the Immigration and Nationality Act, and who thereafter, without the permission of the Attorney General, enters the United States or attempts to do so shall be fined under title 18, United States Code, and imprisoned for a period of ten years which sentence shall not run concurrently with any other sentence."

(3) Section 106(a) (8 U.S.C. 1105a(a)) is amended by striking from the end of subparagraph 8 the semicolon and the word "and" and inserting a period in lieu thereof, and by striking subparagraph 9.

SEC. 726. EFFECTIVE DATE

The provisions of this Act shall be effective upon enactment, and shall apply to all aliens without regard to the date of entry or attempted entry into the United States.

SUBTITLE D -- TERRORISM OFFENSES AND SANCTIONS

Sec. 731. TORTURE

(a) IN GENERAL. -- Part I of Title 18, United States Code, is amended by inserting after chapter 113A the following new chapter:

"CHAPTER 113B - TORTURE

"Sec.

"§2340. Definitions

"As used in this chapter --

"(1) 'torture' means an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.

"(2) 'severe mental pain or suffering' means the prolonged mental harm caused by or resulting from: (a) the intentional infliction or threatened infliction of severe physical pain or suffering; (b) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (c) the threat of imminent death; or (d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

"(3) 'United States' includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title and section 101(38) of the Federal Aviation Act of 1958, as amended

(49 U.S.C. App. 1301(38)).

"§2340A. Torture

"(a) Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both; and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

"(b) There is jurisdiction over the prohibited activity in subsection (a) if: (1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or the alleged offender.

"§2340B. Exclusive remedies

"Nothing in this chapter shall be construed as precluding the application of State or local laws on the same subject, nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any civil proceeding.".

(b) CLERICAL AMENDMENT. --

The table of chapters for part I of title 18, United States Code, is amended by inserting after the item for chapter 113B the following new item:

"113B. Torture . . . . . 2340".

Sec. 732. WEAPONS OF MASS DESTRUCTION. --

(a) FINDINGS. -- The Congress finds that the use and threatened use of weapons of mass destruction, as defined in the statute enacted by subsection (b) of this section, gravely harm the national security and foreign relations interests of the United States, seriously affect interstate and foreign commerce, and disturb the domestic tranquility of the United States.

(b) OFFENSE. -- Chapter 113A of title 18, United States Code, is amended by adding the following new section:

"§ 2339. Use of Weapons of Mass Destruction

"(a) Whoever uses, or attempts or conspires to use, a weapon of mass destruction --

"(1) against a national of the United States while such national is outside of the United States;

"(2) against any person within the United States; or

"(3) against any property that is owned, leased or used by the United States or by any department or agency of the United States, whether the property is within or outside of the United States;

shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.

"(b) For purposes of this section --

"(1) 'national of the United States' has the meaning given in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)); and

"(2) 'weapon of mass destruction' means --

"(a) any destructive device as defined in section 921 of this title;

"(b) poison gas;

"(c) any weapon involving a disease organism; or

"(d) any weapon that is designed to release radiation or radioactivity at a level dangerous to human life.".

(c) CLERICAL AMENDMENT. -- The analysis for chapter 113A of title 18, United States Code, is amended by adding the following: "2339. Use of Weapons of Mass Destruction.".

Sec. 733. HOMICIDES AND ATTEMPTED HOMICIDES INVOLVING FIREARMS IN FEDERAL FACILITIES. -- Section 930 of title 18, United States Code, is amended by --

(a) redesignating subsections (c), (d), (e), and (f) as subsections (d), (e), (f), and (g) respectively;

(b) in subsection (a), deleting "(c)" and inserting in lieu thereof "(d)"; and

(c) inserting after subsection (b) the following:

"(c) Whoever kills or attempts to kill any person in the course of a violation of subsection (a) or (b), or in the course of an attack on a Federal facility involving the use of a firearm or other dangerous weapon, shall --

"(1) in the case of a killing constituting murder as defined in section 1111(a) of this title, be punished by death or imprisoned for any term of years or for life; and

"(2) in the case of any other killing or an attempted killing, be subject to the penalties provided for engaging in such conduct within the special maritime and territorial jurisdiction of the United States under sections 1112 and 1113 of this title.".

Sec. 734. PROVIDING MATERIAL SUPPORT TO TERRORISTS

(a) OFFENSE.-- Chapter 113A of title 18, United States Code, is amended by adding the following new section:

"§2339A. Providing material support to terrorists

"Whoever, within the United States, provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used to facilitate a violation of section 32, 36, 351, 844(f) or (i), 1114, 1116, 1203, 1361, 1363, 1751, 2280, 2281, 2332, or 2339 of this title, or section 902(i) of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. 1472(i)), or to facilitate the concealment or an escape from the commission of any of the foregoing, shall be fined under this title, imprisoned not more than ten years, or both. For purposes of this section, material support or resources shall include, but not be limited to, currency or other financial securities, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives,

personnel, transportation, and other physical assets.".

(b) CLERICAL AMENDMENT.-- The analysis for chapter 113A of title 18, United States Code, is amended by adding the following:

"2339A. Providing material support to terrorists".

SEC. 735. ADDITION OF TERRORIST OFFENSES TO THE RICO STATUTE.

(a) Section 1961(1)(B) of title 18 of the United States Code is amended by:

(1) inserting after "Section" the following: "32 (relating to the destruction of aircraft), section 36 (relating to violence at international airports), section";

(2) inserting after "section 224 (relating to sports bribery),;" the following: "section 351 (relating to Congressional or Cabinet officer assassination),";

(3) inserting after "section 664 (relating to embezzlement from pension and welfare funds)," the following: "section 844(f) or (i)(relating to destruction by explosives of government property or property affecting interstate or foreign commerce),;

(4) inserting after "section 1084 (relating to the transmission of gambling information)," the following: "section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1203 (relating to hostage taking),";

(5) inserting after "section 1344 (relating to financial institution fraud)," the following: "section 1361 (relating to willful injury of government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction),";

(6) inserting after "section 1513 (relating to retaliating against a witness, victim, or an informant)," the following: "section 1751 (relating to Presidential assassination),";

(7) inserting after "section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire)," the following: "section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms),"; and

(8) inserting after "2320 (relating to trafficking in certain motor vehicles or motor vehicle parts)," the following: "section 2332 (relating to terrorist acts abroad against United States nationals), section 2339 (relating to use of weapons of mass destruction),".

(b) Section 1961(1) of title 18 of the United States Code is amended by striking "or" before "(E)", and inserting at the end thereof the following: "or (F) section 902(i) or (n) of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. 1472(i) or (n));".

(c) Section 1961(5) of title 18 of the United States Code is amended by adding at the end thereof the following sentence:

"The term shall not be construed to require the presence of any pecuniary purpose when the acts of racketeering involve only crimes of violence."

Sec. 736. FORFEITURE FOR TERRORIST AND OTHER VIOLENT ACTS.

(a) IN GENERAL.-- Chapter 46 of title 18, United States Code, is amended by adding after section 982 the following new sections:

"§983. Civil forfeiture of property used to commit violent acts.

"(a) The following property shall be subject to civil forfeiture by the United States;

"(1) Any property used or intended for use to commit or facilitate the commission of a violent act; and

"(2) Any property constituting or derived from the gross profits or other proceeds obtained from a violent act.

No interest of an owner in property shall be forfeited under paragraphs (1) or (2) by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent or willful blindness of that owner.

"(b) All provisions of the customs law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale

thereof, the remission or mitigation of such forfeitures, and the compromise of claims, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, insofar as applicable and not inconsistent with the provisions of this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

"(c) As used in this section the term "violent act" means-

"(1) any felony offense under the following chapters of this title: chapter 2 (relating to aircraft and motor vehicles); chapter 5 (relating to arson); chapter 7 (relating to assault); chapter 12 (relating to civil disorders); chapter 18 (relating to congressional, cabinet, and supreme court assassination, kidnapping, and assault); chapter 35 (relating to escape and rescue); chapter 40 (relating to importation, manufacture, distribution and storage of explosive materials; chapter 41 (relating to extortion and threats); chapter 44 (relating to firearms); chapter 51 (relating to homicide); chapter 55 (relating to

40-812 0 - 91 - 5

kidnaping); chapter 65 (relating to malicious mischief); chapter 81 (relating to piracy and privateering); chapter 84 (relating to Presidential and Presidential staff assassination, kidnapping, and assault); chapter 95 (relating to racketeering); chapter 97 (relating to railroads); chapter 102 (relating to riots); chapter 103 (relating to robbery and burglary); chapter 105 (relating to sabotage); chapter 111 (relating to shipping); chapter 113A (relating to terrorism); or chapter 113B (relating to torture);

"(2) any felony offense under the following sections of this title: section 831 (relating to prohibited transactions involving nuclear materials); section 956 (relating to conspiracy to injure property of foreign government); or section 1153 (relating to offenses committed within Indian country);

"(3) any felony offense under: section 2284 of title 42 of the United States Code (relating to the sabotage of nuclear facilities); sections 901(i), (j), (k), (l), (m), or (n) of the Federal Aviation Act of 1958 (49 U.S.C. App. 1472 (i), (j), (k), (l), (m) or (n)); section 11(c)(2) of the Natural Gas Pipeline Safety Act (49 U.S.C. App. 1679a(c)(2)); or section 208(c)(2) of the Hazardous Liquid Pipeline Safety Act (49 U.S.C. App. 2007(c)(2));

"(4) any other United States offense punishable by imprisonment for more than one year involving murder, robbery, kidnaping, extortion, or malicious destruction of property; or

"(5) a conspiracy or attempt to commit any of the foregoing offenses.

"(d) The filing of an indictment of information alleging a violation of an offense constituting a violent act which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

"§984. Criminal forfeiture of property used to commit violent acts

"(a) Any person convicted of a violent act as defined in section 983(c) of this title shall forfeit to the United States, irrespective of any provision of State law, such person's interest in --

"(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violent act; and

"(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violent act.

"(b) The provisions of subsections (b), (c), and (e)-(p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853(b), (c), and (e)-(p))

shall apply to --

"(1) property subject to forfeiture under subsection (a);

"(2) any seizure or disposition of such property; and

"(3) any judicial proceeding in relation to such property.".

(b) **CLERICAL AMENDMENT.** -- The analysis for chapter 46 of title 18, United States Code, is amended by adding at the end thereof, as amended, the following:

"983. Civil forfeiture of property used to commit violent acts.

"984. Criminal forfeiture of property used to commit violent acts.".

Sec. 737. ENHANCED PENALTIES FOR CERTAIN OFFENSES

(a) Section 1705(b) of Title 50, United States Code, is amended by replacing "$50,000" with "$1,000,000";

(b) Section 1705(a) of Title 50, United States Code, is amended by replacing "$10,000" with "$1,000,000".

(c) Section 1541 of Title 18, United States Code, is amended by replacing "$500" with "$250,000" and by replacing "one year" with "five years".

(d) Sections 1542, 1543, 1544 and 1546 of Title 18, United States Code, are each amended by replacing "$2,000" with "$250,000" and by replacing "five years" with "ten years".

(e) Section 1545 of Title 18, United States Code, is amended

by replacing "$2,000" with "$250,000" and by replacing "three years" with "ten years".

Sec. 738. SENTENCING GUIDELINES INCREASE FOR TERRORIST CRIMES.

The United States Sentencing Commission is directed to amend its sentencing guidelines to provide an increase of not less than three levels in the base offense level for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime.

SUBTITLE E -- ANTITERRORISM ENFORCEMENT PROVISIONS

Sec. 741. ALIENS COOPERATING IN TERRORIST OR OTHER INVESTIGATIONS

(a) IN GENERAL. -- Notwithstanding any other provision of law, whenever the Attorney General, or his designee, determines that the entry of a particular alien into the United States for permanent residence or other status, or where an alien is already present in the United States, the award of permanent residence or other status, is in the interest of national security, essential to the furtherance of the national intelligence mission, important to the United States public safety, or necessary to protect the life of an individual who has provided cooperation to federal law enforcement, such alien and his immediate family shall be given entry into the United States and/or awarded permanent residence or other status. Where the decision to grant

such entry or award of permanent residence or other status is based on furtherance of the national intelligence mission, the Attorney General shall consult with the Director of the Central Intelligence Agency concerning the decision.

(b) LIMIT ON NUMBER OF ALIENS. -- The number of aliens and members of their immediate families entering the United States under the authority of this section shall in no case exceed two hundred persons in any one fiscal year. The decision to grant or deny permanent resident or other status under this section is at the discretion of the Attorney General and shall not be subject to judicial review.

SEC. 742. AMENDMENT TO THE ALIEN ENEMY ACT

Section 21 of title 50, United States Code, is amended by inserting "(a)" before "Whenever," and by adding the following new subsection:

> "(b) Whenever the President invokes the authority contained in subsection (a) as to aliens of a hostile nation or government and further determines that the United States may also be subject to actual, attempted, or threatened predatory incursions by aliens of other nations, whether or not acting in concert with the hostile nation, the President is authorized, by his proclamation thereof, to include within the terms of subsection (a) and sections 22, 23, and 24, any and all other aliens within the United States, or any subcategories or subclasses of such aliens, by nationality or otherwise, as the President may so designate.".

SEC. 743. COUNTERINTELLIGENCE ACCESS TO TELEPHONE RECORDS

Section 2709 of Title 18 of the United States Code is amended by --

(1) striking out subsections (b) and (c); and

(2) inserting the following new subsections (b) and (c):

"(b) REQUIRED CERTIFICATION. -- The Director of the Federal Bureau of Investigation (or an individual within the Federal Bureau of Investigation designated for this purpose by the Director) may:

"(1) request any such information and records if the Director (or the Director's designee) certifies in writing to the wire or electronic communication service provider to which the request is made that --

"(A) the information sought is relevant to an authorized foreign counterintelligence investigation; and

"(B) there are specific and articulable facts giving reason to believe that the person or entity about whom information is sought is a foreign power or an agent of a foreign power as defined in Section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801); and

"(2) request subscriber information regarding a person or entity if the Director (or the Director's designee) certifies in writing to the wire or electronic

communications service provider to which the request is made that --

"(A) the information sought is relevant to an authorized foreign counterintelligence investigation; and

"(B) that information available to the FBI indicates there is reason to believe that communication facilities registered in the name of the person or entity have been used, through the services of such provider, in communication with a foreign power or an agent of a foreign power as defined in Section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801).

"(c) PENALTY FOR DISCLOSURE. -- No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information under this section. A knowing violation of this section is punishable as a class A misdemeanor.".

SEC. 744. COUNTERINTELLIGENCE ACCESS TO CREDIT RECORDS.

Section 1681(f) of Title 15, United States Code, is amended by inserting "(1)" before the existing paragraph thereof, and by adding the following provisions:

"(2) Notwithstanding the provisions of section 1681(b) of this title, a consumer reporting agency shall furnish a consumer report to the Federal Bureau of Investigation (FBI)

when presented with a request for a consumer report made pursuant to this subsection by the FBI provided that the Director of the FBI, or his designee, certifies in writing to the consumer reporting agency that such records are sought for counterintelligence purposes and that there exists specific and articulable facts giving reason to believe the person to whom the requested consumer report relates is an agent of a foreign power as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801).

"(3) Notwithstanding the provisions of section 1681(b) of this title, a consumer reporting agency shall furnish identifying information respecting any consumer limited to name, address, former addresses, places of employment or former places of employment, to a representative of the FBI when presented with a written request signed by the Director of the FBI, or his designee, stating that the information is sought in connection with an authorized foreign counterintelligence investigation.

"(4) No consumer reporting agency, officer, employee, or agent of such institution, shall disclose to any person that the FBI has sought or obtained a consumer report, or identifying information respecting any consumer. A knowing violation of this section is punishable as a class A misdemeanor.".

Sec. 745. AUTHORIZATION FOR INTERCEPTIONS OF COMMUNICATIONS

(a) Section 2516(1)(k) of title 18, United States Code, is amended by adding before the ";" the following: ", or of 50 U.S.C. section 1701 et seq. (relating to the International Emergency Economic Powers Act); 50 U.S.C. App. 2410 (relating to the Export Administration Act); or 50 U.S.C. App. 5 (relating to the Trading with the Enemy Act)".

(b) Section 2516(1) of title 18, United States Code, is further amended by redesignating subparagraph (o) as subparagraph (p) and adding a new subparagraph (o) as follows:

"(o) any violation of section 956 or section 960 of title 18, United States Code (relating to certain actions against foreign nations);".

(c) Section 2516(1)(c) of title 18, United States Code, is amended by inserting before "or section 1992 (relating to wrecking trains)" the following: "section 2332 (relating to terrorist acts abroad), section 2339 (relating to weapons of mass destruction), section 36 (relating to violence at airports),".

Sec. 746. PARTICIPATION OF FOREIGN AND STATE GOVERNMENT PERSONNEL IN INTERCEPTIONS OF COMMUNICATIONS.

Section 2518(5) of title 18, United States Code, is amended by inserting "(including personnel of a foreign government or of a State or subdivision of a State)" after "Government personnel".

Sec. 747. DISCLOSURE OF INTERCEPTED COMMUNICATIONS TO FOREIGN LAW ENFORCEMENT AGENCIES

Section 2510(7) of title 18, United States Code, is amended by inserting before the semicolon "and additionally, for purposes of section 2517(1)-(2), any person authorized to perform investigative, law enforcement, or prosecutorial functions by a foreign government".

SEC. 748. EXTENSION OF THE STATUTE OF LIMITATIONS FOR CERTAIN TERRORISM OFFENSES.

(a) Chapter 213 of title 18, United States Code, is amended by inserting a new section 3286 as follows:

"§ 3286. Extension of statute of limitations for certain terrorism offenses.

Notwithstanding the provisions of section 3282, no person shall be prosecuted, tried, or punished for any offense involving a violation of section 32 (aircraft destruction), section 36 (airport violence), section 112 (assaults upon diplomats), section 351 (crimes against Congressmen or Cabinet officers), section 1116 (crimes against diplomats), section 1203 (hostage taking), section 1361 (willful injury to government property), section 1751 (crimes against the President), section 2280 (maritime violence), section 2281 (maritime platform violence), section 2332 (terrorist acts abroad against United States nationals), section 2339 (use of weapons of mass destruction), or section 2340A (torture) of this title or section 902(i), (j), (k), (l), or (n) of the Federal Aviation Act of 1958, as amended

(49 U.S.C. App. 1472(i), (j), (k), (l), or (n)), unless the indictment is found or the information is instituted within ten years next after such offense shall have been committed.".

(b) The table of sections for chapter 213 is amended by inserting below the item for "§ 3285. Criminal contempt." the following: "3286. Extension of statute of limitations for certain terrorism offenses.".

TITLE VIII -- SEXUAL VIOLENCE AND CHILD ABUSE

SEC. 801. ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEXUAL ASSAULT AND CHILD MOLESTATION CASES

The Federal Rules of Evidence are amended by adding after Rule 412 the following new rules:

"Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

"(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

"(d) For purposes of this Rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State that involved --

"(1) any conduct proscribed by chapter 109A of Title 18, United States Code;

"(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

"(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

"(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

"(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

"Rule 414. Evidence of Similar Crimes in Child Molestation Cases

"(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

"(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the

scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

"(d) For purposes of this Rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State that involved --

"(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

"(2) any conduct proscribed by chapter 110 of title 18, United States Code;

"(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

"(4) contact between the genitals or anus of the defendant and any part of the body of a child;

"(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

"(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

"Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

"(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct

constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these Rules.

"(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

"(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.".

SEC. 802. DRUG DISTRIBUTION TO PREGNANT WOMEN. -- Section 418 of the Controlled Substances Act is amended by inserting ", or to a woman while she is pregnant," after "to a person under twenty-one years of age" in subsection (a) and subsection (b).

SEC. 803. DEFINITION OF SEXUAL ACT FOR VICTIMS BELOW 16. --

Paragraph (2) of section 2245 of title 18, United States Code, is amended --

(1) in subparagraph (B) by striking "or" after the semicolon;

(2) in subparagraph (C) by striking "; and" and inserting in lieu thereof "; or"; and

(3) by inserting a new subparagraph (D) as follows:

"(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16

years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;".

SEC. 804. INCREASED PENALTIES FOR RECIDIVIST SEX OFFENDERS. -- (a) Section 2245 of title 18, United States Code, is redesignated section 2246.

(b) Chapter 109A of title 18, United States Code, is amended by inserting the following new section after section 2244:

"§ 2245. Penalties for subsequent offenses

"Any person who violates a provision of this chapter after a prior conviction under a provision of this chapter or the law of a State (as defined in section 513 of this title) for conduct proscribed by this chapter has become final is punishable by a term of imprisonment up to twice that otherwise authorized.".

(c) The table of sections for chapter 109A of title 18, United States Code, is amended by --

(1) striking "2245" and inserting in lieu thereof "2246"; and

(2) inserting the following after the item relating to section 2244:

"2245. Penalties for subsequent offenses.".

Sec. 805. RESTITUTION FOR VICTIMS OF SEX OFFENSES

Section 3663(b)(2) of title 18, United States Code, is amended by inserting "or an offense under chapter 109A or chapter 110 of this title" after "an offense resulting in bodily injury to a victim".

SEC. 806. HIV TESTING AND PENALTY ENHANCEMENT IN SEXUAL ABUSE CASES

(a) Chapter 109A of Title 18, United States Code, is amended by inserting at the end thereof the following new section:

"§ 2247. Testing for Human Immunodeficiency Virus; Disclosure of Test Results to Victim; Effect on Penalty

"(a) TESTING AT TIME OF PRE-TRIAL RELEASE DETERMINATION. -- In a case in which a person is charged with an offense under this chapter, a judicial officer issuing an order pursuant to section 3142(a) of this title shall include in the order a requirement that a test for the human immunodeficiency virus be performed upon the person, and that follow-up tests for the virus be performed six months and twelve months following the date of the initial test, unless the judicial officer determines that the conduct of the person created no risk of transmission of the virus to the victim, and so states in the order. The order shall direct that the initial test be performed within 24 hours, or as soon thereafter as feasible. The person shall not be released from custody until the test is performed.

"(b) TESTING AT LATER TIME. -- If a person charged with an offense under this chapter was not tested for the human immunodeficiency virus pursuant to subsection (a), the court may at a later time direct that such a test be performed upon the person, and that follow-up tests be performed six months and twelve months following the date of the initial test, if it appears to the

court that the conduct of the person may have risked transmission of the virus to the victim. A testing requirement under this subsection may be imposed at any time while the charge is pending, or following conviction at any time prior to the person's completion of service of the sentence.

"(c) TERMINATION OF TESTING REQUIREMENT. -- A requirement of follow-up testing imposed under this section shall be canceled if any test is positive for the virus or the person obtains an acquittal on, or dismissal of, all charges under this chapter.

"(d) DISCLOSURE OF TEST RESULTS. -- The results of any test for the human immunodeficiency virus performed pursuant to an order under this section shall be provided to the judicial officer or court. The judicial officer or court shall ensure that the results are disclosed to the victim (or to the victim's parent or legal guardian, as appropriate), the attorney for the government, and the person tested.

"(e) EFFECT ON PENALTY. -- The United States Sentencing Commission shall amend existing guidelines for sentences for offenses under this chapter to enhance the sentence if the offender knew or had reason to know that he was infected with the human immunodeficiency virus, except where the offender did not engage or attempt to engage in conduct creating a risk of transmission of the virus to the victim.".

(b) CLERICAL AMENDMENT. -- The section a analysis for chapter 109A of title 18, United States Code, is amended by inserting at the end thereof the following new item:

"2247. Testing for Human Immunodeficiency Virus; Disclosure of Test Results to Victim; Effect on Penalty".

SEC. 807. PAYMENT OF COST OF HIV TESTING FOR VICTIM.

Section 503(c)(7) of the Victims' Rights and Restitution Act of 1990 is amended by inserting before the period at the end thereof the following: ", and the cost of up to two tests of the victim for the human immunodeficiency virus during the twelve months following the assault".

TITLE IX -- DRUG TESTING

SEC. 901. DRUG TESTING OF FEDERAL OFFENDERS ON POST-CONVICTION RELEASE

(a) DRUG TESTING PROGRAM. -- (1) Chapter 229 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3608. Drug testing of defendants on post-conviction release.

"The Director of the Administrative Office of the United States Courts shall, as soon as is practicable after the effective date of this section, establish a program of drug testing of criminal defendants on post-conviction release. In each district where it is feasible to do so, the chief probation officer shall arrange for the drug testing of defendants on post-conviction release pursuant to a conviction for a felony or other offense

described in section 3563(a)(4) of this title.".

(2) The section analysis for chapter 229 of title 18, United States Code, is amended by adding at the end thereof the following: "3608. Drug testing of defendants on post-conviction release."

(b) DRUG TESTING CONDITION --

(1) Section 3563(a) of title 18, United States Code, is amended --

(A) in paragraph (2), by striking out "and";

(B) in paragraph (3), by striking out the period and inserting in lieu thereof "; and"; and

(C) by adding a new paragraph (4), as follows:

"(4) for a felony, an offense involving a firearm as defined in section 921 of this title, a drug or narcotic offense as defined in section 404(c) of the Controlled Substances Act (21 U.S.C. 844(c)), or a crime of violence as defined in section 16 of this title, that the defendant refrain from any unlawful use of a controlled substance and submit to periodic drug tests (as determined by the court) for use of a controlled substance. This latter condition may be suspended or ameliorated upon request of the Director of the Administrative Office of the United States Courts, or the Director's designee. No action may be taken against a defendant on the basis of a drug test administered pursuant to this paragraph or sections 3583(d) or 4209(a) of this title, unless the drug test confirmation is a urine drug test confirmed using gas chromatography/mass spectrometry

techniques or such test as the Director of the Administrative Office of the United States Court after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy, except that a defendant who tests positive may be detained pending confirmation of the test result as provided in this paragraph.".

(2) Section 3583(d) of title 18, United States Code, is amended by inserting after the first sentence the following: "For a defendant convicted of a felony or other offense described in section 3563(a)(4) of this title, the court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to periodic drug tests (as determined by the court) for use of a controlled substance. This latter condition may be suspended or ameliorated as provided in section 3563(a)(4) of this title.".

(3) Section 4209(a) of title 18, United States Code, is amended by inserting after the first sentence the following: "If the parolee has been convicted of a felony or other offense described in section 3563(a)(4) of this title, the Commission shall also impose as a condition of parole that the parolee refrain from any unlawful use of a controlled substance and submit to periodic drug tests (as determined by the Commission) for use of a controlled substance. This latter condition may be suspended or ameliorated as provided in section 3563(a)(4) of this title."

(c) REVOCATION OF RELEASE. -- (1) Section 3565(a) of title 18, United States Code, is amended by inserting in the final

sentence after "3563(a)(3)," the following: "or unlawfully uses a controlled substance or refuses to cooperate in drug testing, thereby violating the condition imposed by section 3563(a)(4),".

(2) Section 3583(g) of title 18, United States Code, is amended by inserting after "substance" the following: "or unlawfully uses a controlled substance or refuses to cooperate in drug testing imposed as a condition of supervised release,".

(3) Section 4214(f) of title 18, United States Code, is amended by inserting after "substance" the following: ", or who unlawfully uses a controlled substance or refuses to cooperate in drug testing imposed as a condition of parole,".

SEC 902. DRUG TESTING IN STATE CRIMINAL JUSTICE SYSTEMS AS A CONDITION OF RECEIPT OF JUSTICE DRUG GRANTS.

(a) IN GENERAL. -- Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.) is amended by adding at the end of part E (42 U.S.C. 3750-3766b) the following:

"Drug Testing Programs

"Sec. 523. (a) PROGRAM REQUIRED. -- It is a condition of eligibility for funding under this part that a State formulate and implement a drug testing program for targeted classes of persons subject to charges, confinement, or supervision in the criminal justice systems of the State. Such a program must meet criteria specified in regulations promulgated by the Attorney General under subsection (b) of this section. Notwithstanding the above, no state shall be required to expend an amount for drug testing

pursuant to this section in excess of 10% of the minimum amount which that state is eligible to receive under this part.

"(b) REGULATIONS. -- The Attorney General shall promulgate regulations to implement this section, which shall incorporate scientific and technical standards determined by the Secretary of Health and Human Services to ensure reliability and accuracy of drug test results. The regulations shall include such other guidelines for drug testing programs in State criminal justice systems as the Attorney General determines are appropriate, and shall include provisions by which a State may apply to the Attorney General for a waiver of the requirements imposed by this section, on grounds that compliance would impose excessive financial or other burdens on such State or would otherwise be impractical or contrary to State policy.

"(c) EFFECTIVE DATE. -- This section shall take effect with respect to any State at a time specified by the Attorney General, but no earlier than the promulgation of the regulations required under subsection (b).".

TITLE X -- EQUAL JUSTICE ACT

SEC. 1001. SHORT TITLE. -- This title may be cited as the "Equal Justice Act".

SEC. 1002. PROHIBITION OF RACIALLY DISCRIMINATORY POLICIES CONCERNING CAPITAL PUNISHMENT OR OTHER PENALTIES.

(a) The penalty of death and all other penalties shall be administered by the United States and by every State without regard to the race or color of the defendant or victim. Neither the United States nor any State shall prescribe any racial quota or statistical test for the imposition or execution of the death penalty or any other penalty.

(b) For purposes of this title --

(1) the action of the United States or of a State includes the action of any legislative, judicial, executive, administrative, or other agency or instrumentality of the United States or a State, or of any political subdivision of the United States or a State;

(2) "State" has the meaning given in section 541 of title 18, United States Code; and

(3) "racial quota or statistical test" includes any law, rule, presumption, goal, standard for establishing a prima facie case, or mandatory or permissive inference that --

(A) requires or authorizes the imposition or execution of the death penalty or another penalty so as to achieve a specified racial proportion relating to offenders, convicts, defendants, arrestees, or victims; or

(B) requires or authorizes the invalidation of, or bars the execution of, sentences of death or other penalties based on the failure of a jurisdiction to

achieve a specified racial proportion relating to offenders, convicts, defendants, arrestees, or victims in the imposition or execution of such sentences or penalties.

SEC. 1003. GENERAL SAFEGUARDS AGAINST RACIAL PREJUDICE OR BIAS IN THE TRIBUNAL.

In a criminal trial in a court of the United States, or of any State --

(1) on motion of the defense attorney or prosecutor, the risk of racial prejudice or bias shall be examined on voir dire if there is a substantial likelihood in the circumstances of the case that such prejudice or bias will affect the jury either against or in favor of the defendant;

(2) on motion of the defense attorney or prosecutor, a change of venue shall be granted if an impartial jury cannot be obtained in the original venue because of racial prejudice or bias; and

(3) neither the prosecutor nor the defense attorney shall make any appeal to racial prejudice or bias in statements before the jury.

SEC. 1004. FEDERAL CAPITAL CASES.

(a) JURY INSTRUCTIONS AND CERTIFICATION. -- In a prosecution for an offense against the United States in which a sentence of death is sought, and in which the capital sentencing determination is to be made by a jury, the judge shall instruct the jury that it

is not to be influenced by prejudice or bias relating to the race or color of the defendant or victim in considering whether a sentence of death is justified, and that the jury is not to recommend the imposition of a sentence of death unless it has concluded that it would recommend the same sentence for such a crime regardless of the race or color of the defendant or victim. Upon the return of a recommendation of a sentence of death, the jury shall also return a certificate, signed by each juror, that the juror's individual decision was not affected by prejudice or bias relating to the race or color of the defendant or victim, and that the individual juror would have made the same recommendation regardless of the race or color of the defendant or victim.

(b) RACIALLY MOTIVATED KILLINGS. -- In a prosecution for an offense against the United States for which a sentence of death is authorized, the fact that the killing of the victim was motivated by racial prejudice or bias shall be deemed an aggravating factor whose existence permits consideration of the death penalty, in addition to any other aggravating factors that may be specified by law as permitting consideration of the death penalty.

(c) KILLINGS IN VIOLATION OF CIVIL RIGHTS STATUTES. -- Sections 241, 242, and 245(b) of title 18, United States Code, are each amended by deleting "shall be subject to imprisonment for any term of years or for life" and inserting in lieu thereof "shall be punished by death or imprisonment for any term of years or for life".

SEC. 1005. FUNDING OBJECTIVE.

Section 501 of Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3751) is amended by striking "and" following the semicolon in paragraph (20), striking the period at the end of paragraph (21) and inserting in lieu thereof "; and", and adding at the end thereof the following new paragraph:

"(22) providing, in all appropriate cases, particularly collateral and other post-conviction proceedings, adequate resources and expertise to ensure that the death penalty is expeditiously carried out.".

SEC. 1006. EXTENSION OF PROTECTION OF CIVIL RIGHTS STATUTES

(a) Section 241 of title 18, United States Code, is amended by deleting "inhabitant of" and inserting in lieu thereof "person in".

(b) Section 242 of title 18, United States Code, is amended by deleting "inhabitant of" and inserting in lieu thereof "person in", and by deleting "such inhabitant" and inserting in lieu thereof "such person".

TITLE XI -- VICTIMS' RIGHTS

SEC. 1101. RESTITUTION AMENDMENTS.

(a) EXPANSION OF RESTITUTION. -- Section 3663(b) of title 18, United States Code, is amended by striking "and" following the semicolon in paragraph (3), redesignating paragraph (4) as paragraph (5), and adding after paragraph (3) the following:

"(4) in any case, reimburse the victim for necessary child

care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and".

(b) SUSPENSION OF FEDERAL BENEFITS. -- Subsections (g) and (h) of section 3663 of title 18, United States Code, are redesignated as subsections (h) and (i), respectively, and a new subsection (g) is inserted as follows:

"(g)(1) If the defendant is delinquent in making restitution in accordance with any schedule of payments established under subsection (f)(1) of this section, or any requirement of immediate payment under subsection (f)(3) of this section, the court may, after a hearing, suspend the defendant's eligibility for all Federal benefits until such time as the defendant demonstrates to the court good-faith efforts to return to such schedule.

"(2) For purposes of this subsection --

"(A) the term 'Federal benefits' --

"(i) means any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

"(ii) does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility; and

"(B) the term 'veterans benefit' means all benefits provided to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States.".

SEC. 1102. VICTIM'S RIGHT OF ALLOCUTION IN SENTENCING

Rule 32 of the Federal Rules of Criminal Procedure is amended by --

(1) striking "and" following the semicolon in subdivision (a)(1)(B);

(2) striking the period at the end of subdivision (a)(1)(C) and inserting in lieu thereof "; and";

(3) inserting after subdivision (a)(1)(C) the following: "(D) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement and to present any information in relation to the sentence.";

(4) in the second to last sentence of subdivision (a)(1), striking "equivalent opportunity" and inserting in lieu thereof "opportunity equivalent to that of the defendant's counsel";

(5) in the last sentence of subdivision (a)(1) inserting "the victim," before ", or the attorney for the Government."; and

(6) adding at the end the following:

"(f) Definitions. For purposes of this Rule --

(1) "victim" means any individual against whom an offense for which a sentence is to be imposed has been committed, but the

right of allocution under subdivision (a)(1)(D) may be exercised instead by --

"(A) a parent or legal guardian in case the victim is below the age of eighteen years or incompetent; or

"(B) one or more family members or relatives designated by the court in case the victim is deceased or incapacitated;

if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and

"(2) 'crime of violence or sexual abuse' means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.".

COMPREHENSIVE VIOLENT CRIME CONTROL ACT OF 1991

SECTION-BY-SECTION ANALYSIS

Analysis of Titles:

Introduction

This bill, the "Comprehensive Violent Crime Control Act of 1991," incorporates President Bush's legislative proposal for the 102d Congress to combat violent crime.

Several of the titles in the bill address the same subjects as the violent crime proposal transmitted to Congress by the President in the 101st Congress. The topics that were addressed in the earlier proposal, as well as this one, include the federal death penalty, general habeas corpus reform, exclusionary rule reform, firearms violence, and drug testing of offenders.

The proposal has, however, been substantially modified and expanded. Some of the changes involve incorporation of important provisions and concepts drawn from the crime bills passed by the Senate (S. 1970) and the House of Representatives (H.R. 5269) in the 101st Congress, or from the Administration's National Drug Control Strategy Implementation Act proposals. Others involve entirely new ideas or proposals. The areas of most extensive addition or modification include special habeas corpus procedures for death penalty litigation, alternatives to the exclusionary rule, obstruction of justice, gangs and juvenile offenders, terrorism, sexual violence and child abuse, equal justice, and victims' rights.

The remainder of this analysis summarizes and explains the various provisions of the proposal.

I. DEATH PENALTY

This title would restore an enforceable death penalty for the most heinous federal offenses. It is identical in most respects to the federal death penalty proposal passed by the House of Representatives in the 101st Congress as title II of H.R. 5269. It is also similar in coverage of offenses and procedures to the death penalty proposals passed by the Senate in the 101st Congress (titles I and XIV of S. 1970).

Various provisions of the United States Code now authorize the death penalty for crimes of homicide, treason, and espionage. Most of these provisions, however, are or may be unenforceable because they do not incorporate legislated standards and procedures that reflect the Supreme Court's current capital punishment decisions. This title, like the death penalty proposals of earlier Congresses, is designed to remedy this deficit in relation to existing capital crimes, and to create additional death penalty authorizations for a number of highly aggravated federal crimes.

Sec. 102. Death penalty procedures.

This section adds a new chapter 228 to title 18 of the United States Code, consisting of sections 3591 through 3599, and makes necessary technical and conforming amendments. These sections identify the types of crimes for which the death penalty may be imposed and set forth the standards and procedures for imposing and carrying out the death penalty.

Section 3591 (Sentence of Death)

This section sets out the offenses for which the death penalty may be imposed if, after consideration of the mitigating and aggravating factors applicable to the case in a post-verdict hearing (described in subsequent sections), it is determined that the imposition of death is justified. The offenses are treason, espionage, certain types of homicides, certain highly aggravated drug crimes, and attempts to kill the President that result in bodily injury to the President or come dangerously close to causing the President's death.

The subsections relating to the proposed drug offender death penalty (3591 (c)-(e)) and general homicidal offenses (3591(f)) merit more detailed discussion. In the 101st Congress, the drug offender death penalty authorization in 3591(c)-(e) was passed by the Senate (in title XIV of S. 1970) and, with some modification, by the House of Representatives (in title II of H.R. 5269). The general definition of capital murder in 3591(f) is essentially a simplified version of the corresponding provisions in the 101st

Congress bills.

Section 3591(c). The first category of drug offenders who would be potentially eligible for capital punishment -- described in proposed 18 U.S.C. 3591(c) -- are offenders who are currently subject to a mandatory term of life imprisonment under 21 U.S.C. 848(b). This is the highest category of major traffickers recognized under federal law.

In essence, the offenders potentially subject to capital punishment under proposed section 3591(c) consist of principal organizers, administrators, and leaders of drug enterprises including at least five subordinates where transactions involving enormous quantities of drugs are involved (e.g., 30 kilograms of heroin, 150 kilograms of cocaine) or the enterprise has annual revenues of at least $10 million.

The inclusion of the very largest traffickers in the class of persons potentially eligible for the death penalty, as proposed in section 3591(c), is a response to the human and social devastation that is threatened and actually caused by their activities. In the past, Congress has prescribed the death penalty for treason, see 18 U.S.C. 2381, nuclear and other forms of espionage, see 10 U.S.C. 906a, and aircraft piracy, see Act of September 5, 1961, 75 Stat. 466 (1961). The proposal reflects a recognition that the current scourge of drug abuse and of drug-related crime and violence represents a comparable threat to the security and well-being of the public, and that the use of the ultimate sanction should be available in this context.

Section 3591(d). The second category of offenders who would be potentially eligible for capital punishment -- described in proposed 18 U.S.C. 3591(d) -- consists of a somewhat more broadly defined class of drug kingpins who attempt to obstruct the investigation or prosecution of their activities by attempting to kill persons involved in the criminal justice process, or knowingly directing, advising, authorizing, or assisting another to attempt to kill such a person. To fall within the death-eligible class, the defendant would have to be a principal organizer, administrator, or leader of a continuing criminal enterprise (CCE) as defined in 21 U.S.C. 848, but would not necessarily have to satisfy the specific criteria for mandatory life imprisonment under section 848(b).

Including a more broadly defined class of major traffickers -- but limited to those who engage in actual attempted murders to obstruct justice -- is justified by the flagrant and growing problem of extreme violence against witnesses in drug cases, as well as the increasing threat and reality of violence directed against criminal justice professionals. A CCE violator under 21 U.S.C. 848 will face, in any event, a very long term of imprisonment (20 years to life) if he is convicted, and he may

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feel that there is relatively little to lose by attempting to silence a witness or kill other participants in the process. The extension of the death penalty to attempted murders, in this limited context, even where death does not actually result, would send a strong message concerning the system's resolve to deal forcefully and effectively with this problem.

The applicability of proposed section 3591(d), as noted above, would be conditioned on an attempted murder by a drug kingpin to obstruct justice, committed against any public officer -- such as a police officer, judge, or prosecutor -- juror, or witness, or a member of the family or household of such a person. Family members (i.e., parents, spouses, children and siblings) and members of the households of such persons are included because of their exposure to victimization as targets of efforts at intimidation or reprisal by drug offenders.

Section 3591(e). The third category of potentially death-eligible drug offenders -- described in proposed 18 U.S.C. 3591(e) -- fills a gap in existing law. The Anti-Drug Abuse Act of 1988 enacted provisions authorizing capital punishment for certain intentional drug-related killings, see 21 U.S.C. 848(e), but did not cover unintentional killings resulting from aggravated recklessness, such as killings of innocent bystanders during a shoot-out among traffickers, or the death of users resulting from the knowing distribution of bad drugs.

Proposed section 3591(e) would fill this gap by authorizing the death penalty where the defendant, acting with the state of mind required for capital murder under proposed section 3591(f), engages in a federal drug felony (not necessarily a continuing criminal enterprise offense), and a person dies in the course of the offense or from the use of drugs involved in the offense.

Section 3591(f). Subsection (f) defines the general category of homicidal offenses for which the death penalty may be imposed ("capital murders"). The definition is similar in substantive coverage to the corresponding definitions in the death penalty proposals passed by the Senate and the House of Representatives in the 101st Congress (title I of S. 1970 and title II of H.R. 5269), but it provides a simpler and clearer formulation.

Under the definition, a homicide would constitute capital murder if the death penalty was statutorily authorized for the offense, and death was caused intentionally, knowingly, or through recklessness manifesting extreme indifference to human life. The Supreme Court, in Tison v. Arizona, 481 U.S. 137 (1987), held that the death penalty may constitutionally be imposed for killings resulting from highly reckless conduct, as well as intentional killings. The specific formulation used in proposed section 3591(f) is similar to formulations found in the murder provisions of the Model Penal Code (MPC § 210.2) and

various state codes. See e.g., Ala. Code § 13A-6-2(a)(1)-(2); N.D. Cent. Code § 12.1-16-01(1)(a)-(b).

The definition in subsection (f) also covers cases in which death results from the intentional infliction of serious injury. This is substantially the same as a clause in the definition of capital murder in the general death penalty proposal passed by the Senate in the 101st Congress (proposed 18 U.S.C. 3591(c)(2) in title I of S. 1970). There is also support in state law for inclusion of this category of homicides in capital murders. See Ill. Ann. Stat., ch. 38, § 9-1; N.J. Stat. Ann § 2C:11-3.

Section 3592 (Factors to be Considered in Determining Whether a Sentence of Death is Justified)

This section sets forth the statutory mitigating and aggravating factors to be considered by the jury or judge in determining whether a sentence of death is justified upon conviction of a crime for which the sentence is authorized. The section also allows, consistent with Supreme Court decisions, for the consideration of other aggravating or mitigating factors, not listed in the section, which might affect such a determination. See Skipper v. South Carolina, 476 U.S. 1 (1986); Lockett v. Ohio, 438 U.S. 586 (1978); Barclay v. Florida, 463 U.S. 939 (1983); Zant v. Stephens, 462 U.S. 862 (1983).

Subsection (a) sets forth three mitigating factors which must be considered. They are (1) that the defendant's mental capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, although not so impaired as to constitute a defense to the charge; (2) that the defendant was under unusual and substantial duress although not such as to constitute a defense; and (3) that the defendant was an accomplice whose participation in the offense was relatively minor. Subsection (a) further states that the jury or judge shall also consider any other aspect of the defendant's background, character, record, or the circumstances of the offense that the defendant may offer in mitigation. While the Supreme Court has held that no limitation may be placed on the defendant's introducing evidence of mitigating factors, some linkage must be established between the evidence offered in mitigation and the defendant's persona or the offense. For example, the catch-all provision in subsection (a) is not intended to allow such evidence as that on the night of the murder in New York City, unusually heavy rain had fallen in Los Angeles.

Subsection (b) sets forth the aggravating factors for treason and espionage. They are that the defendant had previously been convicted of an offense involving espionage or treason for which a sentence of life imprisonment or death was authorized by statute, that the defendant knowingly created a

grave risk to the national security, and that the defendant knowingly created a grave risk of death to another person.

Subsection (c) sets forth the aggravating factors for the homicide offenses and for the attempted murder of the President. They are:

(1) that the conduct resulting in death occurred during the commission, attempted commission, or the immediate flight from the commission, of one of several exceptionally dangerous crimes;

(2) that the defendant used or carried a firearm during and in relation to the offense -- an aggravating factor that would typically be established by the defendant using the gun to shoot the victim but which would also be established if the defendant armed himself with a firearm for possible use during the offense but killed the victim in some manner other than shooting -- or had previously been convicted of a felony involving the use, attempted use, or threatened use of a firearm against another person;

(3) that the defendant had previously been convicted of another federal or State offense resulting in death for which life imprisonment or death was authorized;

(4) that the defendant had previously been convicted of two or more federal or State offenses, committed on different occasions, each involving the infliction or attempted infliction of serious bodily injury or the distribution of a controlled substance and each punishable by imprisonment for more than one year;

(5) that the defendant in the commission of the offense knowingly created a grave risk of death to one or more persons in addition to the victim;

(6) that the defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse of the victim;

(7) that the defendant procured the commission of the offense by paying or promising to pay anything of pecuniary value;

(8) that the defendant committed the offense as consideration for receiving or in the expectation of receiving something of pecuniary value;

(9) that the defendant committed the offense after substantial planning and premeditation;

(10) that the victim was particularly vulnerable due to old age, youth, or infirmity; and

(11) that the defendant committed the offense against certain specified public officials.

The aggravating factors in subsection (c) are the same as the corresponding provisions in title II of H.R. 5269 as passed by the House of Representatives, subject to two changes that are deigned to make the capital sentencing option more consistently available in cases involving terrorist murders: Factor (1), which permits consideration of the death penalty where the lethal conduct occurs in the course of specified offenses, has been augmented to include a more comprehensive list of crimes that threaten massive loss of life or are otherwise likely to be committed by terrorists. Factor (11), which permits consideration of the death penalty for murders of certain federal public servants, has been augmented to include killings in which the victim is outside of the country, for the protection of diplomatic and military personnel and other federal public servants whose duties take them abroad.

It should be noted that subsections (b) and (c) do not define the offenses for which the death penalty is authorized. That authorization is in the penalty provision for each individual capital offense. Rather, subsections (b) and (c) specify the aggravated instances in which the commission of a capital offense will permit a jury to consider whether the death penalty should be imposed, and would often be applied in capital sentencing determinations for offenses whose defining statutes already contain general capital punishment authorizations.

In particular, subsection (b) would be applied in relation to the existing capital crimes of espionage (18 U.S.C. 794) and treason (18 U.S.C. 2381). Subsection (c) would be applicable in relation to various existing statutes that authorize capital punishment in cases where death results, including 18 U.S.C. 32, 34 (destruction of aircraft and aircraft facilities), 33, 34 (destruction of motor vehicles and motor vehicle facilities), 115 (retaliation against families of federal officials), 351 (violence against Members of Congress and Cabinet officers), 844 (d),(f),(i) (explosives offenses), 1111 (murder in special maritime and territorial jurisdiction), 1114 (murder of federal judges and officers), 1512 (witness tampering), 1716 (mailing dangerous articles), 1751 (violence against the President and Presidential staff), 1992 (wrecking trains), 2113 (bank robbery), 21 U.S.C. 848(e) (certain drug-related killings), and 49 U.S.C. App. 1473 (aircraft piracy).

However, eight (non-drug) offenses in current law, which are not now subject to the death penalty, are changed to capital offenses by the conforming amendments in this title. They are:

(1) the murders of certain foreign officials under 18 U.S.C. 1116;

(2) kidnaping where a death results under 18 U.S.C. 1201;

(3) murder for hire under 18 U.S.C. 1958;

(4) murder in aid of racketeering under 18 U.S.C. 1959;

(5) murder during a hostage taking in violation of 18 U.S.C. 1203;

(6) terrorist murders of American nationals abroad in violation of 18 U.S.C. 2332;

(7) attempted assassination of the President in violation of 18 U.S.C. 1751; and

(8) murder in furtherance of genocide in violation of 18 U.S.C. 1091(a)(1).

In addition, the title creates a new federal capital offense of murder committed by a federal prison inmate serving a life sentence (proposed 18 U.S.C. 1118). Subsection (c) would be applied in capital sentencing determinations under these new authorizations, as well as to the existing capital punishment authorizations for homicidal offenses listed above.

Other titles of this bill also provide new death penalty authorizations to which the aggravating factors of subsection (c) would apply. Title V, relating to obstruction of justice, adds death penalty authorizations for murders in violation of 18 U.S.C. 1503 (injuring jurors or court officers) and 1513 (retaliation against witnesses). Title VII, relating to terrorism, creates several new offenses for which capital punishment will be authorized in cases where death results -- proposed 18 U.S.C. 36 (violence at international airports), 930(c) (killings in firearms attacks on federal facilities), 2280 (violence against maritime navigation), 2281 (violence against maritime fixed platforms), 2339 (use of weapons of mass destruction), and 2340A (torture). Title X, relating to equal justice, adds death penalty authorizations to the principal criminal provisions of the federal civil rights statutes, 18 U.S.C. 241, 242, and 245, for violations with fatal consequences.

Subsection (d) of proposed section 3592 would be applied in relation to the proposed "drug offender" death penalty under the bill. It is a special list of aggravating factors to be considered by the jury in deciding whether the death penalty should be imposed on offenders in the three "drug offender" categories in proposed 18 U.S.C. 3591(c)-(e). These factors are

tailored to the conditions of drug trafficking and identify features of a defendant's conduct or background that provide particularly strong evidence of dangerousness, incorrigibility, or indifference to human life. The jury would have to find at least one of these additional factors to impose a death sentence:

Paragraphs (1)-(2) of subsection (d) set out general criminal record aggravating factors. These are prior conviction of a homicide punishable by life imprisonment, and prior conviction of at least two violent or drug felonies.

The factor in paragraph (3) of subsection (d) is prior conviction of a drug offense punishable by five or more years of imprisonment. This is nearly the same as one of the aggravating factors in the Anti-Drug Abuse Act death penalty provisions (21 U.S.C. 848(n)(10)).

The factor in paragraph (4) of subsection (d) is using or knowingly directing, advising, authorizing, or assisting another to use a firearm to threaten, intimidate, assault, or injure a person in committing the drug offense, or in furtherance of a continuing criminal enterprise (as defined in 21 U.S.C. 848) of which the offense was a part. Mere possession of a firearm in connection with drug activities would not be covered; the defendant would actually have to engage in or sanction the hostile use of a firearm against a person.

The factors in paragraphs (5)-(7) of subsection (d) involve a violation in committing the drug offense, or in furtherance of a continuing criminal enterprise, of the provisions that define aggravated offenses where trafficking is carried out in a manner that exploits or jeopardizes young people. This includes distribution to persons under twenty-one, distribution near schools, and using minors in trafficking. The 1988 Anti-Drug Abuse Act death penalty provisions similarly have an aggravating factor (21 U.S.C. 848(n)(11)) for distribution to persons under twenty-one in violation of 21 U.S.C. 845. The factor would apply where the defendant directly committed such an offense, or would be liable as an accomplice in such an offense under the normal standards of 18 U.S.C. 2 (by aiding, abetting, counseling, commanding, inducing, procuring, or willfully causing the commission of the offense).

Factor (8) of subsection (d) covers cases where the offense involves importing, manufacturing, or distributing drugs that are mixed with a potentially lethal adulterant, and the defendant is aware of the presence of the adulterant. This is designed to reach situations in which the manufacturer or distributor cuts drugs with another toxic substance, such as household detergent.

Section 3593 (Special Hearing to Determine Whether a Sentence of Death is Justified)

This section sets out the procedure for a special hearing to determine whether a sentence of death is justified. At the conclusion of the hearing the jury (except in those unusual cases where the sentencing hearing is before the judge alone) will return a binding recommendation as to whether the sentence of death is justified. If the jury returns a recommendation of the death penalty as opposed to some lesser punishment, the court must impose a sentence of death.

Section 3593(a) provides that if the attorney for the government believes that the circumstances of one of the offenses for which the death penalty is authorized (the offenses set out in section 3591) justify the imposition of the death penalty, he or she must file with the court and serve on the defendant a notice of the conclusion and set forth the aggravating factors (including any not statutorily enumerated) the government proposes to show at the hearing. The notice must be filed and served on the defendant a reasonable time before trial or the accepting of a guilty plea or at such time thereafter as the court may permit upon a showing of good cause. The provision is intended to give adequate notice to the defendant so he can prepare for the post-conviction sentencing hearing and to ensure an appropriate voir dire that comports with applicable Supreme Court cases.

The subsection specifies that aggravating factors for which notice is provided may include factors concerning the effect of the offense on the victim and the victim's family. The effect on the victim may include the suffering of the victim in the course of the killing or during a period of time between the infliction of injury and resulting death, and the victim's loss of the opportunity to continue his characteristic activities and enjoyments and to realize his plans and aspirations because of the extinction of his life by the defendant. The effect on the victim's family may include emotional anguish and distress, and economic hardship. Since the defense is generally free to bring out sympathetic features of the defendant and his background, permitting the government to show the harm caused by the offense in relation to the victim and his family is necessary to provide the jury with a balanced picture of the relevant facts for purposes of the capital sentencing determination.

This point was recognized in the general death penalty proposal passed by the Senate in the 101st Congress, which provided for the introduction of a "victim impact statement" in capital sentencing hearings (proposed 18 U.S.C. 3593(g) in title I of S. 1970). However, the Senate provision was not fully integrated into the general system for proving and finding aggravating factors under the proposal. Proposed subsection (a) in this proposal avoids this problem by providing that notice of factors concerning the effect of the offense on the victim and

his family may be given in the same manner as notice of other aggravating factors. If such notice was given, information supporting a "victim impact" factor could be introduced at the sentencing hearing as with other factors.

Section 3593(b) provides that if the attorney for the government has filed the notice required by subsection (a) and if the defendant is found guilty, a sentencing hearing shall be conducted by the judge who presided at trial or accepted the guilty plea or by another judge if the first one is unavailable. No presentence report is to be prepared in such a case inasmuch as the issue at the hearing is the existence of aggravating or mitigating factors and the justifiability of imposing a death sentence, and the issue is to be determined on the basis of the information presented at the hearing. The hearing is to be conducted before the jury that determined the defendant's guilt, except that a jury may be impaneled for the purpose of the sentencing hearing in a case in which the defendant was convicted on a trial to the court or on a plea of guilty, in a case in which the original jury was discharged for good cause, or in a case where reconsideration of the sentence is necessary. This subsection also provides that the defendant may move that the sentencing hearing be conducted before the court alone but that the attorney for the government must concur. In the absence of this concurrence by the government, the sentencing hearing is before a jury.

Section 3593(c) deals with proof of the aggravating and mitigating factors. Any information relevant to the sentence may be presented. Information concerning any mitigating factor or factors, both those listed in section 3592 and those not so listed, may be introduced. Evidence of at least one aggravating factor listed in section 3592 must be introduced. As explained, the government must give the defendant notice of which aggravating factors it will seek to establish. If evidence of a statutory aggravating factor is introduced, the government may also introduce evidence of any other aggravating factor, again providing the government has given notice as to the nature of such a nonstatutory factor.

The information may include trial transcripts and exhibits or relevant parts thereof. Other evidence relevant to any mitigating or previously identified aggravating factor may be presented regardless of its admissibility under the rules of evidence, except that the court may exclude information if its probative value is outweighed by the danger of its creating unfair prejudice, confusing the issues, or misleading the jury. The burden of establishing an aggravating factor is on the government and the standard of proof for such a factor is beyond a reasonable doubt. The defendant has the burden of establishing any mitigating factor but this burden is satisfied if the defendant proves such a factor by a preponderance of the

evidence.

Section 3593(d) deals with the return of special findings required in the sentencing hearing. It provides that the jury, or if there is no jury, the court, must consider all the information received at the sentencing hearing. The jury, or if there is no jury, the court, must return a special finding identifying each aggravating factor (both statutory and nonstatutory) which it has found. Once again, it can only find the existence of an aggravating factor for which notice was provided. The finding with respect to an aggravating factor must be unanimous. If no aggravating factor is found, the death penalty cannot be imposed and the court must impose some other sentence authorized by statute.

With respect to mitigating factors, subsection (d) reflects the holding of the Supreme Court in Mills v. Maryland, 486 U.S. 367 (1988), that individual jurors may not be precluded from considering mitigating evidence regardless of the number of jurors who agree on a particular factor. Consequently, subsection (d) provides that a finding with respect to a mitigating factor may be made by one or more members of the jury.

As used throughout section 3593, the term "mitigating factor" is meant to include all mitigating evidence which the sentencer must consider before returning a sentence of death to comport with such cases as Eddings v. Oklahoma, 455 U.S. 104 (1982). Nevertheless, the jury may only consider evidence presented at trial or at the sentencing hearing. It may not speculate on the existence of some factor completely unsupported by any evidence. See California v. Brown, 479 U.S. 538 (1987). Any member of the jury who is persuaded by a preponderance of the evidence -- the standard set out in subsection (c) -- that a particular mitigating factor exists may consider such a factor established. That juror (even if he or she is the only one who believes the evidence and has concluded that such a factor has been established) may then weigh that evidence against any aggravating factors which have been found unanimously beyond a reasonable doubt -- again, the requirement of subsection (c) -- in deciding, under subsection (e), whether to return a binding recommendation for a sentence of death.

Section 3593(e) provides that if one or more of the statutorily required aggravating factors is found to exist (a constitutional requirement under Zant v. Stephens and Barclay v. Florida, supra) the jury, or the court if there is no jury, must then consider whether the aggravating factor or factors which it has found outweigh the mitigating factor or factors. It is the intent of this subsection that the jurors be instructed that they are to weigh and balance the aggravating factor or factors found against any mitigating evidence. As discussed above, findings of aggravating factors would require a formal determination of the

whole jury, but the individual members of the jury would make their own determinations concerning the existence of mitigating factors.

If each juror found no mitigating factors or found that any mitigating factors were outweighed by the aggravating factor or factors, then the jury would be required to make a binding recommendation to impose the death penalty. This reflects the judgment that the death penalty is presumptively the appropriate penalty for the crimes described in section 3591 under the aggravated circumstances described in section 3592, and that the death penalty should be imposed in such cases unless the aggravating factors are balanced or outweighed by mitigating circumstances. The Supreme Court upheld rules requiring that the death penalty be imposed under these conditions in Blystone v. Pennsylvania, 110 S.Ct. 1078 (1990), and Boyde v. California, 110 S.Ct. 1190 (1990). This approach promotes equal justice and avoids the potential for arbitrariness that would exist under an approach that gave the jury or court less guidance in imposing the death penalty.

Subsection (e) also requires an instruction to the jury that it is not to be influenced in its decision whether to recommend the death penalty by sympathy, sentiment, passion, prejudice, or any other arbitrary factor, and should make such a recommendation as the information warrants. This is substantially the same as the instruction upheld by the Supreme Court in Saffle v. Parks, 110 S.Ct. 1257 (1990). See also California v. Brown, 479 U.S. 538 (1987) (approving similar instruction). The requirement of such an instruction serves to promote equal justice by emphasizing that capital sentencing decisions are not to be influenced by legally inadmissible considerations or personal whim or caprice. Rather, what is called for is a reasoned factual and moral assessment by the jury based on the evidence presented at the trial and sentencing hearing and its conclusions concerning the existence and relative weight of pertinent aggravating and mitigating factors.

Section 3593(f) is designed as a special precaution against discrimination by the jury on the basis of the defendant's or the victim's race, color, national origin, religion or gender. It provides that in a sentencing hearing in which the death penalty is sought, the jury shall be specifically instructed that it must not be influenced by prejudice or bias relating to these factors and that the jury is not to make its binding recommendation for a sentence of death unless it would recommend such a sentence no matter what the race, color, national origin, religion or sex of the defendant or any victim. Moreover, the jury must return to the court a certificate signed by each juror stating that such prejudice or bias was not involved in his or her individual decision, and that he or she would have made the same binding recommendation as to the sentence no matter what these particular

characteristics of the defendant or victim might be.

Section 3594 (Imposition of a Sentence of Death)

This section provides that if the jury recommends a sentence of death, the court must sentence the defendant to death. If the court, rather than the jury, is the fact finder at the sentencing hearing, section 3594 requires the court to follow its own recommendation and impose the death penalty. If, however, the jury, or if there is no jury, the court, does not recommend the sentence of death, the court shall impose any sentence other than death authorized by law.

This section also provides that notwithstanding any other provision of law, life imprisonment without possibility of release is an authorized sentence for a conviction of an offense punishable by death if the maximum term of imprisonment for such an offense is life.

Section 3595 (Review of a Sentence of Death)

This section sets out the rules applicable to appeals from the imposition of the death sentence. Subsection (a) provides that a sentence of death shall be subject to review by the court of appeals upon an appeal of the sentence by the defendant. Notice of appeal of the sentence must be filed within the time specified for filing an appeal of the judgment of conviction and the court may consolidate the appeal of the sentence and the appeal of the conviction. The review of a case in which the death sentence has been imposed must be given priority over all other cases.

Section 3595(b) provides that the court of appeals must consider the entire record including the evidence submitted at trial, the information submitted during the sentencing hearing, the procedures employed at the sentencing hearing, and the special findings returned at the sentencing hearing as to the existence of the aggravating factors.

Section 3595(c) requires the court of appeals to uphold the sentence of death if it was not imposed under the influence of passion, prejudice, or any other arbitrary factor, the evidence and information support the special findings of aggravating factors, and the proceedings did not otherwise involve prejudicial error requiring reversal of the sentence that was properly preserved for and raised on appeal. The death sentence could be upheld even if an aggravating factor were invalidated on appeal, provided at least one valid statutory aggravating factor remained. See Zant v. Stephens, supra. Proportionality review with other death cases would not be a part of the review process. Pulley v. Harris, 465 U.S. 37 (1984). If the sentence was not upheld, the court of appeals would remand the case for

reconsideration under section 3593 or for imposition of another authorized sentence, as appropriate. The court of appeals must state in writing the reasons for its disposition of an appeal of a sentence of death.

Section 3596 (Implementation of a Sentence of Death)

This section is concerned with the implementation of a sentence of death. Section 3596(a) provides that a person sentenced to death shall be committed to the custody of the Attorney General pending completion of the appeal and review process. When the sentence is to be implemented, custody of the person would be given to a United States Marshal who would then supervise the implementation of the penalty in accordance with the law of the State in which the sentence is imposed. If that State has no death penalty, the court would designate another State which does have such a penalty and the execution would be carried out in the manner prescribed in that State. This subsection generally reinstates a portion of the provisions of former section 3566 of title 18 which was repealed as of November 1, 1987, by P.L. 98-473.

Section 3596(b) states that a sentence of death shall not be carried out upon a person who lacks the mental capacity to understand the death penalty and why it was imposed, or upon a woman who is pregnant. The latter limitation is to spare the unborn. Following the conclusion of the pregnancy, the sentence of death would be implemented. The former limitation is intended to implement the bar on execution of a person who is mentally incompetent but who was sane at the time of the offense and who was competent to stand trial. See Ford v. Wainwright, 477 U.S. 399 (1986). This limitation, too, would normally only postpone the implementation of the sentence of death. See Ford v. Wainwright, concurring opinion of Justice Powell, 477 U.S. at 425 and footnote 5: "The only question raised is not whether but when his execution may take place. [Emphasis in original.] [I]f petitioner is cured of his disease, the State is free to execute him."

Section 3597 (Use of State Facilities)

This section reinstates other parts of former section 3566 not contained in subsection 3596(a) by authorizing the United States Marshal charged with implementing the sentence of death to use State facilities and to pay the costs thereof.

Sections 3598 and 3599 (Appointment of Counsel and Collateral Attack)

Sections 3598 and 3599 would adopt improved procedures for federal death penalty litigation based on the recommendations of the Ad Hoc Committee of the Judicial Conference on Federal Habeas

Corpus in Capital Cases (the "Powell Committee"), as set out in that Committee's report of August 23, 1989. Both the Senate and the House of Representatives passed these provisions in the 101st Congress (proposed 18 U.S.C. 3598-99 in title XIV of S. 1970 and title II of H.R. 5269).

Following the Powell Committee's recommendations, a balanced approach would be adopted under which the defendant's right to appointment of counsel would be extended, but improved safeguards against dilatory tactics and repetitive litigation would also be enacted. The defendant would be afforded counsel meeting specified standards of competence from the commencement of trial proceedings until the conclusion of the litigation of an initial motion for collateral relief under 28 U.S.C. 2255. The defendant would, however, normally be limited to a single section 2255 motion, and the motion would have to be filed within a specified time period. Following the final rejection of such a motion by the courts, further litigation would be limited to extraordinary cases in which the defendant raises a claim that undermines confidence concerning his factual guilt of the offense for which the death penalty was imposed. The specific provisions are as follows:

Section 3598

Subsection (a) of proposed section 3598 would create a right to appointed counsel for indigent federal capital defendants, running from the commencement of trial proceedings until the conclusion of the litigation of an initial motion for collateral relief under 28 U.S.C. 2255, or the failure of the defendant to file or pursue such a motion in a timely manner.

Subsection (b) provides for appointment of counsel at trial in conformity with 18 U.S.C. 3005, an existing statute that entitles a federal capital defendant, on request, to two lawyers at trial. At least one lawyer so appointed would continue to represent the defendant in direct review proceedings, unless replaced by the court with other qualified counsel.

Subsection (c) governs appointment of counsel for collateral proceedings. After the judgment has become final through the conclusion of direct review or a failure of the defendant to seek direct review in a timely manner, the government would so notify the sentencing court. The court would then proceed within 10 days to determine whether the defendant is eligible for appointment of counsel, and on the basis of that determination would issue an order appointing counsel, or denying appointment of counsel because the defendant was not indigent or refused appointment of counsel. Following the approach of the Powell Committee recommendations, counsel appointed for collateral proceedings would be different from the counsel who represented the defendant at earlier stages, absent a contrary request by the

defendant and counsel. This would serve to provide a lawyer capable of taking a fresh and dispassionate look at the issues in the case, including possible errors by counsel in prior proceedings. See Powell Committee Report at 10, 12-13.

Subsection (d) sets standards of competence for appointment of counsel under the section. The basic requirement would be five years' admission to the bar and three years of felony litigation experience in the federal courts. This standard is based on the appointment of counsel standard of the death penalty provisions of the Anti-Drug Abuse Act of 1988 (21 U.S.C. 848(q)(5)-(6)). Also following the Anti-Drug Abuse Act provisions (21 U.S.C. 848(q)(7)), the court, for good cause, could appoint other counsel under the section whose background, knowledge, or experience qualified him to handle such cases, although he did not meet the specific experience requirements set out in the statute. Utilization of this authority in appropriate cases would help ensure that the class of qualified counsel available to defendants would not be unduly limited, and that delay would not occur in litigation because of the unavailability of qualified counsel to represent capital defendants. For example, it might be found that extensive criminal litigation experience in state cases, or completion of a training or certification program for capital litigation, would be an adequate substitute or partial substitute for these specific experience requirements.

Subsection (e) provides that the provisions of the Criminal Justice Act (18 U.S.C. 3006A) would apply to appointments under this section except as otherwise provided in the section. Section 3006A sets general standards and procedures for appointment and reimbursement of counsel, including due allowance for waiving normal compensation limits in cases of unusual difficulty or complexity. The proviso in this paragraph to the applicability of the Criminal Justice Act -- "[e]xcept as otherwise provided in this section" -- recognizes that the standards of the section are in some important respects more favorable to defendants than the general section 3006A standards. For example, appointment of counsel for indigents in collateral proceedings is discretionary under section 3006A, but would be mandatory in an initial section 2255 motion under this section.

Subsection (f) provides that the entitlement to counsel for collateral proceedings under this section would not create any novel right to attack capital sentences on grounds of alleged ineffectiveness of counsel at that stage. This is parallel to proposed 28 U.S.C. 2256(e) in the Powell Committee proposal. See Powell Committee Report at 10, 13.

Section 3599

Proposed 18 U.S.C. 3599 would be a new section governing

collateral litigation -- i.e., litigation of motions by federal defendants pursuant to 28 U.S.C. 2255 -- in capital cases.

Subsection (a) of proposed section 3599 would require that an initial section 2255 motion be filed within 90 days of the issuance of the order under proposed section 3598 relating to appointment of counsel for collateral proceedings. The court, for good cause, could extend the time for filing for up to 60 days. A motion under the section would be given priority over all non-capital matters in the district court and the court of appeals.

Superficially, the time provided for filing a motion under subsection (a) is shorter than the general two-year time limit for section 2255 motions proposed in subtitle A of title II of this bill, and the general 180 day time limit on a state prisoner's application for federal habeas corpus review under the Powell Committee recommendations for state cases. However, the reforms proposed in subtitle A of title II are designed for the general class of federal prisoners who may seek collateral relief, including prisoners who do not have counsel, and need to find their own way in filing section 2255 motions. They accordingly provide a very long time period for that purpose. In contrast, under the instant proposal, federal defendants under sentence of death will always have legal representation for purposes of collateral (section 2255) litigation, and the time allowed is properly limited to the time required for an experienced attorney to prepare and file a section 2255 motion. The 90 day time period proposed under subsection (a), subject to a possible 60 day extension if needed, is ample for that purpose.

Similarly, the time rule under subsection (a) cannot be compared directly to the 180 day time limit for federal habeas applications by state prisoners under the Powell Committee procedures, because the 180 day Powell Committee limit encompasses two periods: both the time required for counsel to file an initial application for collateral relief in the state courts, and the time later required for filing a federal habeas corpus application following the conclusion of state collateral litigation. See Powell Committee Report at 6, 18-21. When this difference is taken into account, the time allowed for filing by federal prisoners under subsection (a) is comparable in practical terms to the time allowed for state prisoner filing under the Powell Committee procedures.

Subsection (b) of proposed section 3599 provides essentially that execution is automatically stayed until the conclusion of litigation of an initial section 2255 motion, if such a motion is filed and pursued in conformity with the applicable time rules. This is parallel to the mandatory stay of execution provisions of the Powell Committee procedures for state cases. See Powell Committee Report at 13-14, 15-17.

Subsection (c) of proposed section 3599 governs further litigation following the conclusion of litigation of an initial section 2255 motion, or failure to pursue such a motion in a timely manner. Beyond this point, no court would have the authority to stay the execution or grant relief, except in an extraordinary case involving a claim based on facts which would undermine confidence in the defendant's guilt of the offense for which the death penalty was imposed, where the claim was not raised in earlier proceedings and the failure to raise the claim was the result of (a) governmental action in violation of federal law, (b) Supreme Court recognition of a new right that is retroactively applicable, or (c) based on a factual predicate that could not have been discovered in time for earlier proceedings through reasonable diligence. This is parallel to proposed 28 U.S.C. 2257(c) in the Powell Committee recommendations. See Powell Committee Report at 14-15, 17-18.

Sec. 103. Conforming amendment relating to destruction of aircraft or aircraft facilities.

Section 103 of the bill applies the procedures of the new chapter 228 concerning the death penalty to violations of chapter 2 of title 18 dealing with the destruction of or damage to aircraft and motor vehicles where death results. The death penalty is authorized for such violations under current law but the penalty is unavailable due to the lack of necessary procedural provisions.

Sec. 104. Conforming amendment relating to espionage.

Section 104 prescribes the scope of the availability of the death penalty for espionage. In accordance with the view reflected in prior bills that the death penalty is both constitutional and appropriate for this offense, the penalty is retained as a possible punishment for peacetime espionage where it concerns certain major military matters, such as nuclear weapons or satellites which directly affect national defense. The death penalty, of course, remains applicable under 18 U.S.C. 794(b) to any instance of wartime espionage.

Secs. 105-107. Conforming amendments dealing with explosives.

Sections 105, 106, and 107 apply the sentencing procedures of the new chapter 228 to three serious explosives offenses where death results. These sections, all of which deal with deliberate property destruction by explosives or the transportation of explosives in interstate commerce for the purpose of injuring persons or property, currently provide for the death penalty, but

the penalty is unenforceable due to the lack of necessary procedures.

Sec. 108. Conforming amendment relating to murder.

Section 108 applies the new death penalty procedures to the offense of first degree murder committed in the special maritime and territorial jurisdiction, a crime for which the death penalty is authorized (but unavailable as a practical matter because of the lack of procedures) under current law.

Sec. 109. Conforming amendment relating to killing official guests or internationally protected persons.

Section 109 amends 18 U.S.C. 1116(a) to provide for the death penalty for murders of foreign officials, official guests of the United States, and internationally protected persons.

Sec. 110. Murder by Federal prisoner.

Section 110 adds a new section 1118 to title 18 to provide that a person serving a life sentence in a federal prison who murders another person will be punished by death or by life imprisonment without the possibility of release.

Sec. 111. Death penalty relating to kidnapping.

Section 111 amends the federal kidnaping statute, 18 U.S.C. 1201, to provide for the imposition of the death penalty, under the sentencing procedures of chapter 228, if death results from the kidnaping.

Sec. 112. Death penalty relating to hostage taking.

Section 112 provides for the death penalty under 18 U.S.C. 1203 (enacted in 1984) if death occurs in the course of a hostage-taking, either within the United States or, if the victim is a United States national, outside the United States, such as occurred in the incident a few years ago involving the cruise ship Achille Lauro.

Sec. 113. Conforming amendment relating to mailability of injurious articles.

Section 113 applies the new sentencing provisions to section 1716, dealing with the mailing of injurious articles where death

results. This effectuates the presently unenforceable death penalty provision for this section.

Sec. 114. Conforming amendment relating to presidential assassination.

Section 114 of the bill would provide for the death penalty for an attempt to kill the President if the attempt results in bodily injury to the President or otherwise comes dangerously close to killing the President. The procedures of the new chapter 228 would be applicable to such an offense.

Secs. 115-116. Conforming amendments relating to murder for hire and to violent crimes in aid of racketeering.

Sections 115 and 116 provide for the death penalty under two related offenses enacted in 1984 and renumbered in 1988 proscribing murders for hire and killings in aid of racketeering activity (18 U.S.C. 1958 and 1959).

Sec. 117. Conforming amendment relating to wrecking trains.

Section 117 applies the new sentencing provisions of chapter 228 to violations of 18 U.S.C. 1992 involving the wrecking of trains where death results. This effectuates the presently unenforceable death penalty provision for this offense.

Sec. 118. Conforming amendment relating to bank robbery.

Section 118 restricts the application of the death penalty in cases of bank robbery and incidental crimes in violation of section 2113 of title 18 to cases where death results, and provides for life imprisonment as an alternative penalty in such cases.

Sec. 119. Conforming amendment relating to terrorist acts.

Section 119 amends 18 U.S.C. 2332 to provide for the death penalty for terrorist murders of United States nationals outside of the United States.

Sec. 120. Conforming amendment relating to aircraft hijacking.

Section 120 applies the procedures of chapter 228 to aircraft piracy where death results from the commission or attempted commission of the offense by repealing the capital

punishment procedures in the Federal Aviation Act of 1958 (49 U.S.C. App. 1473(c)) while retaining the death penalty for such piracy where death results.

Sec. 121. Conforming Amendment to Controlled Substances Act

Section 121 similarly applies the procedures of chapter 228 to drug-related killings for which the death penalty is authorized under the Controlled Substances Act (21 U.S.C. 848 (e)).

Sec. 122. Conforming amendment relating to genocide.

Section 122 amends 18 U.S.C. 1091(b)(1) to authorize the death penalty for killing a person in furtherance of the commission of genocide.

Sec. 123. Inapplicability to uniform code of military justice.

Under 10 U.S.C. 836, pretrial, trial and post-trial procedures for cases arising under the Uniform Code of Military Justice are promulgated by the President. Section 123 is included in this title to make it clear that the capital punishment procedures of the new chapter 228 do not apply to prosecutions under the Uniform Code of Military Justice, since the President has prescribed separate death penalty procedures for use in trials by courts-martial.

II. HABEAS CORPUS

Title II contains provisions to curb the abuse of habeas corpus by state and federal prisoners. Subtitle A proposes general habeas corpus reforms, which are largely identical to the reform proposal passed by the Senate in the 98th Congress by a vote of 67 to 9 (S. 1763), and to title VI of the President's violent crime bill of the 101st Congress.

Subtitle B proposes reforms addressed to the particularly acute problems of delay and abuse in capital cases. It combines the basic "Powell Committee" proposal for death penalty litigation, as passed by the House of Representatives in the 101st Congress (title XIII of H.R. 5269), with the most important features of the habeas reform proposals passed by the Senate in the 101st Congress (title II of S. 1970) and the 98th Congress (S. 1763). Specifically, it adds to the Powell Committee proposal definite time rules for concluding the litigation of habeas petitions in capital cases, and a rule of deference to the results of "full and fair" state court adjudications of a petitioner's claims.

A. General Habeas Corpus Reform

Sec. 202.

Section 202 of the bill would add a new subsection to section 2244 of title 28, United States Code. Proposed section 2244(d) would establish a one year time limit on applications for federal habeas corpus, normally commencing at the time State remedies are exhausted. The notion of exhaustion of state remedies, which provides the normal starting point for the limitation period, is explained in S. Rep. No. 226, 98th Cong., 1st Sess. 17 (1983) (Committee Report on Senate-passed habeas reform bill). This rule would provide State defendants with ample time to seek federal review following the conclusion of State proceedings, but would avoid the acute difficulties of proof that currently arise when federal habeas corpus is sought by a prisoner years or decades after the State trial.

The proposed limitation rule may be compared to various existing time limits on seeking review or re-opening of criminal judgments in the federal courts, such as the normal ten day limit on appeals by federal defendants under Fed. R. App. P. 4(b); the normal ninety day limit on a State defendant's application for direct review in the Supreme Court under Sup. Ct. R. 13; and the two year limit on motions for new trials based on newly discovered evidence under Fed. R. Crim. P. 33. Proposed section 2244(d) further provides for deferral of the start of the limitation period in appropriate cases, such as assertion of newly recognized rights or newly discovered claims.

Unlike general habeas reform proposals in earlier Congresses, this section does not attempt to codify the rules governing the raising of claims in federal habeas corpus proceedings that were not properly raised before the state courts ("excuse of procedural defaults"). Provisions addressing this issue were included in the earliest versions of this proposal in the 97th and 98th Congresses because of the many uncertainties that existed at the time concerning the standards for excusing procedural defaults. However, most of the outstanding questions in this area have been resolved by subsequent Supreme Court decisions. See generally Murray v. Carrier, 477 U.S. 478 (1986).

Sec. 203. Appeal.

Section 203 of the bill would amend section 2253 of title 28, United States Code, so as to vest in the judges of the courts of appeals exclusive authority to issue certificates of probable cause for appeal in habeas corpus proceedings. It would also create an identical certificate requirement for appeals by federal prisoners in collateral relief proceedings pursuant to section 2255 of title 28, United States Code. This would implement recommendations of Judge Henry Friendly. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 144 n.9 (1970). The reform would correct inefficiencies of the current system under which an appellate court is obliged to hear an appeal on a district court's certification, though it may believe that the certificate was improvidently granted, and under which a prisoner is afforded duplicative opportunities to persuade first a district judge and then an appellate judge that an appeal is warranted.

Sec. 204. Amendment to rules of appellate procedure.

Section 204 of the bill would amend Fed. R. App. P. 22 to conform it to the amendments of section 203.

Sec. 205. Section 2254 amendments.

Section 205 of the bill would make various changes in section 2254 of title 28, United States Code. Section 205(1) would amend current section 2254(b) to clarify that a habeas corpus petition can be denied on the merits notwithstanding the petitioner's failure to exhaust state remedies. This would implement a recommendation of Professor David Shapiro. See Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 358-59 (1973). It would avoid the waste of State and federal resources that presently results when a prisoner presenting a hopeless petition is sent back to the State courts to exhaust State remedies.

Section 205(3) of the bill would add a new subsection (d) to section 2254. Proposed subsection (d) would accord deference to the result of full and fair State adjudications. This may be compared to the standard of review stated by the Supreme Court in the case of Ex Parte Hawk, 321 U.S. 114, 118 (1944), prior to the unexplained substitution of the current rules of mandatory re-adjudication by the decision in Brown v. Allen, 344 U.S. 443 (1953). The background and rationale for establishing a more limited standard of review are discussed in the Committee Report accompanying the Senate-passed habeas reform bill of the 98th Congress (S. 1763), see S. Rep. No. 226, 98th Cong., 1st Sess. (1983), and in Federal Habeas Corpus Review of State Judgments, 22 U. Mich. J.L. Ref. 901 (1989).

Section 205(2) of the bill would simplify current section 2254(d), which is verbose, confusing, and obscure; redesignate it as section 2254(e); and bring its formulation into conformity with that of proposed new section 2254(d). This provision would be of minor practical significance, coming into play only when the general standard governing deference to State determinations in proposed new section 2254(d) was found by the habeas court to be unsatisfied.

Section 205(4) of the bill would codify the traditional principles governing the appointment of counsel for indigents in federal habeas corpus proceedings. Appointment of counsel in proceedings under section 2254 of title 28, United States Code, and in any subsequent proceedings on review, would be in the discretion of the court, except as provided by rules promulgated by the Supreme Court. The general rule that appointment of counsel is discretionary would apply regardless of the nature of the offense for which the petitioner was convicted or the sentence imposed. The proviso relating to the Supreme Court's rule-making authority recognizes that the Court may create exceptions to the general principle of discretionary appointment for collateral proceedings and require appointment of counsel in some situations. See, e.g., Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts.

Sec. 206. Section 2255 amendments.

Section 206 of the bill would amend section 2255 of title 28, United States Code. It would carry out reforms in the collateral remedy for federal prisoners comparable to the rules proposed in section 202 of the bill governing time limitation in habeas corpus proceedings, and would codify the traditional principles governing appointment of counsel in section 2255 proceedings in a manner parallel to the provision for habeas corpus proceedings in section 205(4) of the bill.

B. Death Penalty Litigation Procedures

Subtitle B would implement the recommendations of the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases (the "Powell Committee") for improved litigation procedures for state capital cases. The proposal was initially set out in that Committee's report of August 23, 1989.

The formulation of the Powell Committee proposal in this subtitle is largely identical to that passed by the House of Representatives as title XIII of H.R. 5269 in the 101st Congress. However, it also incorporates the essential idea of the Senate-passed habeas reform proposal of that Congress (title II of S. 1970) by adding a set of time rules for concluding the litigation of federal habeas petitions before district courts and courts of appeals in capital cases in qualifying states. Moreover, it explicitly incorporates the most important reform of the general habeas reform bills -- such as S. 1763 passed by the Senate in the 98th Congress -- by providing for deference on federal habeas review to "full and fair" state adjudications in capital cases in such states.

In essence, the "Powell Committee" provisions in this subtitle -- a proposed new chapter in the Judicial Code (title 28) comprising sections 2256-63 -- would afford states the option of establishing effective systems for providing indigent defendants under sentence of death with competent representation in state collateral proceedings. If a state chose to establish such a system, stronger rules of finality would apply in subsequent federal review. The defendant would normally be limited to a single federal habeas corpus petition, which would have to be filed within a specified time period. Following the affirmation on appeal of the district court's denial of such a petition, and affirmation of the judgment or denial of certiorari by the Supreme Court, further federal review would be barred except on grounds that undermine confidence concerning the defendant's factual guilt of the capital offense for which the sentence had been imposed.

Section 2256

Proposed 28 U.S.C. 2256 sets out the basic scope of the chapter and the rules relating to appointment of counsel. It is substantially the same as the Powell Committee's formulation of proposed section 2256. See Powell Committee Report at 9-13.

Subsection (a) provides that the chapter governs federal habeas corpus review in capital cases from states that meet the section's appointment-of-counsel standards.

Subsection (b) provides that the procedures of the chapter apply where a state, by rule or statute, requires appointment and compensation of counsel to represent defendants under sentence of death in state collateral proceedings, and articulates standards of competence for such counsel. Appointment of competent counsel for indigents is, of course, constitutionally required at the primary stages of litigation -- the trial and initial appeal. The section 2256 standards would go beyond the constitutional standard, see Murray v. Giarratano, 109 S. Ct. 2765 (1989), in requiring the state to make arrangements for provision of competent counsel to represent indigent capital defendants in state collateral proceedings as well.

Consistent with the principles of federalism, no state would be forced to adopt these non-constitutional standards. Further, each state would be able to make its own decision whether any costs involved in adhering to the section 2256 standards are offset by the benefits of increased finality in the later stages of capital punishment litigation. The latitude afforded to the states in defining specific standards of counsel competence is also desirable in a new procedure of this type, and would enable all states to learn from experience concerning the most effective means of ensuring competent representation through the exploration of different approaches. At a minimum, the immediate benefits to defendants would include the requirement that states electing these procedures actually appoint counsel for collateral proceedings, and that these states focus on and articulate standards of competence for such appointments.

Subsection (c) provides that the appointment mechanism must include entry of an order appointing counsel on a finding that the defendant is indigent, or denying counsel because the defendant is not indigent or refuses counsel.

Subsection (d) provides that the counsel appointed for collateral proceedings must be different from the counsel representing the defendant at trial and on direct appeal, unless the defendant and counsel request continued representation. The Powell Committee explained that this approach would be responsive to problems of attorney "burn out" in capital cases, and would provide a lawyer capable of taking a fresh and dispassionate look at the case, including possible inadequacies in representation at earlier stages. See Powell Committee Report at 12-13.

Subsection (e) provides that ineffectiveness or incompetence of counsel in collateral proceedings would not be grounds for relief in a federal habeas corpus proceeding. This ensures that the expanded entitlement to appointed counsel would not be construed to create a novel ground for challenging capital sentences. However, this limitation would not restrict a court's authority to replace counsel who is not performing adequately. See Powell Committee Report at 13.

Section 2257

Proposed 28 U.S.C. 2257 governs stays of execution and successive habeas corpus petitions. It is substantially the same as the corresponding provision in the Powell Committee's formulation. See Powell Committee Report at 13-18.

Subsections (a)-(b) provide for a stay of execution while judicial remedies are being pursued in a timely manner. The stay would expire after the defendant's federal habeas corpus petition had been denied by the lower federal courts and the Supreme Court had affirmed the denial of relief or denied certiorari. The automatic stay provision would avoid the need for repetitive, wasteful, and hurried litigation over successive applications for stays as a case moves through the various stages of state and federal review. The pressure of impending execution dates would no longer be needed to spur action by the defense in light of the strengthened time limitation and finality rules included in the proposal. See Powell Committee Report at 2-3, 5, 15-16.

Subsection (c) is a critical feature of the proposal as a response to the current problems of delay and repetitive litigation in capital cases. Once an initial federal habeas corpus petition had been denied, and the Supreme Court had affirmed the denial of relief or denied review, additional federal review would generally be foreclosed. Exceptions to this restriction would be limited to extraordinary cases in which specified grounds of justification are established for the failure to raise a claim at an earlier point and the facts underlying the claim, if proven, would undermine the court's confidence in the accuracy of the determination of the defendant's factual guilt of the offense for which the death penalty was imposed. The admissible grounds of justification for an earlier failure to raise such a claim -- state action in violation of federal law, Supreme Court recognition of a new retroactive right, and a factual predicate not discoverable at an earlier point through reasonable diligence -- reflect current caselaw standards governing the excuse of "procedural defaults" in federal habeas corpus proceedings. See Murray v. Carrier, 477 U.S. 478, 488 (1986).

The limitation of proposed subsection (c) is of basic importance in curbing the nearly endless litigation and re-litigation that now occurs in successive habeas corpus petitions concerning alleged defects in capital sentences imposed on defendants whose status as murderers is not in doubt. Even with the section 2257(c) limitation, the standards of the Powell Committee's proposal remain highly generous in affording abundant opportunities for raising claims and multiple layers of review. Beyond trial and direct review, the defendant would typically be accorded a second run through the state trial court and appellate

hierarchy in state collateral proceedings -- with the assistance of counsel -- followed by review by the federal courts at the trial and appellate levels in federal habeas corpus proceedings, with a final opportunity to seek Supreme Court review at the end of the process. If still more review proceedings are to be made available following this process, they should be confined to the compelling case of a defendant who raises grounds that cast serious doubt on his factual guilt. See Powell Committee Report at 17-18.

Section 2258

Proposed 28 U.S.C. 2258 provides that a federal habeas corpus petition generally must be filed within 180 days of appointment of counsel for state collateral proceedings. As the Powell Committee noted, the basic 180 day period "ensures adequate time for the development and presentation of claims," and is far longer than other time rules for seeking review of judgments in the state and federal systems. See Powell Committee Report at 6.

Under subsections (a) and (b), the time would run in the period between the appointment of counsel and the filing of the initial application for state collateral relief, and in the period following the final denial of collateral relief at the state level. It would generally be tolled while applications for review were pending and state filing rules were being met in a timely manner. However, it would not be tolled during the pendency of an application for review to the Supreme Court at the conclusion of state collateral proceedings. As the Powell Committee pointed out, the defendant would in any event have opportunities to seek Supreme Court review at the conclusion of state direct review, and following federal habeas corpus proceedings in the lower federal courts. Suspending the time rule to provide still another opportunity for seeking such review immediately after state collateral proceedings would only occasion pointless delay and repetitive applications. See Powell Committee Report at 20.

Under subsection (c), the time for seeking federal habeas corpus could be extended for up to 60 days for good cause.

Superficially, the basic 180 day limitation period is more restrictive than the one-year time limit for habeas corpus applications in the general habeas corpus reform proposal of subtitle A of this title. However, the general one-year period is designed for the whole class of potential habeas corpus petitioners, including petitioners who may not have had the assistance of counsel at the later stages of state proceedings. In contrast, the limitation period of proposed section 2258 would only apply to defendants who have had the assistance of counsel in developing and presenting their claims at every significant

stage of the state process. Moreover, the incentives for delay -- and the public interest in guarding against unjustified delay -- are greatest in capital punishment litigation, because the continuation of litigation normally does not interrupt a term of imprisonment, but it does prevent the carrying out of a sentence of death imposed on a defendant. In this context, there is no legitimate basis for permitting lengthy delay in seeking review, and the basic 180 day period proposed by the Powell Committee is clearly not unduly restrictive.

Section 2259

Proposed 28 U.S.C. 2259 concerns the range of claims that can be raised in habeas corpus proceedings under the proposed procedures, and the taking of additional evidence in such proceedings. It is largely identical to the corresponding provision in the Powell Committee's original formulation. See Powell Committee Report at 21-23.

Under this section, review would be limited to claims that had actually been presented and litigated in the state courts -- a requirement comparable to the normal requirement of exhaustion of state remedies for habeas corpus review, see 28 U.S.C. section 2254(b) -- and to claims that had not been raised at the state level where specified grounds of justification for the failure to raise them can be established. The grounds specified for excusing a failure to raise claims in the state courts -- state action in violation of federal law, Supreme Court recognition of a new retroactive right, and claims whose factual predicate was not earlier discoverable through reasonable diligence -- are essentially the same as the grounds specified in proposed section 2257(c)(2), and reflect existing caselaw standards. See Murray v. Carrier, 477 U.S. 478, 488 (1986). The district court would conduct any hearing needed to complete the record for review, and rule on the claims that were properly before it.

The court would not be authorized, however, to overturn a capital conviction or sentence on the basis of a claim that the state courts had rejected following a full and fair adjudication. In practical terms, this means that review of a previously adjudicated claim would normally be limited to verifying that the state adjudication of the claim was full and fair. This avoids the pointless re-litigation in federal habeas proceedings of claims that have already been fairly considered and decided by the state courts.

As noted above, the same principle of deference to full and fair state adjudications appears in the general habeas reform proposal in subtitle A of this title. Enactment of this principle as part of the general habeas reform proposal would make it uniformly applicable in both capital and non-capital

cases. Reiteration of this principle in the special procedures for death penalty litigation ensures that this important reform will not be omitted for capital cases in qualifying states if the proposal of this subtitle is separately enacted.

Section 2260

This section, which would waive the normal requirement that a habeas corpus petitioner obtain a certificate of probable cause to appeal a district court's denial of relief, is identical to the corresponding Powell Committee provision. See Powell Committee Report at 23.

Section 2261

Proposed 28 U.S.C. 2261 was passed by the House of Representatives as part of title XIII of H.R. 5269 in the 101st Congress, but did not appear in the Powell Committee's original formulation. It would extend the potential application of the proposed procedures to states having "unitary review" systems for capital cases.

In general, the purpose of collateral remedies is not to give defendants a second round on claims that were raised, or could have been raised, at trial or on direct review. Rather, they provide a means for raising claims that could not have been raised at earlier stages. Given the normal limitation of the scope of appellate review to claims of error appearing in the trial record, some other means is needed for raising claims of off-the-record error or misconduct.

A separate system of collateral remedies is not, however, the only means by which a state may choose to deal with this problem in capital cases. It can combine the normal functions of direct review and collateral attack in a "unitary review" procedure. Under this type of procedure, the defense is authorized to raise "off the record" claims -- as well as the normal claims cognizable on appeal -- at the initial stage of review beyond the trial, where the failure to raise such a claim at trial is adequately justified. California, for example, has adopted a unitary review procedure for capital cases by rule of its supreme court. Under the California procedure, collateral claims can be raised in the course of direct review by concurrently filing a petition for habeas corpus in the state supreme court during its consideration of the direct appeal in the case. Counsel is appointed and compensated for litigating such collateral claims during the direct review process, as well as the normal claims cognizable on appeal.

The omission of coverage of unitary review procedures in the Powell Committee proposal is a defect in that proposal. It would discourage state adoption of the unitary review approach, despite

potential advantages in efficiency and expeditiousness, and despite the fact that this approach serves as well as collateral review to provide the defendant with a fair and comprehensive adjudication of his claims at the state level. It would also arbitrarily deny states that have opted for the unitary review approach the benefits of the proposal's strengthened finality rules.

Proposed section 2261 would correct this omission by extending the application of the chapter to states with adequate unitary review procedures in capital cases.

Subsection (a) defines a "unitary review" procedure as a procedure that authorizes raising, in the course of direct review, such claims as could be raised in collateral proceedings under the law of the state. The chapter would apply to such a procedure if it included appointment of counsel meeting articulated standards of competence for representation on unitary review, including representation in connection with the litigation of collateral claims in that context.

Under subsection (b), a qualifying unitary review procedure would have to include appointment of counsel for indigents following trial for purposes of unitary review. Parallel to the rule of proposed section 2256(d) that would normally require appointment of new counsel for collateral proceedings, new counsel would have to be appointed at the start of the unitary review process, absent a request for continuation of the trial representation by defendant and counsel.

Under subsection (c), the strengthened time limitation and finality rules of the chapter would apply to capital cases from states that have unitary review procedures meeting these standards. The starting point of the 180 day time limit for applying for federal habeas corpus would be deferred until a trial transcript was available to counsel or the defendant, to ensure that the time would not be running during a period when counsel was unable to pursue unitary review because of the unavailability of a transcript.

Section 2262

Proposed 28 U.S.C. 2262 is a new provision that incorporates the main features of the habeas corpus title of the Senate-passed crime bill of the 101st Congress (title II of S. 1970) -- definite time rules for determining federal habeas petitions. The general Powell Committee procedures of this subtitle provide effective safeguards against the delay and obstruction of capital punishment through repetitive habeas corpus filing by limiting second and successive petitions. The time limitation approach of the Senate bill provides complementary safeguards against delay

at all stages of the process, including the adjudication of an initial habeas petition. In conjunction, these elements provide a comprehensive response to the problem of unjustified delay in death penalty litigation.

Proposed section 2262 would apply to federal habeas review of capital cases from states that had opted-in to the Powell Committee procedures by broadening the right of indigent capital defendants to appointment of competent counsel in state proceedings. The section would also apply to collateral litigation (section 2255 motion litigation) in federal capital cases. Both the Senate and House crime bills of the 101st Congress included procedures modeled on the Powell Committee recommendations for federal capital cases (proposed 18 U.S.C. 3598-99 in S. 1970 title XIV and H.R. 5269 title II). The same provisions are included in title I of this bill. Supplementing these procedures with more definite time rules for concluding collateral litigation has the same value in federal capital cases as in state capital cases.

The first sentence of subsection (a) of proposed 28 U.S.C. 2262 provides that the adjudication of habeas petitions in capital cases by the district courts and courts of appeals is to have priority over all non-capital matters. Capital cases present a uniquely compelling need for prompt adjudication and determination, because the sentence actually cannot be carried out while litigation continues.

Both the Senate and the House of Representatives recognized the force of this point in their respective crime bills in the 101st Congress. Both bills provided that appeals in federal capital cases "shall have priority over all other cases" in the federal courts of appeals. (Proposed 18 U.S.C. 3595(a) in S. 1970 title I and title XIV, and in H.R. 5269 title II.) Both bills provided that collateral motions by federal capital defendants "shall have priority over all non-capital matters in the district court, and in the court of appeals on review of the district court's decision." (Proposed 18 U.S.C. 3599(a) in S. 1970 title XIV and H.R. 5269 title II.) The first sentence of subsection (a) states a comparable general principle for collateral review of capital cases (both state and federal) in the federal courts.

The remainder of subsection (a) sets definite time limits for determining habeas petitions and related appeals -- 180 days for the district court and 180 days for the court of appeals (with an additional 180 days if the court of appeals grants rehearing en banc). These periods are longer than those proposed in S. 1970 title II (110 days for the district court and 90 days for the court of appeals -- proposed 28 U.S.C. 2268 in S. 1970). This change reflects the advice of state death penalty litigators that the proposed 180 day periods more realistically reflect the

time that is reasonably required for the litigation and determination of federal habeas petitions in capital cases. The proposed periods will ensure that both the states and defendants will have adequate time to develop and present their cases, while also providing effective protection against the lengthy unjustified delay that now often occurs.

The general time period for the court of appeals under subsection (a) would run from the filing of the record -- rather than from the filing of the notice of appeal, as proposed in S. 1970 -- since some unavoidable delay may be entailed in preparing the record and transmitting it to the court of appeals, and the normal briefing schedule in a court of appeals runs from the filing of the record. Proposed section 2262 does not carry forward a provision of S. 1970 requiring the Supreme Court to act on a petition for certiorari within 90 days, because experience does not show that significant unjustified delay occurs in capital cases at the level of the Supreme Court.

Subsection (b) of proposed 28 U.S.C. 2262 clarifies that the time limitation rules apply to both initial and successive petitions. The same point appeared in proposed 28 U.S.C. 2264(c)(3) in S. 1970 title II. Subsection (b) also clarifies that the same time rules apply to the re-determination of a petition or related appeal following a remand by a higher court for further proceedings.

Subsection (c) clarifies that the time rules of the section do not broaden the grounds for granting stays of execution. Under the general procedures of this subtitle, an automatic stay of execution would be in effect through the litigation of an initial federal habeas petition, but the automatic stay would expire at the conclusion of that litigation. (Proposed 28 U.S.C. 2257). The time rules under this section, which would apply to both initial and successive petitions, are solely intended to control delay in the litigation and decision of petitions, and set outer limits on the determination of petitions and related appeals for that purpose. They are not intended to create any right or presumption in favor of granting a stay for the consideration of a petition which would not otherwise be available to the petitioner.

The first sentence of subsection (d) responds to a concern expressed by Senator Graham in the course of the floor debate on S. 1970 that the proposed time limit rules might be construed as authorizing or requiring a court to grant the relief requested by the petitioner -- overturning the conviction or sentence -- if a petition is not determined within these limits. Cong. Rec. S6815-16 (May 23, 1990); Cong. Rec S9513 (July 11, 1990). Subsection (d) clarifies that overturning the conviction or sentence is not a permitted sanction for non-compliance with the time rules of the section.

The second sentence of subsection (d) responds to the broader concern reflected in Senator Graham's remarks that S. 1970 title II did not explicitly identify a sanction or mechanism for enforcing its time requirements. Subsection (d) clarifies that these requirements could be enforced by applying to a higher court for a writ of mandamus -- that is, a compulsory order directing compliance with the section. The procedures for seeking mandamus are set out in Fed. R. App. P. 21 and Sup. Ct. R. 20.

Section 2263

The final section of proposed chapter 154 provides that the chapter is to be construed to bring about the expeditious conduct and conclusion of state and federal review in capital cases.

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III. EXCLUSIONARY RULE

This title would (1) generally bar the exclusion in federal proceedings of evidence obtained in circumstances justifying an objectively reasonable belief that a search or seizure was in conformity with the Fourth Amendment, (2) clarify that federal law does not require the exclusion of evidence obtained in such circumstances in state proceedings, (3) make the exclusionary rule inapplicable to seizures by federal officers of firearms which are to be used as evidence against dangerous offenders where alternative safeguards against Fourth Amendment violations are provided involving administrative and legislative oversight and compensation of victims of unlawful searches and seizures, and (4) clarify that evidence cannot be excluded in federal proceedings on the basis of non-constitutional violations unless such exclusion is expressly authorized by law.

One of the principal reform proposed in the title -- an objective reasonableness standard for the admission of evidence -- was also passed by the House of Representatives as section 2204 of H.R. 5269 of the 101st Congress. Similar exclusionary rule reform legislation was passed by the Senate as S. 1764 in the 98th Congress and by the House of Representatives as section 673 of H.R. 5484 in the 99th Congress. In common parlance, this title, like the earlier exclusionary rule reform proposals passed by the House and the Senate, establishes a general "good faith" exception to the exclusionary rule.

However, the title goes beyond earlier proposals in proposing alternatives to the exclusionary rule -- involving administrative and legislative oversight of search and seizure activities of federal officers and compensation of victims of improper searches and seizures -- and in making the exclusionary rule wholly inapplicable to certain types of seizures once such alternative safeguards against Fourth Amendment violations are in place. The specific provisions of the title are as follows:

The title would add a new section 3509 to the federal criminal code. Subsection (a)(1) of proposed section 3509 provides that evidence shall not be excluded in any federal proceeding on the ground that a search or seizure was in violation of the Fourth Amendment if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the Fourth Amendment. This would apply the underlying principle of United States v. Leon, 468 U.S. 897 (1984), so as to bar the exclusion of evidence obtained in such circumstances in cases involving warrantless searches, as well as in cases involving searches pursuant to a warrant. The Leon decision specifically barred the suppression of evidence obtained in conformity with a warrant in circumstances justifying an objectively reasonable belief in the

warrant's validity, noting that excluding evidence where an officer's conduct is objectively reasonable "will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty." Leon, 468 U.S. at 920.

This principle has already been applied for several years by the federal courts in the Fifth and Eleventh Circuits in deciding on the admissibility of evidence obtained through searches and seizures in both warrant and non-warrant cases. See United States v. Williams, 622 F.2d 830 (5th Cir. 1980). The standard of objective reasonableness is also uniformly applied in determining an officer's exposure to civil liability based on an allegedly unlawful search or seizure. See Anderson v. Creighton, 483 U.S. 635 (1987).

Subsection (a)(1) of proposed section 3509 perpetuates as a special case the specific holding of United States v. Leon, supra, that evidence is not subject to suppression if obtained in objectively reasonable reliance on a warrant. It also provides specifically that the fact that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of the existence of circumstances justifying an objectively reasonable belief that a search or seizure was in conformity with the Fourth Amendment. This reflects the fact that "[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." Leon, 468 U.S. at 921. Thus, the fact that evidence was obtained in conformity with a warrant would be adequate to establish objective reasonableness in the absence of rebuttal by the defendant. See generally Leon, 468 U.S. at 922-23.

Subsection (a)(2) of proposed section 3509 provides that the law of the United States does not require the exclusion of evidence in any court under circumstances in which it would be admissible in a federal court under subsection (a)(1). This makes it clear that federal law does not require the state courts to exclude evidence obtained in circumstances justifying an objectively reasonable belief that the officer's conduct was consistent with the constitutional strictures on searches and seizures. Each state is free to make its own determination concerning the admissibility of evidence in such circumstances.

Subsection (b)(1) of proposed section 3509 would bar the suppression of firearms seized by federal officers where the firearms are to be used in a federal prosecution for a crime or violence or serious drug offense, or a federal prosecution of an offender who is disqualified from firearms possession because of

a prior felony conviction or other grounds enumerated in 18 U.S.C. 922(g).

Under current law, the Supreme Court has recognized a number of exceptions to the exclusionary rule which are not limited to the objective reasonableness ("good faith") situation, including holding that the exclusionary rule is wholly inapplicable in grand jury and deportation proceedings and generally inapplicable in habeas corpus proceedings, see United States v. Calandra, 414 U.S. 338 (1974); INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); Stone v. Powell, 428 U.S. 465 (1976), and that evidence inadmissible at trial in the government's case in chief under the exclusionary rule may nevertheless be used for impeachment, see Walder v. United States, 347 U.S. 62 (1954). Subsection (b)(1) would establish a new exception of this type for searches and seizures in the indicated category. This exception is justified by the exceptional danger posed to the public by violent offenders, serious drug offenders, and legally disqualified persons who use or possess firearms, the compelling public interest in bringing such offenders to justice, and the frequently critical need for use of a seized firearm and related evidence to obtain a conviction.

The applicability of the exception created by subsection (b)(1), however, would be contingent on the establishment of alternatives to the exclusionary rule as provided in the remainder of subsection (b). This approach to exclusionary rule reform is constitutionally permissible and fully consistent with that suggested by the decisions of the Supreme Court. The Court has frequently emphasized that the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." See, e.g., United States v. Leon, 468 U.S. 897, 906 (1984). The Court has further suggested that the need for the exclusionary rule is dependent on "the absence of a more efficacious sanction." See, e.g., Franks v. Delaware, 438 U.S. 154, 171 (1978).

These principles were reflected in the holding of the Court in INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), in which the Court held that the exclusionary rule is wholly inapplicable in deportation proceedings. In reaching this result, the Court attached particular weight to the fact that the Immigration and Naturalization Service has a system of administrative oversight for preventing search and seizure violations by its officers. See id. at 1044-1045. The Court in INS v. Lopez-Mendoza also observed that "[t]here comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative

Branches." (Id. at 1050.) The alternative safeguards set out in proposed section 3509(b) provide a "more efficacious sanction" that involves the direct exercise of this proper "supervisory role" by the Executive and Legislative Branches, thereby obviating the need for the exclusionary rule.

Subsection (b)(2) directs the Attorney General to promulgate rules and regulation to ensure compliance with the Fourth Amendment by officers of the Department of Justice. Under subparagraphs (A)-(D), the rules would have to specify standards for training of officers in the law of search and seizure, standards and procedures for carrying out searches and seizures, procedures for reporting and investigating violations, and the sanctions to be imposed for violations.

Under subparagraph (E), standards and procedures would also be required for settling claims under the Federal Tort Claims Act (FTCA) based on searches and seizures. In 1974, Congress amended the FTCA so as to provide a comprehensive tort remedy against the United States for unlawful searches and seizures. The Committee Report to that amendment explained (1974 U.S. Code Cong. & Admin. News 2791):

> The Committee amendment . . . would add a proviso at the end of the intentional torts exception to the Federal Tort Claims Act (28 U.S.C. 2680(h)). The effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents, acting within the scope of their employment, or under color of Federal law, commit any of the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process. . . .
>
> The Committee realizes that under the Federal Tort Claims Act, Government tort liability for intentional conduct is unclear. For example certain intentional torts such as trespass and invasion of privacy are not always excluded from Federal Tort Claims Act coverage. Obviously, it is the intent of the Committee that these borderline cases under the present law, such as trespass and invasion of privacy, would be viewed as clearly within the scope of the Federal Tort Claims Act, if the amendment is adopted.
>
> The whole matter was brought to the attention of the Committee in the context of the Collinsville raids, where the law enforcement abuses involved Fourth Amendment constitutional torts. Therefore, the Committee amendment would submit the Government to liability whenever its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants or with warrants issued without probable cause.

Under 28 U.S.C. 2675, FTCA claims must first be presented to the responsible department or agency for settlement, prior to the institution of litigation. Under the standards and procedures required by proposed subsection (b)(2)(E), it is contemplated that persons subjected to unlawful searches and seizures will normally be given the compensation to which they are legally entitled as part of the administrative process, thereby sparing them the expense, delay, and other burdens of going to court. The proposed system accordingly offers basic advantages over the exclusionary rule in affording redress to persons wronged by Fourth Amendment violations, as well as more effective means of preventing and punishing such violations.

Subsection (b)(3) affords other federal departments and agencies the same option of establishing alternative administrative systems for preventing and redressing fourth amendment violations. As with the Department of Justice, the inapplicability of the exclusionary rule in relation to the specified class of firearms seizures by another agency's officers would be contingent on the agency's establishment of such an alternative system.

Subsection (b)(4) requires the Department of Justice, and other agencies that adopt alternatives to the exclusionary rule, to establish a review board to consider all claimed violations of the Fourth Amendment by the department or agency's officers, and to impose or recommend appropriate disciplinary action when a violation is determined to have occurred. The review board could also be charged with responsibility for considering FTCA claims for damages based on searches and seizures. This ensures a locus of responsibility and accountability in each qualifying agency for securing compliance with the law of search and seizure by the agency's officers, and an impartial forum for determining violations that is free of potentially conflicting operational responsibilities.

Subsection (b)(5) requires annual reports to Congress by the Attorney General or other responsible agency head concerning all allegations of search and seizure violations, the action taken on such allegations, and the basis for the action. This requirement provides an important element of external oversight, and ensures that the alternative oversight mechanisms will not be only a "self-policing" system for federal agencies. In light of this requirement, the alternative systems will operate "in the open," subject to Congressional and public scrutiny.

Subsection (b)(6) sets out definitions for terms used in subsection (b).

Subsection (b)(7) provides that the inapplicability of the exclusionary rule to certain firearms seizures by an agency's officers, as provided in paragraph (1), will take effect when the

alternative oversight system required by subsection (b) has been established.

Subsection (c) of proposed section 3509 would bar the exclusion of evidence in federal proceedings on the basis of non-constitutional violations, except as expressly authorized by statute or by a rule promulgated by the Supreme Court pursuant to statutory authority. Given the high price of the exclusionary rule to the truth-finding process, and the fact that the rule is not even applied in relation to all constitutional violations in light of the Leon decision and other Supreme Court decisions, it is desirable to codify explicitly the principle that evidence may not be excluded on the basis of non-constitutional violations in the absence of statutory authority for doing so. This restriction on the exclusion of evidence is already implicit in the broader rule of Federal Rule of Evidence 402, which provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Subsection (c) would clarify the import of the principle of Rule 402 in relation to evidence obtained in violation of non-constitutional provisions.

The value of such clarification is illustrated by the case of United States v. Caceres, 440 U.S. 741 (1979), in which a defendant accused of bribing an IRS agent attempted to secure the exclusion of evidence of his guilt on the ground that procedures specified in IRS regulations had not been complied with in obtaining the evidence. Under the plain terms of Rule 402, this argument should have been rejected summarily as an effort to secure the exclusion of relevant evidence in circumstances in which exclusion was not provided for by "the Constitution . . . by Act of Congress, by [the] rules [of evidence], or by other rules prescribed by the Supreme Court pursuant to statutory authority." The Supreme Court did reject the defendant's effort to create an exclusionary rule for violations of IRS regulations, but declined to address the government's argument that this result was required by Rule 402. See 440 U.S. at 755 & n. 22.

While the Supreme Court reached a result consistent with Rule 402 for independent reasons in the Caceres decision, it failed to produce any directive to the inferior courts to comply with the terms of that rule. Efforts by defendants to secure the exclusion of relevant and probative evidence of their guilt on the basis of alleged violations of non-constitutional provisions have accordingly continued to be a source of litigation in the lower courts. Subsection (c) would foreclose such litigation in the absence of a decision by Congress or by the Supreme Court pursuant to its statutory rulemaking authority to authorize the use of the exclusionary sanction and would ensure consistent compliance with the principle of Rule 402 in this context in

future judicial decisions.

Subsection (d) of proposed section 3509 states that the section shall not be construed to require or authorize the exclusion of evidence in any proceeding. This makes it clear that the section is not to be construed as reflecting legislative approval of the exclusion of evidence as a sanction for official misconduct in any circumstances, and that the section's rules which explicitly bar the exclusion of evidence in certain circumstances should not be understood as implying that the exclusion of evidence is appropriate or permissible in other circumstances.

As noted above, the Supreme Court has recognized a number of important exceptions to the application of the exclusionary rule which are not confined to the "objective reasonableness" situation, including holding that the exclusionary rule is wholly inapplicable in grand jury and deportation proceedings and generally inapplicable in habeas corpus proceedings, and that evidence inadmissible at trial in the government's case in chief under the exclusionary rule may nevertheless be used for impeachment. In light of subsection (d), there would be no basis for arguing that these broader limitations of the exclusionary rule should be restricted or reconsidered in light of proposed section 3509, or that it would be inappropriate for the courts to create other broader limitations on the exclusionary rule in the future. Indeed, in light of the alternative safeguards against Fourth Amendment violations proposed in subsection (b), it would be both appropriate and desirable for the courts to consider whether the continued application of the exclusionary rule is necessary in other contexts.

IV. FIREARMS

Title IV contains provisions relating to control of the criminal use of firearms. Subtitle A contains a variety of amendments and new provisions in furtherance of this objective. Subtitle B proposes a general ban on gun clips and magazines that enable a firearm to fire more than 15 rounds without reloading.

A. Firearms and Related Amendments

Section 401.

This section would double the current mandatory penalty in 18 U.S.C. 924(c) for persons convicted of using a semiautomatic firearm during and in relation to a felony crime of violence or drug trafficking offense from five to ten years in prison. (The mandatory penalty is thirty years in the case of a destructive device, machinegun or silenced weapon). The proposal builds upon the similar amendment made in § 1101 of the Crime Control Act of 1990 (S. 3266) for short-barreled shotguns and rifles. The vastly increased danger to innocent victims occasioned by the use of semiautomatic firearms in the course of violent or drug crimes, as illustrated by several recent incidents, warrants this enhanced penalty. The amendment also provides a definition of the term "semiautomatic firearm" for insertion in 18 U.S.C. 921.

Section 402.

This section is designed to broaden the prohibitions in 18 U.S.C. 924(c) and 844(h) to reach persons who have a firearm or explosive available during the commission of certain crimes, even if the firearm is not carried or used. Currently, section 924(c) punishes by a mandatory five-year prison sentence the carrying or use of a firearm during and in relation to the commission of a drug or violent felony. The court in United States v. Feliz-Cordero, 859 F.2d 250 (2d Cir. 1988), held that this statute does not cover a situation in which a loaded firearm was found in the dresser drawer of an apartment which the defendant utilized in connection with his drug dealings. Compare United States v. Torres, 901 F.2d 205, 217-18 (2d Cir. 1990). The court noted that "carries" has been interpreted to encompass a case in which the defendant has a firearm "within reach", while "uses" has been construed to extend to a situation in which the defendant planned to use the firearm if a suitable contingency arose or to make his escape; but the court concluded that neither verb was broad enough to proscribe the constructive possession by a defendant of a firearm which is kept available generally in aid of or in relation to the commission of a drug trafficking or violent crime.

The proposed amendment, adding the phrase "or otherwise

possesses" to the statute, is designed to reverse the result in Feliz-Cordero, and to cover any circumstance in which, for example, a drug trafficker has available a firearm during and in relation to his illegal drug activities. As under the existing provision, the government will still be required to establish a relationship or connection between the drug or violent offense and the defendant's possession of the firearm (e.g., it would not include a gun kept exclusively in a club locker and used only for sporting purposes at the club), but the relationship or connection may be more attenuated than under current law and may apply to a firearm that is possessed by the defendant for potential employment in his illegal activities, even though it is not physically on his person or within reach and even though it is not proved to have been used or planned to be used during the offense.

The possession of firearms by persons who commit serious drug or violent crimes creates a sufficient danger of increased violence and harm so as to justify this extension. This section would make a conforming amendment to the parallel statute, 18 U.S.C. 844(h), which punishes the carrying of an explosive during the commission of any federal felony.

Section 403.

Section 6460 of the Anti-Drug Abuse Act of 1988 increased the penalty under 18 U.S.C. 924(c) for a second offense of using a firearm to commit a federal violent or drug felony to twenty years' imprisonment, but failed to make a corresponding change to 18 U.S.C. 844(h), which prohibits the use of an explosive to commit a federal felony. This proposed amendment would effect a conforming increase to twenty years in the penalty for a second offense under section 844(h).

Section 404.

Under current law, any conviction for a crime punishable by imprisonment for a term exceeding one year which has been expunged, set aside, or pardoned or with respect to which the convicted person has had civil rights restored is not considered disabling for purposes of firearms possession unless such expunction, setting aside, pardon, or restoration expressly provides otherwise.

However, the procedures for pardons, expunctions, set-asides and restorations among the various States are far from uniform. Such proceedings do not erase the legal existence of prior convictions nor remove all State disabilities imposed on felons. Neither do they uniformly involve a considered judgment whether the individual deserves the pardon, expunction, set aside or restoration of civil rights. In fact, in some States civil rights are restored automatically, merely as a result of a

person's completion of his sentence, thereby permitting dangerous felons immediately to purchase a firearm upon their release.

In order to strike a better balance that takes into account the federal interest in preserving public safety, the proposed amendment would provide a uniform standard to determine whether a person is under federal firearms disabilities for certain categories of offenses, i.e., violent felonies involving the threatened or actual use of a firearm or explosive, and serious drug offenses. This approach has a statutory precedent which was contained in 18 U.S.C. App. 1203 prior to its repeal.

The amendment would provide that, with respect to the above-referenced categories of serious offenses, the person would be considered convicted under the federal firearms chapter irrespective of any pardon, expunction or restoration of civil rights. Offenders in these categories would have to apply to federal authorities to have their firearms rights restored. In such instances, as appropriate, a background investigation would be conducted and relief from federal firearms disabilities would be granted if it was determined that the applicant would not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest. This scheme would better protect the public from convicted felons whose receipt and possession of firearms pose a special danger.

Section 405.

This section amends subsection 3142(f)(1) of title 18 to create eligibility for pretrial detention in certain cases involving firearms and explosives. Currently, subsection 3142(f)(1) allows the government to seek a pretrial detention hearing on the ground of the defendant's dangerousness in cases involving crimes of violence, offenses punishable by death or life imprisonment, serious drug felonies, and any other felony case in which the defendant is a person who has already been convicted of two or more crimes in the preceding three categories. The constitutionality of preventive detention was upheld by the Supreme Court in United States v. Salerno, 481 U.S. 739 (1987).

This section would allow the government to seek a pretrial detention hearing in cases in which the defendant is charged with a violation of 18 U.S.C. 842(d) (distribution of explosives by felons and other prohibited persons); 842(h) (knowingly trafficking in stolen explosives); 842(i) (shipping or receiving of explosives by felons and other prohibited persons); 844(d) (transporting explosives with knowledge they will be used to kill or injure a person or damage property); 922(d) (sale of firearms to felons and other prohibited persons); 922(g) (possession or receipt of firearms by felons and other prohibited persons); 922(i) (transporting or shipping stolen firearms); 922(j)

(trafficking in stolen firearms); 922(o) (unauthorized possession of a machine gun); 924(b) (transportation of a firearm knowing it will be used to commit a felony); 924(g) (traveling interstate to acquire a firearm with intent to commit a drug offense or crime of violence); 924(h) (transferring a firearm knowing it will be used to commit a drug or violent felony); or 924(i) (as added by this Act) (smuggling a firearm with intent to promote a drug offense or crime of violence). All of these crimes are of a type likely to be committed by dangerous individuals such as terrorists or career criminals even though the offenses may not themselves meet the definition of a crime of violence. Consequently, the government should be allowed to seek pretrial detention in these cases.

It should be emphasized, however, that the revision of subsection 3142(f)(1) does not require pretrial detention for anyone charged with a violation of one of the listed offenses. It merely means that the government is given an opportunity to show that no conditions of release will reasonably assure the appearance of the person for trial and the safety of the community or of a specific person.

Section 406.

This section (which passed the Senate last year in § 302 of S.1970) would create a new offense carrying severe penalties for smuggling firearms into the United States for the purpose of promoting drug trafficking or violence. At present, 18 U.S.C. 922(l) makes it a five-year offense to import certain firearms into the United States; and 18 U.S.C. 924(h) makes it a ten-year felony to travel interstate or from a foreign country to purchase a firearm with intent to engage in conduct constituting a federal or State drug offense or a crime of violence. The instant proposal is patterned after section 924(h) and would create an offense, similarly punishable by up to ten years' imprisonment, for smuggling or bringing into the United States (or attempting to do so) any firearm with intent to violate or promote conduct in violation of federal or state drug laws or to commit a crime of violence. Clearly, there is no reason to treat traveling to acquire a firearm for illegal drug trafficking purposes any differently from importing or smuggling a firearm into the United States for the same purpose. The proposed offense would thus rectify an anomaly in current firearms statutes.

Section 407.

This section (which passed the Senate last year in § 302 of S. 1970) would create new offenses, punishable by a mandatory minimum two-year prison term, for stealing a firearm or explosive materials. Currently, 18 U.S.C. 844(h) and 922(i) and (j) punish the transportation, receipt, or disposition of firearms known to have been stolen; and 18 U.S.C. 659 similarly punishes the theft

of any goods, including firearms or explosive materials, from an interstate or foreign shipment. There is, however, at present no offense specifically directed at the theft of firearms or explosives.

The proposed offense would close that gap by creating crimes of stealing a firearm or explosive materials that are moving as, are part of, or which have moved in, interstate or foreign commerce. It is intended that the term "steals" be interpreted, as elsewhere in the federal criminal code, to include any type of criminal taking accompanied by an intent to deprive the owner of the rights and benefits of ownership. E.g., United States v. Turley, 352 U.S. 407 (1957). A firearm which had at any time moved in interstate or foreign commerce would be subject to the prohibition in this section. See Barrett v. United States, 423 U.S. 212 (1976).

Section 408.

This section (which passed the Senate as § 303 of S. 1970 last year) makes a conforming amendment to the supervised release statute, 18 U.S.C. 3583. Section 6214 of the Anti-Drug Abuse Act of 1988 provided for the mandatory revocation of probation for a defendant found, after a hearing pursuant to the Federal Rules of Criminal Procedure, to be in actual possession of a firearm at any time prior to the expiration or termination of the probation term. Under section 6214, the court was authorized to impose any other sentence that was available under "subchapter A" (that is, primarily a fine or imprisonment; see 18 U.S.C. 3551) at the time of the initial sentence. Section 6214, however, neglected to make a comparable amendment to section 3583 of title 18, dealing with supervised release. (Compare section 7303 of the Anti-Drug Abuse Act of 1988, which provided similarly for mandatory revocation for possession of controlled substances, and which applied to probation and supervised release, as well as parole.) This amendment effects the conforming change. In contrast to probation, however, Congress has enacted, in 18 U.S.C. 3583(e)(3), a limitation on the number of years of imprisonment that a person violating a condition of supervised release, and who was convicted of a Class B, C, or D felony, may be required to serve. This amendment incorporates those limitations.

In contrast to section 7303 of the Anti-Drug Abuse Act, it is not deemed necessary to extend the provisions here to persons on parole, since the number of persons who would be beginning a term of parole after the date of enactment and for whom a no-firearms possession condition would be appropriate -- given that parole is only available for defendants whose offenses were completed before November 1, 1987 -- will be very small.

It should be noted that this amendment, like that in section

6214 of the Anti-Drug Abuse Act, does not require that the court impose as a condition of supervised release that the defendant not possess a firearm; it thus is applicable only where the court has chosen to impose that condition and the condition is violated. Section 7303 of the Anti-Drug Abuse Act, by contrast properly made it a mandatory condition of release that a defendant not possess controlled substances. Since with respect to firearms there may be instances, for example in misdemeanor cases, or in felony cases where the defendant is seeking to have his firearms disability removed, where the court may wish not to restrict the defendant from possessing firearms as a condition of supervised release, the condition is left discretionary.

Section 409.

This section would raise the maximum penalty for making a knowingly false, material statement to a licensee in connection with the acquisition of a firearm. Presently, such false statements are made unlawful by 18 U.S.C. 922(a)(6) and are punishable under 18 U.S.C. 924(a)(1)(B) by up to five years' imprisonment. Under the proposed amendment, offenses under section 922(a)(6) would be grouped with more serious offenses punishable under 18 U.S.C. 924(a)(2) by up to ten years in prison. The importance of keeping firearms out of the hands of persons disentitled to possess them makes it appropriate to increase the penalty for violations by which licensed dealers, importers, and collectors are knowingly deceived into selling a firearm to an improper purchaser.

Section 410.

This section (which passed the Senate as § 3734 of S. 1970 last year) would extend the statute of limitations for offenses involving firearms such as machineguns, sawed off shotguns, and various explosive devices from three to five years. Title II of the Gun Control Act of 1968 requires that such weapons be registered with the Secretary of the Treasury. When they are transferred, Title II requires the payment of a transfer tax prior to the transfer and registration of the weapon to its new owner. 18 U.S.C. 922(o) sets out a further limitation with respect to machineguns by prohibiting the transfer of these weapons except those lawfully possessed and registered when that subsection took effect on May 19, 1986. Since Title II of the 1968 Act is part of the Internal Revenue Code, the usual IRC statute of limitations period of three years applies.

This amendment recognizes that offenses involving Title II weapons such as possession of an unregistered weapon or obliterating a serial number are criminal offenses involving considerable danger to public safety as contrasted with the regulatory type of violations that predominate under the IRC. It should be noted that the IRC already provides for a six-year

statute of limitations for several tax fraud offenses. This amendment applies a five-year statute of limitations, the same time period as applies to noncapital offenses under title 18 pursuant to 18 U.S.C. 3282.

While many Title II cases involve violations of 26 U.S.C. 5861(d), possession of an unregistered weapon, and are established without the need for an extensive investigation that would require a statute of limitations longer than three years, this is not always the case. For example, the Bureau of Alcohol, Tobacco and Firearms has investigated cases of making false entries in records required to be kept by the Title, a violation of 26 U.S.C. 5861(1), where it appeared a person licensed to manufacture and sell machineguns had altered business records to show machineguns manufactured before May 19, 1986 (and hence eligible for sale) when actually the weapons listed in such records were manufactured after that critical date.

Section 411.

This section (which passed the Senate last year as § 3735 of S. 1970) plugs a loophole in current law by proscribing the possession of explosives by convicted felons and other persons. 18 U.S.C. 842(i) makes it an offense for persons under certain disabilities such as convicted felons and persons who have been committed to mental institutions to ship or transport explosives in interstate or foreign commerce or to receive an explosive which has been transported or shipped in interstate or foreign commerce. Unlike its counterpart in the Gun Control Act (18 U.S.C. 922(g)), however, subsection 842(i) does not proscribe the possession of explosives by a convicted felon or person under another statutory disability. There are occasions when it is harder to prove a receipt offense than a simple possession offense. For example, to prove a receipt offense, it is necessary for purposes of establishing venue to show that the defendant received the explosives in the district in which he is charged with the offense. This may not be possible in certain situations, such as where a search of the defendant's home reveals commercially manufactured explosives made in another State or district. The lack of a possession offense comparable to that for firearms may allow certain dangerous persons who have no business having access to explosives to escape punishment in situations where it is likely they intend to use the material for criminal purposes.

Section 412.

This section (which passed the Senate last year as § 3736 of S. 1970) would amend chapter 40 of title 18 of the United States Code to allow for the summary destruction of explosives used in violation of that chapter. Chapter 40 sets out a series of prohibitions concerning explosives that in many respects are

parallel to the firearms provisions in chapter 44. For example, dealers in explosives must obtain a license and may not distribute explosives to persons under certain disabilities, such as convicted felons. The malicious damage or destruction of several categories of property by explosives is also made a federal crime by this chapter. Under 18 U.S.C. 844(c), any explosive materials used or intended for use in violation of chapter 40 or of any other federal criminal law are subject to seizure and forfeiture. That subsection provides that provisions of the Internal Revenue Code that apply to the forfeiture of Title II firearms -- such as machineguns -- shall extend to forfeitures under chapter 40. The firearms forfeiture provision, 26 U.S.C. 5872(a), states that the forfeiture provisions of the Internal Revenue Code are applicable. That reference makes applicable the provisions of 26 U.S.C. 7323 and 7325 which provide for judicial and administrative forfeiture, respectively.

Section 7325 provides for administrative forfeiture of property valued at $100,000 or less. While virtually all seized explosives would fall into this category, the section requires an appraisal by three different appraisers, and the giving of notice of the proposed forfeiture by newspaper before the forfeiture can be concluded. The section would even appear to require the sale or at least the offering for sale of the explosives. In any event, the statute requires that the explosives be stored from the time of seizure until the forfeiture proceedings are completed. This is often unsafe and very frequently impractical. In actual practice, the Bureau of Alcohol, Tobacco and Firearms is often able to obtain a court order authorizing the immediate destruction of seized explosives especially if they have been homemade or have deteriorated to such a state as to be unsafe or of no commercial value. That may often be the case, for example, where a person planning to make letter or pipe bombs has a quantity of explosives stored in his home -- in itself a violation of 18 U.S.C. 842(j), even if the intended use were lawful -- and they have become unstable. There is, however, no statutory authority to support the granting of such an order and BATF may, at some point, encounter a judge who refuses to authorize the explosives' destruction.

This section would eliminate that problem by providing for the immediate destruction of explosive materials which have been seized for forfeiture because they were used in or involved in a violation of law and it is impracticable or unsafe to remove or store the articles. Provision is made, in proposed 18 U.S.C. 844(c)(3), for the owner or interested party (such as a lien holder) to submit a claim for the value of the explosives destroyed and to receive reimbursement if the person can provide proof that they were not used or intended for use in violation of law, or that any unlawful involvement or use was without the knowledge of the person. A similar provision is contained in section 5609 of the Internal Revenue Code for the immediate

destruction of illegal alcohol distilling equipment when it is impracticable to remove such equipment for storage.

Section 413.

This section would eliminate the need for what are useless but costly forfeiture proceedings for unregistered weapons that are popular with drug dealers and other criminals and have been seized by law enforcement authorities. 26 U.S.C. 5841 requires that gangster weapons such as machineguns, sawed-off shotguns, silencers and homemade destructive devices like mail bombs be registered in the National Firearms Registration and Transfer Record. Firearms of this type which have not been registered are subject to seizure and forfeiture but, pursuant to 26 U.S.C. 5872(a), the forfeiture provisions of the Internal Revenue Code are made applicable. Specifically, 26 U.S.C. 7323 and 7325 provide for judicial and administrative forfeiture, respectively. Section 7325 provides for administrative forfeiture of property valued at $100,000 or less. While virtually any seized weapons would fall into this category, the section requires an appraisal by three different appraisers, the giving of notice of the seizure and proposed forfeiture by newspaper advertisement, and a three week delay before the forfeiture can be concluded.

These are expensive and unnecessary provisions inasmuch as the Supreme court held in United States v. Freed, 401 U.S. 601 (1971), that unregistered firearms cannot be possessed or legally registered by the person from whom seized. Moreover, 26 U.S.C. 5872(b) already provides that in the case of a forfeiture of a firearm for a violation of the National Firearms Act the weapon is not to be sold to the public. Rather, the weapon must be destroyed, sold to State law enforcement authorities, or retained by federal authorities. Accordingly, the money spent on appraisal fees and advertising, and the delay, serve no useful purpose where unregistered firearms are concerned since the person from whom an unregistered weapon was seized cannot lawfully regain possession of it and other private persons are also precluded from obtaining it.

To remedy this situation, the section would provide that the forfeiture provisions in sections 7323 and 7325 of title 26, United States Code, shall not apply to unregistered firearms and that such firearms shall be summarily forfeited to the United States. A similar procedure for the summary forfeiture of controlled substances which cannot be legally possessed by anyone is contained in 21 U.S.C. 881(f). Summarily forfeited firearms which might have some value for law enforcement agencies could be transferred to an appropriate State or Federal agency pursuant to 26 U.S.C. 5872(b), which would not be altered by this section.

In the rare event that a firearm was seized and summarily forfeited and it was subsequently determined that the weapon was

not within the purview of the National Firearms Act, the provisions of proposed § 5872(a)(3) would allow the owner or person interested in the seized firearm -- a lien holder, for example -- to submit a claim for the value of the firearm. Such a person would have to establish that the firearm was not involved or used in a violation of law, or that any unlawful involvement or use had been without the owner's knowledge or consent.

Section 414.

This proposal is designed to insure that certain forfeited firearms, if useful or valuable, are not needlessly destroyed. Rather, under the proposal, the forfeited firearm would be offered, first, to a federal agency without cost; and, finally, if the firearm were novel, rare, or historically significant, as determined by the Secretary of the Treasury, offered for sale to a licensed firearms dealer. Only if neither of these alternatives caused the firearm to be accepted or sold would it be destroyed.

Section 415.

This proposed amendment is purely technical and deletes outmoded language in 18 U.S.C. 924(e) and 924(c)(1) that states that the minimum mandatory sentences there provided for armed career criminals and other firearms offenders shall be served without eligibility for parole. This admonition is no longer necessary, since parole was abolished for all federal offenses committed after November 1, 1987, by the Sentencing Reform Act of 1984. A similar amendment was effected to 18 U.S.C. 924(a) by section 2203 of the Crime Control Act of 1990.

Section 416.

This proposal would amend 18 U.S.C. 922(j) to make a conforming change to add possession offenses. Presently, section 922(j) makes it a felony to receive, conceal, or dispose of a stolen firearm that has moved in interstate commerce, knowing it to have been stolen. But the section does not cover possession. Since receipt involves the act of transferring a firearm to the offender, the government is faced with the difficult and sometimes impossible task of proving when an individual found in possession of a stolen firearm that has moved in interstate commerce actually received it.

In the Crime Control Act of 1990 (§ 2202), the companion offense in 18 U.S.C. 922(k), which proscribes offenses involving firearms which have moved in interstate commerce and whose serial numbers have been obliterated, was amended to reach not only crimes of receipt but also crimes of possession. This proposal would make the same salutary change to section 922(j).

Section 417.

This section amends 18 U.S.C. 924(c) to make it an offense to use or carry a firearm during and in relation to the felony counterfeiting and related offenses set out in chapter 25 of title 18. (If section 402 of this bill is enacted, section 417 would cover possessing a firearm during and in relation to the felonies in chapter 25 as well as using or carrying such a weapon.) Prior to 1984, it was an offense under section 924(c) to use or carry a firearm unlawfully during the commission of any federal felony.

As a result of amendments in 1984 and 1986, section 924(c) now is limited to using or carrying a firearm during and in relation to a federal drug trafficking felony or any federal felony crime of violence.

Some serious felonies, however, do not meet the definition of "crime of violence" -- because they do not have as an element the use, attempted use, or threatened use of physical force against the person or property of another, and cannot be described as necessarily involving a substantial risk that physical force against the person or property of another may be used in their commission -- yet are frequently committed by persons with firearms. The counterfeiting and other offenses in chapter 25 of title 18 are in this category. Counterfeiting of currency and other things such as securities typically requires a sophisticated printing operation which often is protected by armed guards. Moreover, the passing of large quantities of counterfeit money -- for example, the exchange of $1,000,000 in fake bills by one criminal group for $100,000 in genuine currency from another gang -- is frequently carried out by persons carrying firearms. Counterfeiting investigations often require the use of undercover operatives and the presence of firearms makes this work more dangerous.

Moreover, other felonies in chapter 25, such as altering or removing motor vehicle identification numbers, are typical of "chop shop" operations in which armed persons are frequently involved. Finally, although some of the felonies in chapter 25 involve forgery of various types of government documents which may or may not be typically committed by armed persons, the new offense under 924(c), like current law, is limited to situations where the firearm was used or carried "during and in relation to" the offense. In a situation where a person forged a single government document and happened to be carrying a pistol at the time, the weapon would not be carried "in relation to" the offense. On the other hand, an illicit printing plant producing thousands of counterfeit government documents such as bonds issued by various banking agencies (a violation of 18 U.S.C. 493) or military passes allowing access to top secret military bases

(a violation of 18 U.S.C. 499) may be guarded by armed persons nd the new offense would appropriately apply in such cases. As with the current provisions in subsection 924(c), the new offense is limited to using or carrying a firearm during and in relation to only felonies, not misdemeanors.

Section 418.

This section provides a mandatory five-year prison term for possession of firearms by felons who are disqualified from firearms possession in light of 18 U.S.C. 922(g)(1) and who have a previous conviction of a violent felony or serious drug offense. This is comparable to the mandatory five-year term now provided under 18 U.S.C. 924(c) for using or carrying a firearm in relation to a violent crime or drug trafficking crime.

Under the Armed Career Criminal provisions, 18 U.S.C. 924(e), firearms possession by a person with at least three violent felony or serious drug offense convictions is punishable by a mandatory term of imprisonment of fifteen years. However, there is no mandatory term requirement for such possession by dangerous offenders who do not meet the three-conviction standard of section 924(e). The amendment of this section would provide a more adequate system of mandatory penalties by requiring a five-year term for firearms possession by an offender whose record includes at least one violent felony or serious drug offense conviction.

Section 419.

Under current law, 18 U.S.C. 923(g)(1)(D)(3), licensed firearms dealers, collectors, manufacturers, and importers are required to report multiple sales or dispositions of handguns to unlicensed persons to the Bureau of Alcohol, Tobacco and Firearm (BATF). Specifically, the provision requires licensees to notify BATF every time the same person buys two or more pistols or revolvers (or one pistol and one revolver) within five consecutive business days. The report is to be submitted not later than the close of business on the day the multiple disposition occurs. There is no requirement that the firearms licensee provide this information to the chief law enforcement officer of the place of residence of the purchaser, although under the first paragraph of 18 U.S.C. 923(g)(1)(D), BATF may make available information contained in records required to be kept pursuant to chapter 44 of title 18 -- such as the records of multiple sales -- to Federal, State, or local law enforcement officers when such officers so request.

This section makes the reporting of multiple sales more helpful to local law enforcement officers. Initially, it changes the multiple sale reporting requirement so that it would apply in cases in which a person bought two or more handguns in a thirty

day period. The present five day period is easily circumvented. For example, a person could buy a handgun every 6th business day beginning on March 1, 1991 and ending on April 1, 1991 and end up with seven weapons in that 32 day period without implicating the reporting requirements. Such a pattern of sales might attract the attention of BATF when it conducted its next regular annual inspection of the dealer's books as authorized by 18 U.S.C. 923(g)(1)(B)(ii) -- particularly if the weapons were not typically used for sporting purposes -- and the information would likely be shared with law enforcement authorities of the purchaser's place of residence if they suspected the multiple sale and requested it. But local authorities might not have reason to suspect a highly suspicious multiple sale and by the time they became aware it would often be too late to prevent the weapons from being resold to criminals or used in crimes. Extending the multiple sales period to thirty days makes it more difficult for "straw" purchasers of handguns for illegal resale to operate undetected.

Second, the section adds a requirement that the firearms licensee send a copy of the report of multiple sales to the chief law enforcement officer of the place of residence of the purchaser. The copy must be sent by the close of business on the day the multiple sale is completed, the same time period in which the report must be submitted to BATF under current law. This will ensure that local authorities are aware of the multiple sale and can take action as soon as possible in cases where it appears that the multiple sale is likely to lead to improper redistribution of the weapons or their use in criminal activity. The amendment imposes only a very slight burden on firearms licensees. In essence, they are merely required to send a copy of the report of the multiple sale to a local police department at the same time they mail the original report to BATF. The appropriate local police department is easily determined since the purchaser's address must be indicated on the form required to be completed by all firearms purchasers.

Section 420.

Current law prohibits such acts as receiving, concealing, storing, selling, or disposing of stolen firearms or explosives, knowing or having reasonable cause to believe that they are stolen. The amendments in this section extend the list of prohibited activities in relation to stolen firearms and explosives to include possession.

Section 421.

This amendment addresses the law enforcement problem posed by persons such as aliens who are legally in the United States, but who do not reside in any State, and who acquire firearms from Federal firearms licensees by utilizing an intermediary. Having

acquired firearms in this country, such aliens often smuggle the weapons out of the country. It is generally unlawful for any person to transfer a firearm to any other person who does not reside in the State in which the transferor resides. However, the alien's receipt of a firearm from a licensee or through an intermediary does not violate any specific provision of current law.

The amendment would not prohibit an alien lawfully conducting a firearms business in the United States from receiving firearms in the conduct of such business. Moreover, the amendment does not affect those aliens who legally import or bring firearms into the United States for legitimate purposes and would not preclude the lawful acquisition of firearms by aliens who have established residency in a State.

Section 422.

The amendments in this section would provide that the penalty for conspiring to violate Federal firearms or explosives laws would be the same as the substantive offense. They are similar to 21 U.S.C. 846 relating to conspiracies to violate the Federal drug laws.

Section 423.

The amendment in this section, would make it a federal offense, punishable by up to ten years of imprisonment, to steal a firearm or explosive materials from a Federal firearms licensee or a Federal explosive licensee or permittee.

Section 424.

The amendment in this section would make it unlawful for any person, not only licensees, to sell or otherwise dispose of explosive materials to felons or other prohibited persons. This amendment would conform 18 U.S.C. 842(d) to a similar provision on firearms, 18 U.S.C. 422(d).

B. Prohibited Gun Clips and Magazines

Subtitle B of title IV is designed to place severe restrictions on certain ammunition clips and other ammunition feeding devices that are frequently used with "assault weapons" to enable them to fire a large number of rounds without reloading. A detailed discussion of the policy considerations supporting this proposal appears in Statement of Assistant Attorney General Edward S.G. Dennis, Jr., Concerning the Firearms and Drug-Testing Provisions in H.R. 2709 before the House Judiciary Subcommittee on Crime (March 6, 1990).

Sec. 431. Findings.

Section 431 contains congressional findings that the trafficking in and use of magazines, ammunition belts, and other feeding devices that enable a firearm to fire more than fifteen rounds without reloading affect interstate and foreign commerce. Moreover, there is a finding that these devices are sold in interstate and foreign commerce, and are moved in commerce for the purpose of use in violent crimes. Such findings establish a federal jurisdictional nexus under the Interstate Commerce Clause which in turn justifies proscribing certain acts concerning such feeding devices without a showing that the device involved in a case was, or had been, a part of interstate commerce. See Perez v. United States, 402 U.S. 146 (1971).

Secs. 432-33. Certain ammunition clips and magazines defined as firearms and definition of ammunition feeding device.

Section 433 defines the term "ammunition feeding device" and inserts that definition in subsection 921(a) of title 18, the part of chapter 44 that sets out definitions pertaining to firearms and firearms offenses in that chapter. Such a device is defined as a detachable magazine, belt, drum, feed strip, or similar device which has a capacity of, or which can be readily converted or restored to hold more than 15 rounds of ammunition, other than any attached tubular device designed to accept and capable of operating with only .22 rim-fire caliber ammunition. It would also include any combination of parts from which such a device can be assembled.

Section 432, in turn, defines "ammunition feeding device" as a firearm. The term "firearm" already includes such things as mufflers and silencers which, like large-capacity ammunition feeding devices, are not necessary for the actual operation of a firearm. Defining ammunition feeding devices as firearms is necessary to enforce the provisions of this title. It will require manufacturers and importers to keep records, allow government inspection of these records to ensure that these devices are not being illegally imported or sold, and generally make applicable the present inspection and enforcement mechanisms that exist for firearms.

Sec. 434. Prohibitions applicable to ammunition feeding devices.

Section 434 sets out criminal prohibitions that apply to ammunition feeding devices and also important exceptions to those prohibitions. The section sets out a new subsection 922(t) in title 18 which makes it an offense to import, manufacture, transport, ship, transfer, receive, or possess such an ammunition feeding device. Pursuant to section 436 of the bill, the

punishment for such an offense is up to ten years' imprisonment and a felony level fine. Section 434, however, provides for three exceptions. First, it is not an offense for a licensed importer or manufacturer to make or import an ammunition feeding device for sale or distribution to an entity of the federal government or of a State or local government. Second, it is not an offense for a licensee to manufacture such devices for the purpose of exportation.

Third, it is not an offense to possess, transport, or ship an ammunition feeding device which was possessed on the effective date of the new subsection, or to transfer such a device which was possessed on that date provided the conditions of new subsections 922(u) and (v) are met.

Subsections 922(u) and (v), which are also set out in section 434 of this bill, establish a registration scheme for these devices which is akin to that already in place for such firearms as machineguns -- frequently called "Title II firearms" in reference to Title II of the Gun Control Act of 1968. See 26 U.S.C. 5801, et seq., especially section 5841 which establishes the registration system. The registration for ammunition feeding devices is much more limited than that for Title II firearms, however, in that only firearms transferred need be registered. A person lawfully in possession of such a device on the effective date of the bill would not have to register it and may retain it in his possession, or even transport or ship the device in interstate commerce, for example in the course of moving to another state.

If, on the other hand, the person in possession of the device on the effective date of the act wishes to transfer it to another person or entity -- other than a governmental entity -- he must register it to the transferee in accordance with regulations to be promulgated by the Secretary of the Treasury. It is expected that the Secretary will issue regulations, like those applicable to machineguns, requiring proof that the transferee is not under a firearms disability before the device can be registered. It should be noted that an ammunition feeding device once registered to the transferee could be sequentially transferred provided it was registered to each new transferee. This too is like the current law with respect to machineguns.

In addition to the requirement that only ammunition feeding devices transferred must be registered, the registration scheme for these devices differs from that for Title II weapons in other respects. The first is the cost. Registration of ammunition feeding devices will require a payment of a $25.00 fee as compared to a $200.00 tax on machinegun registrations. Second, the more limited registration scheme eliminates the need for a provision like that in 26 U.S.C. 5848 stating that no information contained in the registry of ammunition feeding devices or

derived from the registration process may be used as evidence against a person in a criminal proceeding "with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration."

Such a provision is necessary with respect to the machinegun provision where possession of an unregistered machinegun is itself an offense, only registered weapons may be transferred, and to comply with the registration provision for the purpose of transfer a person would in effect admit that he had not previously registered it. See United States v. Freed, 401 U.S. 601, 605-607 (1971). With respect to an ammunition feeding device, there is no requirement that persons in possession of such a device register it.

Sec. 435. Identification markings for ammunition feeding devices.

This section provides that all ammunition feeding devices must be identified with a serial number and such other identification as the Secretary may prescribe by regulation. Such other information would typically include the manufacturer's name and address. Although ammunition feeding devices are included within the definition of the term "firearm" and although a firearm has to be identified by a serial number, the serial number requirement under current law is that it be placed on the frame or receiver. 18 U.S.C. 923(i). Since this specific placing requirement is meaningless with respect to ammunition feeding devices, this section imposes the requirement on ammunition feeding devices directly for clarity.

Sec. 436. Criminal penalties.

This section sets out the criminal penalty for a violation of new subsection 922(t) and has been discussed in connection with section 434 of this subtitle.

Sec. 437. Noninterruption of business for persons in the business of importing or manufacturing ammunition feeding devices.

Section 437 permits persons already in the business of manufacturing or importing ammunition feeding devices to continue to do so while their applications for licenses are pending. Since such devices are included in the definition of a firearm, manufacturers and importers will be required to obtain licenses to continue to engage in these activities. Section 437 provides that they may continue to engage in these businesses pending their licensing application provided they make application for a license within 30 days of the enactment of this bill.

V. OBSTRUCTION OF JUSTICE

Section 501.

This section (which passed the House of Representatives in similar form in the 101st Congress as § 1201 of H.R. 5269) would establish appropriately higher penalties for obstruction of justice offenses against court officers and jurors by amending 18 U.S.C. 1503. Currently, 18 U.S.C. 1503 prohibits a range of conduct that tends to interfere with the administration of justice, including corrupting, threatening, injuring, or retaliating against "any grand or petit juror" and any "officer in or of any court of the United States." The maximum penalty for the offense defined by 18 U.S.C. 1503 is five years of imprisonment, regardless of the seriousness of the crime and the extent of resulting harm. Thus, for example, a criminal who engaged in a retaliatory murder of a juror who had voted to convict him would be exposed to no more than five years of imprisonment pursuant to this statute.

More adequate penalties appear in the statutes that define the comparable offenses of tampering with or retaliating against witnesses, victims, and informants, 18 U.S.C. 1512 (tampering) and 18 U.S.C. 1513 (retaliation). Under both of these statutes, conduct like that prohibited by 18 U.S.C. 1503 is punishable by up to ten years of imprisonment when directed against a witness. 18 U.S.C. 1512 further authorizes imprisonment for up to twenty years in the case of an attempted killing, and incorporates by reference the penalties for murder and manslaughter under 18 U.S.C. 1111 and 18 U.S.C. 1112 for cases where death results.

The proposed amendment would conform the penalties available under 18 U.S.C. 1503 to those available for obstruction of justice offenses against witnesses, thereby providing an adequate system of sanctions for comparable offenses against jurors, judges, and other judicial officers and officers serving in courts. The basic offense would be punishable by up to ten years of imprisonment, with up to twenty years of imprisonment in the case of an attempted killing, and punishment as provided in the murder and manslaughter statutes in cases where death results.

The amendment would also provide a twenty-year maximum penalty for cases in which the offense was committed against a petit juror in connection with a charged Class A or B felony, i.e., a felony that carries a maximum punishment of twenty-five years' imprisonment or more, or the death penalty. 18 U.S.C. 3559. The purpose of this proposal is to reduce the attractiveness of jury tampering, by establishing an increased penalty when the underlying charge sought to be affected by the offense is itself a more serious crime. Currently, since 18 U.S.C. 1503 provides only a maximum of five years' imprisonment, there is little deterrent for a defendant facing a

potential sentence of life imprisonment or twenty-five or more years not to try to influence a petit juror in the case. A similarly graduated penalty scheme is currently found in 18 U.S.C. 3146, which punishes the willful failure to appear for trial.

The final proposed amendment in this section is technical. It replaces the old term "United States commissioner" in 18 U.S.C. 1503 with the correct title "United States magistrate judge".

Section 502.

This section (which passed the House of Representatives last year as § 1202 of H.R. 5269) would amend 18 U.S.C. 1513 to provide appropriately higher penalties for retaliatory killings and attempted killings of witnesses, victims, and informants. Currently, the companion statute, 18 U.S.C. 1512, prohibits efforts to obstruct justice by tampering or interfering with witnesses, victims, and informants, including killing, attempting to kill, and using physical force against such persons. Under section 1512, a killing is punishable by the penalties prescribed for murder and manslaughter in 18 U.S.C. 1111 and 1112 -- including death or life imprisonment in cases of first degree murder -- while an attempted killing is punishable by up to twenty years in prison. The offense of using physical force, short of attempted murder, is punishable by a maximum of ten years' imprisonment.

18 U.S.C 1513 makes it a ten-year felony to engage in violent retaliatory acts against the same classes of protected persons as section 1512. For no discernible reason, however, section 1513, unlike its counterpart section 1512, contains no specific prohibition or enhanced penalties for the aggravated offenses of killing or attempting to kill a witness, victim, or informant with the same retaliatory intent. The proposed amendments would close this gap by adding to section 1513 an offense of retaliatory killing or attempted killing of witnesses, victims, and informants, carrying the same penalties as the corresponding provision in 18 U.S.C. 1512(a).

Section 503.

This proposal extends to State and local law enforcement officers who are assisting federal officers or employees in the performance of official duties the protection of 18 U.S.C. 1114 and related statutes which make it a crime to murder, kidnap, or assault federal officials enumerated in section 1114. See 18 U.S.C. 111 (assault) and 1201 (kidnapping). In doing so, the proposal codifies a consistent body of appellate case law, which has held existing section 1114 applicable to State and local officers assisting federal employees in a variety of law

enforcement contexts. See e.g., United States v. Torres, 862 F.2d 1025 (3d Cir. 1988); United States v. Williamson, 482 F.2d 508 (5th Cir. 1973); United States v. Reed, 413 F.2d 338 (10th Cir. 1969), cert. denied, 397 U.S. 954 (1970); United States v. Heliczer, 373 F.2d 241 (2d Cir.), cert. denied, 388 U.S. 917 (1967); United States v. Chunn, 347 F.2d 717 (7th Cir. 1965). Although no contrary authority apparently exists, affording express statutory coverage to assisting State and local law enforcement officials is useful in avoiding the need for future litigation. It also would overcome any argument to the contrary (as to persons assisting the Drug Enforcement Administration) based on the somewhat ambiguous provisions of 21 U.S.C. 878(b).

Many federal law enforcement efforts depend for their success upon the assistance of State and local law enforcement personnel, whose safety is often jeopardized as a result of the assistance they render to federal officers. Accordingly, it is appropriate that the protection of section 1114 be extended to State and local law enforcement officials who assist in the performance of federal functions.

VI. Gangs and Juvenile Offenders

Sec. 601.

The amendments in this section are part of the implementation of an element of the President's violent crime program, which calls on the states to "maintain records and report on all serious crimes committed by juveniles who frequently continue their criminal careers into adulthood, but often escape early identification as repeat offenders and recidivists because their juvenile records are not reported." White House Fact Sheet of May 15, 1989, at 6. The same point was endorsed by the Attorney General's Task Force on Violent Crime in 1981, Final Report at 82-83, which stated that states should be encouraged to make available criminal history information for juveniles convicted of serious crimes, and that such information should be entered into the FBI criminal records system.

Empirical data confirms that the unavailability of juvenile criminal records is in fact a serious concern in connection with violent and firearms offenses. For example, the Bureau of Justice Statistics has estimated that 54 percent of armed robbers in state prisons in 1986 had previously been sentenced to probation or incarceration as a juvenile, and that 15 percent had a prior juvenile, but no adult, sentence. This problem would be alleviated by generally providing for the inclusion of juvenile records for serious crimes in the FBI records system, and by making corresponding changes in the rules for reporting offenses by juveniles who are federally prosecuted.

To implement this reform, the Department of Justice is proposing an amendment to 28 C.F.R. § 20.32, which generally defines the offenses that will be accepted in the FBI records system. Paragraph (a) of the rule states that information is to be included concerning "serious and/or significant offenses." Subsection (b) states that nonserious offenses are excluded, such as drunkenness, vagrancy, disturbing the peace, curfew violations, loitering, false fire alarm, non-specific charges of suspicion or investigation, and traffic infractions. However, the second sentence of paragraph (b) states a blanket exclusion of offenses committed by juveniles, unless the juvenile was tried as an adult. The proposed amendment would delete this sentence, and would make a conforming change in paragraph (a), to make it clear that both "adult and juvenile" offenses, if serious, are to be included in the system. This would permit the FBI to receive and retain records relating to serious offenses of state juvenile offenders.

The statutory amendments in this section propose complementary changes in the provisions regarding the records of federally prosecuted juveniles. The first amendment -- in subsection (a) -- would change 18 U.S.C. § 5038, which generally

governs the permissible uses of juvenile records and the circumstances in which they are to be retained. The basic change from current law is that records would routinely be retained and made available where a juvenile is convicted of a serious violent crime or drug crime described in clause (3) of the first paragraph of 18 U.S.C. § 5032. In contrast, the current statute limits the retention and availability of such records through the FBI records system to cases involving a second conviction of the juvenile. The amendment accordingly rejects the view of the current law that a juvenile offender is entitled to "one free bite," even if the initial "bite" is a serious violent crime or drug crime, before information is preserved concerning his offenses for later law enforcement and judicial use. The retention of records would be authorized in any case of conviction for an offense described in clause (3) of the first paragraph of section 5032, regardless of whether the actual exercise of federal jurisdiction in the case was premised on that clause or on another provision of section 5032.

The amendment also adds a subsection to 18 U.S.C. § 5038 authorizing reporting, retention, disclosure and availability of juvenile records pursuant to the law of the state in which a federal juvenile proceeding takes place, if the state law is more permissive as to such matters than the general standards of § 5038. This would generally ensure that federal law will not accord less weight than the law of the state in which the offense occurred to the public's interest in security against crime, and would also eliminate the possibility that a federal prosecutor might be inhibited from exercising federal jurisdiction in a case appropriate for federal prosecution because state law provides more effectively for retention and availability of records concerning the offender.

The second amendment -- in subsection (b) -- repeals a statute, 18 U.S.C. 3607, that authorizes pre-judgment probation for certain drug offenders, and requires expungement of records for such an offender if he was under the age of 21 at the time of the offense. This amendment is also in furtherance of the section's general objective of ensuring retention of accurate and complete criminal records, regardless of the age of the offender.

In its specific provisions, 18 U.S.C. 3607 now authorizes pre-judgment probation for an offense under 21 U.S.C. 844 for offenders without prior drug crime convictions; 21 U.S.C. 844 generally defines the offense of unlawful possession of controlled substances, punishable by up to a year of imprisonment. If a defendant is accorded the special probationary treatment authorized by the statute, only a nonpublic record is retained of the disposition, and that record can only be used for the purpose of determining in a later proceeding whether the defendant is a first time offender for purposes of § 3607. The effect of the mandatory expungement for offenders under 21 is that all refer-

ences relating to the arrest, proceedings, and disposition are removed from normal official records. Section 3607 further provides that the expungement order has the effect of restoring the defendant in contemplation of law to the status he occupied before his arrest or prosecution, and that the defendant is not subject to liability for subsequently failing to recite or acknowledge the occurrence of the arrest or prosecution in any context.

This provision implicitly presupposes that drug possession offenses under 21 U.S.C. 844 may properly have less serious consequences for the offender than other offenses carrying comparable penalties, or that knowledge of such offenses is somehow of less importance for the criminal justice system than knowledge of other prior crimes. However, the statute's implicit policy of leniency toward drug offenders through concealment of records is contrary to the concept of user accountability for such offenders, and gives short shrift to the enormous human and social costs of drug abuse. Moreover, in light of the uniquely potent role of drug abuse as a contributing factor in other criminality, knowledge of a defendant's complete record of drug offenses is at least as important as knowledge of other types of crime for law enforcement, judicial, and correctional purposes.

Section 3607's expungement requirement for offenders under 21 compounds its costs without any offsetting justification. If the offender is a juvenile, he would enjoy in any event the benefits of the special protections of 18 U.S.C. 5038 relating to juvenile records, on the same basis as other juvenile offenders. Conversely, if the offender is an adult, he should be treated in the same way as adults who commit other types of crimes. Neither considerations relating to the offender's interests nor considerations relating to society's interests provide a valid basis for according a specially favored status to defendants who commit offenses covered by § 3607, or justify a special policy of concealment for the records of such offenses. The statute, as proposed in the second amendment, should simply be repealed.

The final subsection of this section, (c), is a conforming amendment that deletes a cross-reference to 18 U.S.C. 3607 in the Controlled Substances Act.

Section 602.

This section combines several amendments that were passed by the Senate last year in S. 1970. The amendments broaden the option of adult prosecution for serious juvenile offenders and gang leaders.

One feature of the amendments (which passed the Senate last year as § 3724 of S. 1970) would add certain "crack" cocaine and drug conspiracy and attempt offenses committed by juveniles to

the list of crimes set forth in 18 U.S.C. 5032 authorizing prosecution as an adult if the Attorney General certifies that there is a "substantial federal interest in the case" that justifies adult prosecution. Currently, substantive drug offenses in 21 U.S.C. 841 (and other statutes) are predicates for such action, but attempts and conspiracies to commit such offenses are not. As some United States Attorneys have noted, this is an anomaly that should be corrected. Unfortunately, many juveniles today are members of gangs of conspirators involved in drug trafficking, and their roles may range from relatively fringe activities to leadership of the conspiracy itself. When the offense is sufficiently serious, prosecutors should have the option of proceeding against a juvenile drug conspirator as an adult, just as they now have that option with respect to a substantive drug crime; and the same holds true for attempts.

Likewise, in view of the seriousness of such offenses, it is appropriate to add to the list of predicate offenses authorizing adult prosecution those involving possession of a mixture or substance containing in excess of five grams of cocaine or "crack". (See 21 U.S.C. 844.)

A second feature of the amendments in this section, which is taken from § 2201(b) and (c) of S. 1970 as passed by the Senate last year, is designed primarily to add three serious firearms offenses to the list of enumerated drug and violent felonies in 18 U.S.C. 5032 for which a prosecutor or a court may determine that a juvenile alleged to have committed such an offense should be prosecuted as an adult. The three firearms offenses that would be added to section 5032 each carries a maximum prison term of ten years and essentially involve acts of receiving or transferring a firearm, or traveling interstate to acquire a firearm, knowing or intending that it will be used to commit a felony.

The deletion of the reference to 18 U.S.C. 922(p) by this section corrects a technical error in section 6457 of the Anti-Drug Abuse of 1988, which had intended the reference to be to a guns-in-the-schoolyard offense. That offense, however, was not enacted in 1988, and by virtue of another bill section 922(p) now refers to the manufacture or possession of an undetectable firearm, for which inclusion in section 5032 was never intended.

A third feature of the amendments in this section, which passed the Senate as part of § 2201(d) of S. 1970 last year, is designed to clarify that a juvenile's leadership role in an offense is a highly pertinent factor in a court's decision whether or not to transfer the juvenile for trial as an adult. Currently, the applicable paragraph of 18 U.S.C. 5032, which sets forth the relevant factors for consideration, only directs the court to weigh the "nature of the offense". While this may implicitly include the issue of the extent of the juvenile's

role, the proposed amendment clarifies this point while also indicating as a matter of policy that an affirmative finding that a juvenile has played a major role in a controlled substance or firearms offense shall count heavily in favor of a determination to try the juvenile as an adult.

Section 603.

The Anti-Drug Abuse Act of 1988 (section 6451) added, as a new predicate offense category to the Armed Career Criminal statute, acts of juvenile delinquency that, if committed by an adult, would constitute a crime of violence. In view of the increasing involvement of youthful offenders with serious drug offenses, and the known association of drug crimes with violence, it is appropriate also to enlarge the scope of the Armed Career Criminal Act to include acts of juvenile delinquency that, if committed by an adult, would meet the Act's definition of a "serious drug offense," i.e., those drug felonies that carry a maximum prison term of ten years of more. An amendment including certain serious drug crimes by juveniles as Armed Career Criminal Act predicate offenses was passed the Senate last year as § 2202 of S. 1970.

Section 604.

The Travel Act was passed in 1961 as part of a series of statutes intended to deal more effectively with organized crime. It punishes any person who travels interstate with intent to (1) distribute the proceeds of any unlawful activity, (2) commit any crime of violence to further any unlawful activity, or (3) otherwise promote or facilitate the promotion of any unlawful activity, and who thereafter performs or attempts to perform any of the intended acts specified above. The statute defines "unlawful activity" to include those generic categories of offenses that are frequently associated with organized crime, namely gambling, controlled substances, prostitution, extortion, arson, bribery, and money laundering.

The Act carries a maximum penalty of five years' incarceration. While this is adequate with respect to violations involving acts of distributing the proceeds of or otherwise promoting unlawful activity, it is not sufficient with respect to acts involving the commission or attempted commission of a crime of violence in furtherance of unlawful activity. The United States Sentencing Commission recently examined about a hundred cases under the Travel Act and came to the same conclusion. The Commission found that close to 30% of all defendants received maximum five-year sentences under the applicable Travel Act guideline, and that more than 70% of that group would, under the guidelines, have received a sentence greater than five years, if this had been allowed by the statute.

40-812 0 - 91 - 8

In these circumstances, the Commission determined that "the sentencing outcomes required by the guidelines have been frustrated by the low statutory maximum penalty." The Commission in a report to Congress thus recommended, consistent with the instant proposal, that the maximum penalty for Travel Act violations be raised to twenty years when the conduct involves a crime of violence, and up to life imprisonment if death results.

This maximum penalty increase will enable the achievement, through the operation of the sentencing guidelines, of an appropriate and fair sentencing result when, for example, an individual is charged with a violation of the Travel Act involving the commission or attempted commission of murder, kidnapping, or serious assault for which the guidelines prescribe a sentence of greater than five years. In short, there is no reason why a defendant who commits a serious crime of violence under the Travel Act should be punished substantially less severely than one who engaged in the same conduct under another federal statute with a different jurisdictional base. The proposed amendment insures that henceforth Travel Act offenses involving crimes of violence may be properly punished.

Section 605.

This amendment, included in S. 1970 as passed by the Senate in the 101st Congress (§ 3709), would increase the penalty under 18 U.S.C. 1958 for conspiring to commit murder for hire. This offense frequently involves "contracts" put out by participants in organized crime activities.

Presently, section 1958 contains no penalty for a conspiracy. The section provides a ten-year maximum penalty for traveling in interstate or foreign commerce with intent to commit murder for hire, and includes increases in the maximum penalty if personal injury or death results from the offense. A conspiracy to violate section 1958 is, however, punishable only under 18 U.S.C. 371, the general conspiracy statute, which carries a maximum of five years' imprisonment.

This penalty level is insufficient to vindicate the seriousness of this offense. Recently, for example, a male-female couple were convicted in Indiana of a scheme to hire a "hit" man to murder the wife of one and the husband of the other; fortunately, the scheme was reported to the FBI which was able to arrest the conspirators after they had paid an undercover agent, posing as a "hit" man, $2,000 to perform the killings.

Under the amendment, section 1958 would itself include a penalty for conspiracies to violate the section. The maximum penalty would be set at the ten-year level, the same as for the offense of traveling interstate with intent to commit murder for hire.

VII. TERRORISM

A. Aviation Terrorism

Sec. 701.

Subsection (a) of this section adds a new section 36 to chapter 2 (relating to Aircraft and Motor Vehicles) of title 18, United States Code, which deals with violence at international airports.

Subsection (a) of proposed 18 U.S.C. 36 establishes the offense required by paragraph 1 of Article II of the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation. The provision makes it an offense for a person unlawfully and intentionally, using any device, substance or weapon, (1) to perform an act of violence against another person at an international airport serving civil aviation or (2) to destroy or seriously damage the facilities of an international airport serving civil aviation or aircraft not in service located thereon, or to disrupt service at such an airport. Consistent with the requirement of the Protocol, the prohibited act must endanger or be likely to endanger safety at an airport serving international civil aviation. Upon conviction, a person would be subject to a fine under 18 U.S.C. 3571 and/or imprisonment of not more than twenty years. If death results from the prohibited conduct, the offender could be punished by death or imprisoned for any term of years or for life.

Proposed 18 U.S.C. 36(b) provides for federal jurisdiction over the prohibited activity (1) when it takes place within the United States or (2) when the prohibited activity takes place outside of the United States and the offender is later found in the United States. The latter jurisdictional basis is required by Article III of the Protocol in order to comply with the mandate of the Protocol that Party States prosecute or extradite for prosecution offenders found in their jurisdiction. The former jurisdictional basis ensures clear federal jurisdiction over any terrorist attack at an international airport serving civil aviation within the United States.

State and local governments would retain their existing jurisdiction over violence at airports. This provision supplements and does not supplant state and local authority. In regard to terrorist attacks at foreign airports in which American nationals are killed or seriously injured, the provisions of 18 U.S.C. 2332 remain applicable. "Finding" the perpetrators within the United States is not a prerequisite for jurisdiction under 18 U.S.C. 2332.

Subsections (b) and (c) of section 701 concern a technical conforming amendment and the effective date of the section.

Sec. 702.

This section repeals section 902(n)(3) of the Federal Aviation Act of 1958 (49 U.S.C. App. 1472(n)(3)) and renumbers section 902(n)(4) as section 902(n)(3). The paragraph to be repealed currently reads: "This subsection shall only be applicable if the place of takeoff or the place of actual landing of the aircraft on board which the offense, as defined in paragraph (2) of this subsection, is committed is situated outside the territory of the State of registration of that aircraft."

Section 902(n), which criminalizes aircraft piracy committed outside the special aircraft jurisdiction of the United States, was enacted as part of the Antihijacking Act of 1974 (section 103(b) of Public Law 93-366), to implement the Hague Convention for the Suppression of Unlawful Seizure of Aircraft. Section 902(n)(3) was intended to reflect paragraph 3 of Article 3 of the Convention, which states that the Convention normally applies "only if the place of take-off or the place of actual landing of the aircraft on which the offense is committed is situated outside the territory of the State of registration of that aircraft." However, the authors of the legislation overlooked the obligation of paragraph 5 of Article 3 of the Convention when the alleged aircraft hijacker is found in the territory of a State Party other than the State of registration of the hijacked aircraft.

For example, under the Hague Convention the hijacking of an Air India flight that never left India is not initially covered by the Convention. (Article 3, paragraph 3.) However, the subsequent flight of the alleged offender from India to another State Party triggers treaty obligations, under the "notwithstanding paragraph 3" language of paragraph 5 of Article 3. Paragraph 5 makes the obligation of Article 7, to either prosecute or extradite an alleged offender found in a party's territory, applicable to a hijacker of a purely domestic air flight who flees to another State: "Notwithstanding paragraphs 3 and 4 of this Article, Articles 6, 7, 8 and 10 shall apply whatever the place of take-off or the place of actual landing of the aircraft, if the offender or the alleged offender is found in the territory of a State other than the State of registration of that aircraft."

While the meaning of paragraph 5 of Article 3 may not have been perfectly understood at the time the Hague Convention was adopted, subsequent international conventions have made the concept crystal clear. It is now appropriate to correct our prior

minor misunderstanding of our international obligation under the Hague Convention.

B. Maritime Terrorism

Secs. 711-13.

These sections contain the short title, findings, and statement of purpose for the Act proposed in this subtitle.

The Act will implement the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.

The Senate gave its advice and consent to ratification of the Convntion and Protocol on November 5, 1989. The Administration has stated its intention to deposit the instrument of ratification after this domestic legislation is enacted. When the Administration deposits the instrument of ratification, it will declare, pursuant to Article 16(2) of the Convention, that the United States does not consider itself bound to submit to the compulsory jurisdiction of the International Court of Justice in respect of disputes arising under the convention, consistent with the understanding of the Senate Foreign Relations Committee contained in the report accompanying Treaty Doc. 101-1. See S. Exec. Rept. 18, 101st Cong. 1st Sess. at p. 3 (November 19, 1989).

Sec. 714.

This section would add two new sections to chapter 111 (relating to shipping) of title 18, United States Code. The new sections supplement existing provisions of federal law and do not supplant them. The first, proposed section 2280, covers violence against maritime navigation. The second, proposed section 2281, deals with violence against maritime fixed platforms.

Section 2280(a) sets forth the various offenses required by the first paragraph of Article 3 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. Section 2280(a)(8) (the attempt provision) effectuates the requirement of paragraph 2(a) of Article 3 of the Convention. (Paragraph 2(b) of Article 3 of the Convention is implemented by existing 18 U.S.C. 2 (complicity) and 371 (conspiracy)). Each of the prohibited acts basically tracks the Convention's language and is self-explanatory. Section 2280(a)(6) (relating to communication of false information) uses the "knowledge" formulation adopted by Congress in 18 U.S.C. 32(a)(6) and fully complies with the Convention's requirements. The penalty level complies with Article 5 of the Convention and

is comparable to that contained in 18 U.S.C. 32 (destruction of aircraft or aircraft facilities).

Section 2280(b) (relating to threats) implements paragraph 2(c) of Article 3 of the Convention. Section 2280(b) follows the penalty level and the formulation utilized by Congress in recently enacted 18 U.S.C. 32(c) and 49 U.S.C. App. 1472(m)(2) (i.e., "with an apparent determination and will to carry the threat into execution"). The words "threatened act" are used to clearly show that it is the act which, if it were performed, must endanger the safe navigation of the ship. The threat by itself does not have to endanger the safe navigation of the ship.

Section 2280(c) specifies the circumstances when federal jurisdiction exists over the prohibited acts of section 2280(a). Paragraph (1) of subsection (c) relates to circumstances involving a "covered " ship. Paragraph (2) of subsection (c) relates to circumstances involving a "noncovered" ship, which is required by paragraph 2 of Article 4 of the Convention (i.e., the offender has fled the territory of the country where the prohibited act occurred upon or against a ship not initially protected by the Convention and the offender is now present in the United States).

The term "covered ship," which is based upon paragraph 1 of Article 4 of the Convention, basically means a ship that is operating or scheduled to operate outside the territorial "waters" (i.e., the territorial sea and/or internal waters) of any particular country. Hence, it covers all ships that go, have come, or are scheduled to go upon the high seas as well as ships that leave, are scheduled to leave, or have arrived from outside the territorial waters of any particular country. The term applies primarily to ships engaged in international shipping, although, if a ship is engaged only in commerce between points in the same country, the term also encompasses that ship if the ship travels at some time during its voyage upon the high seas. A ship is not covered under the Convention if it has remained or is scheduled to stay within the territorial waters of a single country and if, in fact, it so stays. However, if it departs the territorial waters of a single country or is scheduled to so depart, it is covered under the Convention.

The clauses of paragraph (1) of subsection (c) establish jurisdiction in the situations mandated by paragraph 1 of Article 6 of the Convention, (i.e., clauses (c) (1) (A) (i), (ii) and (iii) (relating to nationals of the United States)) and two optional situations permitted by paragraph 2 of Article 6 of the Convention (i.e., clauses (c)(1)(A)(iii)) (as to a stateless person whose habitual residence is in the United States), and (c)(1)(B)). In addition, subparagraph (C) of paragraph (1) of subsection (c) implements the mandatory requirement in paragraph 4 of Article 6 of the Convention to cover the situation where the

offender is subsequently present in the United States after having committed a prohibited act on or against a covered ship over which conduct the United States was provided no direct mandatory or optional jurisdictional basis pursuant to paragraphs 1 or 2 of Article 6 of the Convention at the time of the offense. This provision is necessary to comply with the basic "prosecute or extradite" requirement of the Convention.

Paragraph (2) of subsection (c) establishes the jurisdiction required by paragraph 2 of Article 4 of the Convention to cover the situation when a prohibited act is committed against a ship not covered by the Convention (i.e., a ship engaged in commerce within a single country) but the perpetrator has fled and is now present in the United States.

Paragraph (3) of subsection (c) has been drafted to cover all prohibited activity against or upon any vessel committed in an attempt to compel the United States to do or abstain from doing an act. The Convention, in paragraph 2 of Article 6, permits coverage when the extortionate demand against a State involves a "covered ship." The limitation to covered ships is not desirable when the United States itself is the target of the extortion. Expanding coverage to any vessel is clearly justified under the protective principle of extraterritoriality under customary international law. Hence, extortionate demands directed against the United States involving a vessel are covered whether they occur within the United States (including its territorial sea), on the high seas, or within the territorial seas or internal waters of a foreign nation. Moreover, section 2280(c)(3) uses the term "vessel" to cover all vessels and not just ships as defined in section 2280(e)(1). Thus, governmental ships are covered by section 2280(c)(3).

Section 2280(d) carries out the requirement of Article 8 of the Convention that the United States impose certain obligations upon the masters of covered ships flying the flag of the United States when delivering an offender and evidence to another State Party. Subsection (d) also directs the master to notify the Attorney General before delivering a person believed to have committed an offense under the Convention. The notification, which is not mandated by the Convention, is necessary to allow the United States the opportunity to obtain custody of the alleged offender, if practicable, before delivery to another country. It should be noted that the obligations of Article 8 of the Convention cover offenses committed not only on the master's ship but upon any ship protected by the Convention. Hence, it also covers fugitives who have committed prior offenses prohibited by the Convention and who are presently on the master's ship.

Section 2280(e) contains the definitions of "ship," "covered ship, "territorial sea of the United States," "national of the

United States," and "United States." The latter two are standard definitions . See, e.g., 18 U.S.C. 1203(c) and 3077(4). Under Article 1 of the Convention, a ship is defined as "a vessel of any type whatsoever not permanently attached to the seabed, including dynamically supported craft, submersibles, or any other floating craft." However, paragraph 1 of Article 2 of the Convention makes the Convention inapplicable to (1) a warship, (2) a ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes, or (3) a ship which has been withdrawn from navigation or laid up. Thus, like the international convention pertaining to aircraft, the Convention concerns ships of a "civilian" nature, and does not apply to United States naval vessels, United States customs vessels, or any other law enforcement vessel operated by United States authorities. Likewise, a vessel which is not currently in an operational mode is not covered by the definition.

The term "covered ship" describes a ship engaged or scheduled to engage in travel that will take it out (or has taken it) onto the high seas or into the territorial waters of a "different country." The focus is on international voyages, cargo as well as passenger. No commercial nexus, however, is required, and, oceangoing pleasure craft are protected.

The definition of territorial sea of the United States follows the terminology of Presidential Proclamation 5928 of December 27, 1988, which expanded the territorial sea of the United States, for international purposes, to twelve nautical miles from the baselines of the United States determined in accordance with international law.

Section 2281, dealing with violence against maritime fixed platforms, fully implements the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf. The Protocol is primarily directed at off-shore fixed platforms located outside the territorial waters of any country. Section 2281 utilizes all the mandatory and optional jurisdictional bases required or permitted by the Protocol. In addition, section 2281 covers any situation involving a fixed platform anywhere when the prohibited activity is performed in an attempt to compel the United States to do or abstain from doing any act.

Section 2281(a) sets forth the various offenses required by paragraph 1 of Article 2 of the Protocol. Section 2281(a)(6) (the attempt provision) effectuates the requirement of paragraph 2(a) of Article 2 of the Protocol. (Paragraph 2(b) of Article 2 of the Protocol is implemented by existing 18 U.S.C. 2 (complicity) and 371 (conspiracy)). The penalties are consistent with Article 5 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation which is made applicable to the Protocol by paragraph 1 of Article 1 of the Protocol. The

prohibited acts basically track the Protocol language and are self-explanatory.

Section 2281(b) (relating to threats) implements paragraph 2(c) of Article 2 of the Protocol. Section 2281(b), which is comparable to the threat provision contained in section 2280(b), follows the penalty level and the formulation utilized by Congress in recently enacted 18 U.S.C. 32(c) and 49 U.S.C. App. 1472(m)(2) (i.e., "with an apparent determination and will to carry the threat into execution"). The words "threatened act" are used to clearly show that it is the act which, if it were performed, must endanger the safety of the fixed platform. The threat by itself does not have to endanger the safety of the fixed platform.

Section 2281(c) specifies the circumstances when federal jurisdiction exists over the prohibited acts of section 2281(a). Paragraph (1) of section 2281(c) establishes jurisdiction in those situations mandated by paragraph 1 of Article 3 of the Protocol (i.e., subparagraphs (A) and (B) (relating to nationals of the United States)) and the optional bases permitted by paragraph 2(a) (relating to stateless persons whose habitual residence is in the United States) and paragraph (2)(c) of Article 3 of the Protocol. Subparagraph (C) of paragraph (1) of subsection (c), moreover, goes beyond the optional measure in the Protocol as it encompasses any prohibited activity committed in an attempt to compel the United States to do or abstain from doing any act involving a fixed platform anywhere in the world, and not just a platform located upon a continental shelf. This expanded coverage, clearly justifiable under the protective principle of extraterritoriality under customary international law, is desirable whenever the United States is itself the target of the extortion.

Paragraph (2) of subsection (c) establishes the optional jurisdiction bases permitted by paragraph 2(b) of Article 3 of the Protocol. Paragraph (3) of subsection (c) implements the mandatory requirement in paragraph 4 of Article 3 of the Protocol. This covers the situation where the offender is subsequently present in the United States after having committed a prohibited act on or against a fixed platform located on the continental shelf of another country over which conduct the United States had no direct mandatory or optional jurisdictional basis under paragraphs 1 or 2 of Article 3 of the Protocol. Paragraph (3) of subsection (c) also implements the mandatory requirement contained in paragraph 2 of Article 1 of the Protocol. This covers the situation where the offender is present in the United States after having committed a prohibited act on or against a fixed platform located within the internal waters or territorial sea of another country. Such "internal" platforms are not subject to the Protocol unless the offender flees the jurisdiction of the country in which the platform is

located.

Section 2281(d) contains the definitions of "continental shelf," "fixed platform," "national of the United States," "territorial sea of the United States," and "United States." The latter three definitions are the same as those used in section 2280(e), supra. "Fixed platform'" is defined exactly as it is found in paragraph 3 of Article 1 of the Protocol. The platform must be permanently attached and must be for economic purposes. The definition of "continental shelf" incorporates by reference the definition of that term under Article 76 of the 1982 Convention on the Law of the Sea. While the United States is not a signatory to the Law of the Sea Convention, Article 76, nevertheless, reflects the customary international law definition of continental shelf.

Secs. 715-16.

These sections contain provisions related to section 714 concerning clerical matters and effective dates.

Section 715 amends the analysis for chapter 111 of title 18, United States Code.

Section 716 establishes the effective date for the legislation depending upon certain contingencies.

Sec. 717.

This section affirms the action taken by the President on December 27, 1988 in expanding the territorial sea of the United States from three to twelve nautical miles. Moreover, it clearly places the territorial sea, for federal criminal jurisdiction purposes, within the special maritime and territorial jurisdiction of the United States as that term is used in title 18, United States Code. This affirmance is necessary to ensure criminal coverage over foreign ships located within the expanded portion of the territorial sea.

While existing legislation covered foreign ships within the old territorial sea, the Supreme Court has held that the legislation was not intended to reach crimes committed by an alien upon an alien on a foreign vessel under the de jure or de facto control of the foreign nation on the high seas outside the territorial sea of the United States. See United States v. Holmes, 18 U.S. (5 Wheat.) 411 (1820); United States v. Palmer, 16 U.S. (3 Wheat.) 281, 288 (1818). The provision in the Presidential Proclamation stating that "Nothing in this Proclamation (a) extends or otherwise alters existing Federal law or any jurisdiction, rights, legal interests, or obligations derived therefrom" raises a question concerning federal criminal jurisdiction over foreign ships in the expanded portion of the

territorial sea.

Section 717 removes any ambiguity and establishes clear jurisdiction commensurate with our assertion of sovereignty. Moreover, this provision ensures that all fixed platforms located within the expanded portion of the territorial sea are also within the special maritime and territorial jurisdiction of the United States. Clear criminal coverage over such platforms is essential because new section 2281 of title 18, United States Code, would only cover off-shore platforms located outside the territorial sea of the United States. Section 717 is intended to apply to federal criminal jurisdiction generally, but is not intended to affect any other laws pertaining to the expanded portion of the territorial sea.

Sec. 718.

This section incorporates the appropriate state law for purposes of the federal assimilated crimes statute, 18 U.S.C. 13, in regard to the expanded portion of the territorial sea. Because state boundaries generally only extend three statutory (or geographical) miles into the ocean, portions of the expanded territorial sea of the United States are not within any state. Hence, large areas of the expanded territorial sea of the United States are not within any particular state or territory. Accordingly, criminal acts such as prostitution, gambling, drunkenness, etc., would not be prohibited under federal law unless some state law was adopted. The method used here, assimilating the law of the nearest state, is very similar to what Congress did in regard to artificial islands and fixed structures under the Outer Continental Shelf Lands Act (43 U.S.C. 1333(a)(2)(A)). The provision clearly covers crimes committed on, below, and above that portion of the territorial sea of the United States that is not located within the territory of any state, territory, possession or district.

Sec. 719.

This section establishes a new jurisdictional basis in section 7 of title 18, United States Code, relating to the definition of the special maritime and territorial jurisdiction of the United States. 18 U.S.C. 7 allows for federal jurisdiction over certain important common crimes, e.g., murder, theft, sexual abuse. Section 719 extends federal criminal jurisdiction to any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

The Department of Justice has experienced a continuing legal problem concerning federal jurisdiction over certain crimes committed by or against United States nationals on foreign cruise

ships operating from the United States. The country whose flag the foreign ship is flying often shows little interest in prosecuting. If the foreign ship is not within United States waters at the time of the offense, it is not always clear whether federal criminal jurisdiction exists. While cogent legal arguments can be made, and have on occasions been made successfully, it is desirable to have a clear statutory basis of jurisdiction. The provision provides jurisdiction even when the scheduled cruise enters the waters of a foreign nation. Of course, the jurisdiction only reaches conduct committed by or against a national of the United States. International law recognizes the right of a nation to apply its laws extraterritorially in such cases.

C. Terrorist Alien Removal

This subtitle, the "Terrorist Alien Removal Act of 1991," provides effective means for removing from the United States aliens involved in terrorist activities.

In recent years, the Department of Justice has obtained considerable evidence of involvement in terrorism by aliens in the United States. Both legal aliens, such as lawful permanent residents and aliens here on student visas, and illegal aliens are known to have aided and to have received instructions regarding terrorist acts from various international terrorist groups. While many of these aliens would be subject to deportation proceedings under the Immigration and Nationality Act (INA), these proceedings are unsatisfactory in cases involving sensitive information. Specifically, these procedures do not prevent disclosure of sensitive information where such disclosure would harm national security, adversely affect foreign relations, or reveal investigative techniques or confidential sources. Consequently, the proposed Terrorist Alien Removal Act sets out a new title in the INA devoted exclusively to the removal of aliens involved in terrorist activity.

The new title would create a special court, patterned after the special court created under the Foreign Intelligence Surveillance Act (50 U.S.C. 1801 et seq.). When the Department of Justice believes that it has identified an alien in the United States who has engaged in terrorist activity, and that to afford such an alien a deportation hearing would reveal information that would harm national security or foreign relations or compromise important investigative techniques or confidential sources, it could seek an ex parte order from the court. The order would authorize a formal hearing, called a special removal hearing, before the same court, at which the Department of Justice would seek to prove by clear and convincing evidence that the alien had in fact engaged in terrorist activity. At the hearing, certain evidence could be presented in camera and not revealed to the

alien or the public, although its general nature would be summarized and revealed if that could be accomplished without seriously harming national security or jeopardizing human life.

Enactment of this Act would provide a valuable new tool with which to combat aliens who would use the United States as a base from which to launch terrorist attacks either on U.S. citizens or on persons in other countries. It is a carefully measured response to the menace posed by alien terrorists and fully comports with all constitutional requirements applicable to aliens.

Sec. 722.

This section sets out findings that aliens are committing terrorist acts in the United States and against United States citizens and interests and that the existing provisions of the Immigration and Nationality Act (INA) providing for the deportation of criminal aliens are inadequate to deal with this threat. The findings explain that these inadequacies arise primarily because the INA, particularly in its requirements pertaining to deportation hearings, requires disclosure of confidential information and investigative techniques that aid the terrorists themselves, terrorist organizations, and the foreign governments which support them.

The findings are important in explaining congressional intent and purpose. As noted above, the proposed Act creates an entirely new type of hearing to determine whether aliens believed to be terrorists should be removed from the United States. At such a "special removal hearing", the government would be permitted to introduce in camera and ex parte evidence that the alien has engaged in terrorist activity. Such hearings would be held before Article III judges, and the in camera evidence would be information that, if provided to the alien or otherwise made public, would pose a risk to national security, adversely affect foreign relations, reveal investigative techniques important to efficient law enforcement, or disclose confidential sources of information. Such an extraordinary type of hearing would be invoked only in a very small percentage of deportation cases, and would be applicable only in those cases in which an Article III judge has found probable cause to believe that the aliens in question are involved in terrorist acts. In appropriate cases, special removal hearings would be held in lieu of an administrative deportation hearing before an official of the Executive Office for Immigration Review. Although the bill provides the alien many rights equal to -- and in some respects greater than -- those enjoyed by aliens in ordinary deportation proceedings, the rights specified for aliens subject to a special removal hearing are deemed exclusive of any rights otherwise afforded under the INA.

It is within the power of Congress to provide for a special adjudicatory proceeding and to specify the procedural rights of aliens involved in terrorist acts. The Supreme Court has noted that "control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature . . . The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." Landon v. Plasencia, 459 U.S. 21, 34-35 (1982). Moreover, Congress can specify what type of process is due different classes of aliens. "[A] host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens itself is a heterogeneous multitude of persons with a wide-ranging variety of ties to this country." Mathews v. Diaz, 426 U.S. 67, 78-79 (1976). Because the Due Process Clause does not require "that all aliens must be placed in a single homogeneous legal classification" (id.), Congress can provide separate processes and procedures for determining whether to remove alien terrorists.

Sec. 723.

This section incorporates as the definition of the terms "terrorist activity" and "engage in terrorist activity" the corresponding definitions provided by section 601(a) of the recently enacted Immigration Act of 1990, Public Law 101-649.

Sec. 724.

This section adds a new title V to the Immigration and Nationality Act to provide a special process for removing alien terrorists when compliance with normal deportation procedures might adversely affect important interests of the United States. However, the new title V is not the only way of expelling alien terrorists from the United States. In addition to proceedings under the new special removal provisions, aliens falling within 8 U.S.C. 1251(a)(4)(B) alternatively could be deported following a regular deportation hearing. Moreover, like all other aliens, alien terrorists remain subject to possible expulsion for any of the remaining deportation grounds specified in section 241 of the Act (8 U.S.C. 1251). For example, alien terrorists who violate the criminal laws of the United States remain subject to "ordinary" deportation proceedings on charges under INA section 241(a)(2). The special removal provisions augment, without in any way narrowing, the prosecutorial options in cases of alien terrorists.

The new title V consists of four new sections of the INA, sections 501-504 (8 U.S.C. 1601-1604). Briefly, the title

provides for creation of a special court comprised of Article III judges, patterned after the special court created under the Foreign Intelligence Surveillance Act (50 U.S.C. 1801 et seq.). When the Department of Justice believes it has identified an alien terrorist, that is, an alien who falls within 8 U.S.C. 1251(a)(4)(B), and determines that to disclose the evidence of that fact to the alien or the public would compromise national security, foreign policy, investigatory techniques, or confidential sources of information, the Department may seek an order from the special court. The order would authorize the Department to present its evidence, or some part of its evidence, that the alien is a terrorist in camera and ex parte at a special removal hearing. The judge could then direct the alien and his counsel and all spectators to leave the courtroom during the presentation of the evidence covered by the order, or alternatively could elect to receive the evidence in chambers with only the reporter, the counsel for the government, and the witness present. Only the general nature of such evidence, without identifying particulars, would be revealed to the alien, his counsel, and the public.

If, at the conclusion of the hearing, the judge finds that the government has established by clear and convincing evidence that the alien has engaged in terrorist activity, the judge would order the alien removed from the United States. The alien could appeal the decision to the Court of Appeals for the Federal Circuit, and ultimately could petition for a writ of certiorari to the Supreme Court.

Use of information that is not made available to the alien for reasons of national security is a well-established concept in the existing provisions of the INA and immigration regulations. For example, section 235(c) provides for an expedited exclusion process for aliens excludable under 8 U.S.C. 1182(a)(3) (providing for the exclusion, inter alia, of alien spies, saboteurs, and terrorists), and states in relevant part:

> If the Attorney General is satisfied that the alien is excludable under [paragraph 212(a)(3)] on the basis of information of a confidential nature, the disclosure of which the Attorney General, in his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by [an immigration judge].

Thus, where it is necessary to protect sensitive information, existing law authorizes the Attorney General to conduct exclusion proceedings outside the ordinary immigration court procedures and to rely on confidential information in ordering the exclusion of alien terrorists.

In the deportation context, 8 C.F.R. 242.17 (1990) provides that in determining whether to grant discretionary relief to an otherwise deportable alien, the immigration judge

> may consider and base his decision on information not contained in the record and not made available for inspection by the [alien], provided the Commissioner has determined that such information is relevant and is classified under Executive Order No. 12356 (47 FR 14874, April 6, 1982) as requiring protection from unauthorized disclosure in the interest of national security.

The constitutionality of this provision has been upheld. Suciu v. INS, 755 F.2d 127 (8th Cir. 1985). The alien in that case had been in the United States for sixteen years and had become deportable for overstaying his student visa, a deportation ground ordinarily susceptible to discretionary relief. Nevertheless, the court held that it was proper to deny the alien discretionary relief without disclosing to him the reasons for the denial. Suciu followed the Supreme Court's holding sustaining the constitutionality of a similar predecessor regulation in Jay v. Boyd, 351 U.S. 345 (1956).

Section 501 (Applicability)

Section 501 sets forth the applicability of the new title. Section 501(a) states that the title may, but need not, be employed by the Department of Justice whenever it has information that an alien is subject to deportation because he is an alien described in 8 U.S.C. 1251(a)(4)(B), that is, that he has engaged in terrorist activity.

Section 501(b) provides that whenever an official of the Department of Justice determines to seek the expulsion of an alien terrorist under the special removal provisions, only the provisions of the new title need be followed. This ensures that such an alien will not be deemed to have any additional rights under the other provisions of the Immigration and Nationality Act. Except when specifically referenced in the special removal provisions, the remainder of the INA would be inapplicable. For example, under the special removal provisions an alien who has entered the United States (and thus is not susceptible to exclusion proceedings) need not be given a deportation hearing under section 242 of the Act, 8 U.S.C. 1252, and will not have available the rights generally afforded aliens in deportation proceedings (e.g., the opportunity for an alien out of status to correct his status).

Section 501(c) states that Congress has enacted the title upon finding that alien terrorists represent a unique threat to the security and interests of the United States. Consequently, the subsection states Congress' specific intent that the Attorney General be authorized to remove such aliens without resort to a traditional deportation hearing, following an ex parte judicial determination of probable cause to believe they have engaged in terrorist activity and a further judicial determination, following a modified adversarial hearing, that the Department of Justice has established by clear and convincing evidence that the aliens in fact have engaged in terrorist activity.

Section 501(c) is designed to make clear that singling out alien terrorists for a special type of hearing rather than according them ordinary deportation hearings is a careful and deliberate policy choice by a political branch of government. This policy choice is grounded upon the legislative determination that alien terrorists seriously threaten the security and interests of the United States and that the existing process for adjudicating and effecting alien removal is inadequate to meet this threat. In accordance with settled Supreme Court precedent, such a choice is well within the authority of the political branches of government to control our relationship with and response to aliens.

For example, in Mathews v. Diaz, supra, the Court held that Congress could constitutionally provide that only some aliens were entitled to Medicare benefits. The Court held that it was "unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and duration of his residence," and noted that the Court was "especially reluctant to question the exercise of congressional judgment" in matters of alien regulation. 426 U.S. at 83, 84; see Fiallo v. Bell, 430 U.S. 787, 792 (1977) (describing the regulation of aliens as a political matter "largely immune from judicial control"). The specific findings and reference to the intent in adopting the new provisions of title V make clear the policy judgment that alien terrorists should be treated as a separate class of aliens and that this choice should not be disturbed by the courts.

Section 502 (Special Removal Hearing)

Section 502 sets out the procedure for the special removal hearing. Section 502(a) provides that whenever the Department of Justice determines to use the special removal process it must submit a written application to the special court (established pursuant to section 503) for an order authorizing such procedure. Each application must indicate that the Attorney General or Deputy Attorney General has approved its submission and must include the identity of the Department attorney making the application, the identity of the alien against whom removal proceedings are sought, and a statement of the facts and

circumstances relied upon by the Department of Justice as justifying the belief that the subject is an alien terrorist and that following normal deportation procedures would "pose a risk to the national security of the United States, adversely affect foreign relations, reveal an investigative technique important to efficient law enforcement, or disclose a confidential source of information."

Section 502(b) provides that applications for special removal proceedings shall be filed under seal with the special court established pursuant to section 503. At or after the time the application is filed, the Attorney General may take the subject alien into custody. The Attorney General's authority to retain the alien in custody is governed by the provisions of new title V which, as explained below, provide in certain circumstances for the release of the alien.

Although title V does not require the Attorney General to take the alien subjects of special removal applications into custody, it is expected that most such aliens will be apprehended and confined. The Attorney General's decision whether to take such aliens into custody will not be subject to judicial review. Subsequent provisions (section 504(a)) authorize the Attorney General to retain custody of alien terrorists who have been ordered removed until such aliens can be physically delivered outside our borders.

Section 502(c) provides that special removal applications shall be considered by a single Article III judge in accordance with section 503. In each case, the judge shall hold an ex parte hearing to receive and consider the written information provided with the application and such other evidence, whether documentary or testimonial in form, as the Department of Justice may proffer. The judge shall grant an ex parte order authorizing the special removal hearing as provided under title V if the judge finds that, on the basis of the information and evidence presented, there is probable cause to believe that the subject of the application is an alien who falls within the definition of alien terrorist and that adherence to the ordinary deportation procedures would impair national security, adversely affect foreign relations, reveal an important investigatory technique, or disclose a confidential source of information.

Section 502(d)(1) provides that in any case in which a special removal application is denied, the Department of Justice within twenty days may appeal the denial to the Court of Appeals for the Federal Circuit. In the event of a timely appeal, a confined alien may be retained in custody. When the Department of Justice appeals from the denial of a special removal application, the record of proceedings will be transmitted to the Court of Appeals under seal and the court will hear the appeal ex parte. Subsequent provisions (section 502(p)) authorize the

Department of Justice to petition the Supreme Court for a writ of certiorari from an adverse appellate judgment.

Section 502(d)(2) provides that if the Department of Justice does not seek appellate review of the denial of a special removal application, the subject alien must be released from custody unless, as a deportable alien, the alien may be arrested and taken into custody pursuant to title II of the Immigration and Nationality Act. Thus, for example, when the judge finds that the special procedures of title V are unwarranted but the alien is subject to deportation as an overstay or for violation of status, the alien might be retained in custody but such detention would be pursuant to and governed by the provisions of title II.

Subsection 502(d)(3) provides that if a special removal application is denied because the judge finds no probable cause that the alien has engaged in terrorist activities, the alien must be released from custody during the pendency of an appeal by the government. However, section 502(d)(3) is similar to section 502(d)(2) in that it provides for the possibility of continued detention in the case of aliens who otherwise are subject to deportation under title II of the Act.

Section 502(d)(4) applies to cases in which the judge finds probable cause that the subject of a special removal application has been correctly identified as an alien terrorist, but fails to find probable cause that use of the special procedures are necessary for reasons of national security, foreign relations, or the protection of law enforcement techniques or confidential sources of information, and the Department of Justice determines to appeal. A finding that the alien has engaged in terrorist activity -- a ground for deportation that would support confinement under title II of the Act -- justifies retaining the alien in custody. Nevertheless, section 502(d)(4) provides that the judge must determine the question of custody based upon an assessment of the risk of flight and the danger to the community or individuals should the alien be released. The judge shall release the alien subject to the least restrictive condition(s) that will reasonably assure the alien's appearance at future proceedings, should the government prevail on its appeal, and will not endanger the community or individual members thereof. The possible release conditions are those authorized under the Bail Reform Act of 1984, 18 U.S.C. 3142(b) and (c), and range from release on personal recognizance to release on execution of a bail bond or release limited to certain places or periods of time. As with the referenced provisions of the Bail Reform Act, the judge may deny release altogether upon determining that no condition(s) of release would assure the alien's future appearance and community safety.

Section 502(e)(1) provides that in cases in which the special removal application is approved, the judge must then

consider separately each piece of evidence that the Department of Justice proposes to introduce in camera at the special removal hearing. The judge shall authorize the in camera introduction of any item of evidence which, if introduced in open court or in ordinary deportation proceedings, "would pose a risk to the national security of the United States, adversely affect foreign relations, reveal an investigative technique important to efficient law enforcement, or disclose a confidential source of information." The same standard applies both to justify the convening of a special removal hearing and to support the in camera introduction of specific items of evidence because a central purpose of the special procedures is to allow the secure use of sensitive, confidential information.

Section 502(e)(1) also provides that with respect to any evidence authorized to be introduced in camera, the judge must consider how the alien subject to the proceedings is to be advised regarding such evidence. Section 502(e)(1)(A) provides that the judge shall sign and the Department of Justice shall provide to the alien a summary of the in camera evidence that the government plans to introduce at the special removal hearing. The summary is to be sufficient to inform the alien of the general nature of the evidence that he has engaged in terrorist activity, "and to permit the alien to marshal the facts and prepare a defense," but the summary "shall not pose a risk to the national security, adversely affect foreign relations, reveal an investigative technique important to efficient law enforcement, or disclose a confidential source." In considering the summary to be provided to the alien of the government's proffered evidence, it is intended that the judge balance the alien's interest in having an opportunity to hear and respond to the case against him against the government's extraordinarily strong interest in protecting the national security, foreign relations, important investigative techniques, and confidential sources of information.

Section 502(e)(1)(B) deals with the extraordinary situation in which the alien cannot safely be provided with any summary of the government's in camera evidence. It provides that "if necessary to prevent serious harm to the national security or death or serious bodily injury to any person," the notice to the alien may consist of a statement that, pursuant to such provisions, no summary of the evidence will be provided.

Subparagraphs (A) and (B) of section 502(e)(1) must be considered in conjunction with each other. For example, if the Department of Justice has evidence from a confidential source that the alien has been involved in a plot to sabotage Dulles Airport, the summary under (e)(1)(A) might characterize the evidence without identifying the source. If even alluding to the sabotage plot would threaten disclosure of the source, the provisions of (e)(1)(B) might apply. Similarly, if even a

cursory description of the government's in camera evidence would threaten serious harm to national security or threaten death or serious bodily injury, (e)(1)(B) would apply and the alien would be told that no summary of the government's proffer regarding his involvement in terrorism was possible.

It is anticipated that section 502(e)(1)(B) will only rarely be used and that usually it will be possible to provide the alien with notice of at least the general nature of the circumstances giving rise to the removal proceedings. However, it is not intended that (e)(1)(B) be avoided because it might be possible by other means to reduce the risk threatened by providing the alien with a summary of the in camera evidence. For example, if any summary of the evidence threatens the death of an informant, the judge should direct that no summary need be provided. The judge in such a case should not order a summary on the grounds that the informant might be provided with guards or other protection against the threatened harm.

Section 502(e)(2) provides that, in certain situations, the Department of Justice may take an interlocutory appeal to the Court of Appeals for the Federal Circuit from the judge's rulings regarding the in camera admission and summarization of particular items of evidence. Interlocutory appeal is authorized if the judge rules that a piece of evidence may not be introduced in camera; if the Department disagrees with the judge regarding the wording of an evidence summary (that is, if the Department believes that the summary will compromise national security, foreign relations, investigatory techniques, or a confidential source); or if the judge rules that a summary must be provided and the Department contends that any summary would threaten national security or result in death or serious bodily injury. Because the alien is to remain in custody during such an appeal, the Court of Appeals must hear the matter as expeditiously as possible. When the Department appeals, the entire record must be transmitted to the Court of Appeals under seal and the court shall hear the matter ex parte.

Section 502(f) provides that in any case in which the Department's application is approved, the court shall order a special removal hearing for the purpose of determining whether the alien in question has engaged in terrorist activity. Subsection (f) provides that "[i]n accordance with subsection (e), the alien shall be given reasonable notice of the nature of the charges against him." This cross-reference is intended to make clear that subsection (f) is not to be construed as requiring that information be given to the alien about the nature of the charges if such information would reveal the matters that are to be introduced in camera. The special removal hearing must be held as expeditiously as possible.

Section 502(g) provides that the special removal hearing

shall be held before the same judge who approved the Department of Justice's application therefor unless the judge becomes unavailable due to illness or disability.

Section 502(h) sets out the rights to be afforded to the alien at the special removal hearing. The hearing shall be open to the public, the alien shall have the right to be represented by counsel (at government expense if he cannot afford representation), and to introduce evidence in his own behalf. Except as provided in section 502(j) regarding presentation of evidence in camera, the alien also shall have a reasonable opportunity to examine the evidence against him and to cross-examine adverse witnesses. As in the case of administrative proceedings under the INA and civil proceedings generally, the alien may be called as a witness by the Department of Justice. A verbatim record of the proceedings and of all evidence and testimony shall be kept.

Section 502(i) provides that either the alien or the government may request the issuance of a subpoena for witnesses and documents. A subpoena request may be made ex parte, except that the judge must inform the Department of Justice where the subpoena sought by the alien threatens disclosure of evidence or the source of evidence which the Department of Justice has introduced or proffered for introduction in camera. In such cases, the Department of Justice shall be given a reasonable opportunity to oppose the issuance of a subpoena and, if necessary to protect the confidentiality of the evidence or its source, the judge may, in his discretion, hear such opposition in camera. A subpoena under section 502(i) may be served anywhere in the United States. Where the alien shows an inability to pay for the appearance of a necessary witness, the court may order the costs of the subpoena and witness fee to be paid by the government from funds appropriated for the enforcement of title II of the INA. Section 502(i) states that it is not intended to allow the alien access to classified information.

Section 502(j) provides that any evidence which has been summarized pursuant to section 502(e)(1)(A) or for which no summary is possible as provided in section 502(e)(1)(B) may be introduced into the record, in documentary or testimonial form, in camera. While the alien and members of the public would be aware that evidence was being submitted in camera, neither the alien nor the public would be informed of the nature of the evidence except as set out in section 502(e). For example, if the Department of Justice sought to present in camera evidence through live testimony, the courtroom could be cleared of the alien, his counsel, and the public while the testimony is presented. Alternatively, the court might hear the testimony in chambers attended by only the reporter, the government's counsel, and the witness. In the case of documentary evidence, sealed documents could be presented to the court without examination by

the alien or his counsel (or access by the public).

While the Department of Justice does not have to present evidence in camera, even if it previously has received authorization to do so, it is contemplated that ordinarily much of the government's evidence (or at least the crucial portions thereof) will be presented in this fashion rather than in open court. The right to present evidence in camera was determined in the ex parte proceedings before the court pursuant to subsections (a) through (c) of section 502.

Section 502(k) provides that evidence introduced in open session or in camera may include all or part of the information that was presented at the earlier ex parte proceedings. If the evidence is to be introduced in camera, the attorney for the Department of Justice could refer the judge to such evidence in the transcript of the ex parte hearing and ask that it be considered as evidence at the removal hearing itself. The Department might present evidence in open court rather than in camera as a result of changed circumstances, for example, where the informant whose life was at risk had died before the hearing or if the Department believes that a public presentation of the evidence might have a deterrent effect on other terrorists. In any event, once the Department of Justice has received authorization to present evidence in camera, its decision whether to do so is purely discretionary and is not subject to review at the time of the special removal hearing.

Section 502(l) provides that following the introduction of evidence, the attorney for the Department of Justice and the attorney for the alien shall be given fair opportunity to present argument as to whether the evidence is sufficient to justify the alien's removal. At the judge's discretion, in camera argument by the Department of Justice attorney may be heard regarding evidence received in camera.

Section 502(m) provides that the Department of Justice has the burden of showing that the evidence is sufficient. This burden is not satisfied unless the Department establishes by clear and convincing evidence -- the standard of proof applicable in a deportation hearing -- that the alien has engaged in terrorist activity. If the judge finds that the Department has met that burden, the judge must order the alien removed. In cases in which the alien has been shown to have engaged in terrorist activity, the judge has no authority to decide that removal would be unfair or is otherwise unwarranted.

Section 502(n)(1) provides that the judge must render his decision as to the alien's removal in the form of a written order. The order must state the facts found and the conclusions of law reached, but shall not reveal the substance of any evidence received in camera.

Section 502(n)(2) provides that either the alien or the Department of Justice may appeal the judge's decision to the Court of Appeals for the Federal Circuit. Any such appeal must be filed within twenty days, and during this period the order shall not be executed. Information received in camera at the special removal hearing shall be transmitted to the Court of Appeals under seal. The Court of Appeals must hear the appeal as expeditiously as possible.

Section 502(n)(3) sets out the standard of review for proceedings in the Court of Appeals. Questions of law are to be reviewed de novo, but findings of fact may not be overturned unless clearly erroneous. This is the usual standard in civil cases.

Section 502(o) provides that in cases in which the judge decides that the alien should not be removed, the alien must be released from custody. There is an exception for aliens who may be arrested and taken into custody pursuant to title II of the INA as aliens subject to deportation. For such aliens, the issues of release and/or circumstances of continued detention would be governed by the pertinent provisions of the INA.

Section 502(p) provides that following a decision by the Court of Appeals, either the alien or the government may seek a writ of certiorari in the Supreme Court. In such cases, information submitted to the Court of Appeals under seal shall, if transmitted to the Supreme Court, remain under seal.

Section 503 (Designation of Judges)

Section 503 establishes the special court to consider terrorist removal cases under section 502, patterned on the special court created under the Foreign Intelligence Surveillance Act, 50 U.S.C. 1801 et seq. Section 503(a) provides that the court will consist of five federal district court judges chosen by the Chief Justice of the United States from five different judicial circuits. One of these judges shall be designated as the chief or presiding judge. The presiding judge shall promulgate rules for the functioning of the special court. The presiding judge also shall be responsible for assigning cases to the various judges. Section 503(c) provides that judges shall be appointed to the special court for terms of five years, except for the initial appointments the terms of which shall vary from one to five years so that one new judge will be appointed each year. Judges may be reappointed to the special court.

Section 503(b) provides that all proceedings under section 502 are to be held as expeditiously as possible. Section 503(b) also provides that the Chief Justice, in consultation with the Attorney General and other appropriate officials, shall provide

for the maintenance of appropriate security measures to protect the ex parte special removal applications, the orders entered in response to such applications, and the evidence received in camera sufficient to prevent disclosures which could compromise national security, foreign relations, investigative techniques, or confidential sources.

Section 504 (Miscellaneous Provisions)

Section 504 contains the title's miscellaneous provisions. Section 504(a) provides that following a final determination that the alien terrorist should be removed (that is, after the special removal hearing and completion of any appellate review), the Attorney General may retain the alien in custody (or if the alien was released, apprehend and place the alien in custody) until he can be removed from the United States. The alien is provided the right to choose the country to which he will be removed, subject to the Attorney General's authority to designate another country if the alien's choice would impair a United States treaty obligation (such as an obligation under an extradition treaty) or would adversely affect the foreign policy of the United States. If the alien does not choose a country or if he chooses a country deemed unacceptable, the Attorney General must make efforts to find a country that will take the alien. The alien may, at the Attorney General's discretion, be kept in custody until an appropriate country can be found, and the Attorney General shall provide the alien with a written report regarding such efforts at least once every six months. The Attorney General's determinations and actions regarding execution of the removal order are not subject to direct or collateral judicial review, except for a claim that continued detention violates the alien's constitutional rights. The alien terrorist shall be photographed and fingerprinted and advised of the special penalty provisions for unlawful return before he is removed from the United States.

Section 504(b) provides that, notwithstanding section 504(a), the Attorney General may defer the actual removal of the alien terrorist to allow the alien to face trial on any State or federal criminal charges (whether or not related to his terrorist activity) and, if convicted, to serve a sentence of confinement. Section 504(b)(2) provides that pending the service of a State or federal sentence of confinement, the alien terrorist is to remain in the Attorney General's custody unless the Attorney General determines that the alien can be released to the custody of State authorities for pretrial confinement in a State facility without endangering national security or public safety. It is intended that where the alien terrorist could possibly secure pretrial release, the Attorney General shall not release the alien to a State for pretrial confinement. Section 503(b)(3) provides that if an alien terrorist released to State authorities is subsequently to be released from state custody because of an acquittal in the collateral trial, completion of the alien's

sentence of confinement, or otherwise, the alien shall immediately be returned to the custody of the Attorney General who shall then proceed to effect the alien's removal from the United States.

Section 504(c) provides that for purposes of sections 751 and 752 of title 18 (punishing escape from confinement and aiding such an escape), an alien in the Attorney General's custody pursuant to this new title -- whether awaiting or after completion of a special removal hearing -- shall be treated as if in custody by virtue of a felony arrest. Accordingly, escape by or aiding the escape of an alien terrorist will be punishable by imprisonment for up to five years.

Section 504(d) provides that an alien in the Attorney General's custody pursuant to this new title -- whether awaiting or after completion of a special removal hearing -- shall be given reasonable opportunity to receive visits from relatives and friends and to consult with his attorney. Determination of what is "reasonable" usually will follow the ordinary rules of the facility in which the alien is confined.

Section 504(d) also provides that when an alien is confined pursuant to this new title he shall have the right to contact appropriate diplomatic or consular officers of his country of citizenship or nationality. Moreover, even if the alien makes no such request, subsection (d) directs the Attorney General to notify the appropriate embassy of the alien's detention.

Sec. 725.

This section of the bill sets out conforming amendments. First, section 106 of the INA, 8 U.S.C. 1105a, is amended to provide that appeals from orders entered pursuant to section 235(c) of the Act (pertaining to summary exclusion proceedings for alien spies, saboteurs, and terrorists) shall be to the Court of Appeals for the Federal Circuit. Thus, in cases involving alien terrorists the same court of appeals shall hear both exclusion and deportation appeals and will develop unique expertise concerning such cases.

Second, section 276 of the INA, 8 U.S.C. 1326, is amended to add increased penalties for an alien entering or attempting to enter the United States without permission after removal under the new title or exclusion under section 235(c) for terrorist activity. For aliens unlawfully re-entering or attempting to re-enter the United States, the section presently provides for a fine pursuant to title 18 and/or imprisonment for up to two years (five years when the alien has been convicted of a felony in the United States, or 15 years when convicted of an "aggravated felony"); the bill increases to a mandatory ten years the term of imprisonment for re-entering alien terrorists.

Finally, section 106 of the INA, 8 U.S.C. 1105a, is amended to strike subsection (a)(9) regarding habeas corpus review of deportation orders. Originally enacted in 1961 to make clear that the exclusive provision for review of final deportation orders through petition to the courts of appeals was not intended to extinguish traditional writs of habeas corpus in cases of wrongful detention, the subsection has been the source of confusion and duplicative litigation in the courts. Congress never intended that habeas corpus proceedings be an alternative to the process of petitioning the courts of appeals for review of deportation orders. Elimination of subsection (a)(9) will make clear that any review of the merits of a deportation order or the denial of relief from deportation is available only through petition for review in the courts of appeals, while leaving unchanged the traditional writ of habeas corpus to examine challenges to detention arising from asserted errors of constitutional proportions.

Sec. 726.

This section provides that the new provisions are effective upon enactment and "apply to all aliens without regard to the date of entry or attempted entry into the United States." Aliens may not avoid the special removal process on the grounds that either their involvement in terrorist activity or their entry into the United States occurred before enactment of the new title. Upon enactment, the new title will be available to the Attorney General for removal of any and all alien terrorists.

D. Terrorism Offenses and Sanctions

Sec. 731. Torture

This section contains the necessary legislation to implement the United Nations Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment. The Senate gave its advice and consent to the Convention on October 27, 1990, after making several reservations, understandings and declarations. The United States will not become a party to the Convention until the necessary implementing legislation is enacted. The legislation creates a new chapter 113B (Torture) in title 18, United States Code. The new chapter is composed of three sections. Section 2340 contains the definitions for "torture," "severe mental pain or suffering," and "United States." The definition of torture emanates directly from article 1 of the Convention. The definition for "severe mental pain or suffering" incorporates the understanding made by the Senate concerning this term. The term "United States" is defined to encompass the requirements of paragraph (1)(a) of article 5 of the Convention.

Section 2340A creates the federal offense of torture committed outside the United States and establishes appropriate penalties taking into account the grave nature of the offense. The penalty provision contains a death penalty when death results from the prohibited conduct. The section applies only to acts of torture committed outside the United States. Since "United States" is defined to include any registered United States aircraft or ship, the provision is not applicable to these particular conveyances when they are outside of the geographical territory of the United States. These places would, as would acts of torture committed within the United States, be covered by existing applicable federal and state statutes. Under section 2340A(b)(1) there is federal jurisdiction when a national of the United States commits an act of torture overseas (i.e., outside the territorial jurisdiction of the United States as defined in section 2340(3)). This jurisdiction is mandated by paragraph 1(b) of article 5 of the Convention. There is also federal jurisdiction under section 2340A(b) when an offender who committed an act of torture outside the United States is subsequently found in the United States. Federal jurisdiction is necessary in this instance in order to comply with paragraph 2 of article 5 of the Convention should the United States decide not to extradite the perpetrator under paragraph 1 of article 7 of the Convention.

Section 2340B makes it clear that the new federal provision on torture is intended to supplement existing state law and not to supplant it. Consistent with the Senate's understanding pertaining to article 14 of the Convention, the legislation does not create any private right of action for acts of torture committed outside the territory of the United States.

Sec. 732. Use of Weapons of Mass Destruction

This section creates a new offense for the use or attempted use of weapons of mass destruction within the United States, or against a national of the United States or property of the United States anywhere. The death penalty is authorized if death results.

Weapons of mass destruction are defined to include destructive devices, poison gas, weapons involving disease organisms, and weapons releasing radiation or radioactivity at a level dangerous to human life. "Destructive devices" has the meaning given in 18 U.S.C. 921(a)(4), and generally includes bombs, grenades, rockets and missiles, mines, and artillery.

Sec. 733. Homicides and Attempted Homicides Involving Firearms in Federal Facilities

This section adds a provision to 18 U.S.C. 930 to proscribe

and punish killings and attempted killings occurring in the course of attacks within or against federal facilities that involve firearms or other dangerous weapons. The death penalty is authorized if death results.

Sec. 734. Providing Material Support for Terrorists

This section creates a new offense of providing material support or resources, or concealing the nature, location, source or ownership of material support or resources, for various terrorist-related offenses.

As a result of international pressures against states which provide support to international terrorists, some terrorist groups have been seeking other means of financing and support, such as raising funds from sympathizers or establishing front companies. The offense created by this section is intended to prevent such activities and other activities in support of the specified offenses, and also to encourage other nations to take similar steps to curb the flow of financial assets to terrorists.

Sec. 735. Addition of Terrorist Offenses to the RICO Statute

Section 735 adds to the Racketeer Influenced and Corrupt Organizations (RICO) statute certain federal violent crimes relating to murder and destruction of property. These are the offenses most often committed by terrorists. While most murders committed within the United States are encompassed as predicate acts for the RICO statute by section 1961(1)(A) of title 18, United States Code, in that they may be a murder under state law, RICO does not presently reach most terrorist acts directed against United States interests overseas. Hence, this section adds to RICO the most likely extraterritorial violations of federal law whose commission by terrorists can be anticipated.

While prosecution of terrorists is always a difficult task, the availability of RICO as a prosecutive tool may be appropriate in a few rare situations where the enterprise used to commit the terrorist activity has sufficient assets which can be forfeited under the RICO statute. Subsection (c) amends the definition of "pattern of racketeering activity" so that it does not require a pecuniary purpose when all of the predicate offenses are crimes of violence. This construction is necessary because often terrorist groups commit their crimes for political reasons not always involving financial gain for themselves or their members. A few federal cases, e.g. U.S. v. Ivic, 700 F.2d 51 (2d Cir. 1983) and U.S. v. Bagaric, 706 F.2d 42 (2d Cir. 1983), have suggested the necessity of some mercenary motive for a RICO enterprise. This provision eliminates any such requirement for those enterprises engaging in a pattern of purely violent crimes. The term "crime of violence" is defined in 18 U.S.C. § 16.

Sec. 736. Forfeiture for Terrorist and Other Violent Acts

This section makes changes to chapter 46 of title 18, United States Code. It creates the following two new sections: (1) section 983 which deals with civil forfeiture of property used to commit violent acts; and (2) section 984 which deals with criminal forfeiture of property used to commit violent acts.

Section 983 is especially broad as it covers property "used or intended for use to commit or facilitate the commission of a violent act." It excludes property of an innocent owner and adopts the custom laws relating to forfeiture. Section 984 creates a criminal forfeiture for those convicted of violent acts. It adopts the criminal forfeiture procedures of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Criminal forfeiture is provided to facilitate economy of judicial resources as both the conviction and forfeiture can be conducted in one proceeding.

Sec. 737. Enhanced Penalties for Certain Offenses

This section provides enhanced penalties for a number of offenses to help combat terrorism. The offenses for which penalties are increased include violations of the International Emergency Economic Powers Act, and the misuse of passport and travel documents provisions.

Sec. 738. Sentencing Guidelines Increase for Terrorist Crimes

This section directs the Sentencing Commission to increase the penalties for offenses that involve or are intended to promote international terrorism.

E. Antiterrorism Enforcement Provisions

Sec. 741. Aliens Cooperating in Terrorist or Other Investigations

This section authorizes the Attorney General to grant permanent resident status for aliens in the interest of national security or for alien witnesses who cooperate in the prosecution of international terrorism and other cases. This amendment is needed to address the serious problem that the Department of Justice has been experiencing in inducing foreign witnesses to testify at federal trials against international terrorists and drug traffickers. Without the ability to remain in the United States, alien witnesses frequently refuse to cooperate with U.S. prosecutors because upon return to their homelands they are exposed to retaliation for such cooperation. Section 741 authorizes the Attorney General to grant permanent resident status for cooperating alien witnesses and their immediate

families, with the number of aliens granted such status limited to 200 in any one year.

Sec. 742. Amendment to the Alien Enemy Act

Section 21 of the Alien Enemy Act, 50 U.S.C. 21, gives the President broad authority over the detention and removal from the United States of aliens from a country at war with the United States or from a country that has threatened an incursion into United States territory. The current Persian Gulf crisis demonstrates that the United States can also be subjected to serious threats of terrorist attacks from citizens of other countries. The Alien Enemy Act, however, does not now clearly extend to aliens from these other countries. This amendment makes clear that the provisions of the Alien Enemy Act may be invoked against citizens of other nations who threaten predatory incursions against the United States as well as against citizens of the hostile nation.

Sec. 743. Counterintelligence Access to Telephone Records

This section would permit the FBI to obtain subscriber information from a communications service provider upon certification of the Director, FBI (or his designee) to the service provider that the facility was utilized to contact a foreign power or an agent of a foreign power as defined by section 101 of the Foreign Intelligence Surveillance Act of 1978.

Sec. 744. Counterintelligence Access to Credit Records

This section would provide the FBI with new authority to request consumer reports and identifying information from consumer reporting agencies on persons who are subjects of foreign counterintelligence investigations, without having such reports being made known to the subject. It is similar to the authority contained in section 314 of the Right to Financial Privacy Act of 1979, giving the FBI authority to access financial records covered by that statute for foreign counterintelligence purposes. The Director, FBI would have to certify that the report relates to an agent of a foreign power or is otherwise necessary in connection with an authorized foreign counterintelligence investigation.

The existing statute authorizes consumer reporting agencies to provide consumer reports only with the written consent of the consumer, or to persons who intend to use the information for a variety of specified purposes (e.g., for employment, in connection with a credit transaction). In other words, while use in a foreign counterintelligence investigation is not a specified use, the uses that are specified are quite broad, suggesting a rather marginal guarantee of privacy. The proposed amendment

would prohibit disclosure to the consumer (which otherwise is required) of the fact that the request was made or information obtained.

Sec. 745. Authorization for Interceptions of Communications

This section adds additional crimes to the list of Title III predicate offenses for interception of wire, oral and electronic communications. The offenses added include violations of the International Emergency Economic Powers Act, the Export Administration Act, the Trading with the Enemy Act, the Neutrality Act, and a number of other anti-terrorism provisions.

Sec. 746. Participation of Foreign and State Government Personnel in Interceptions of Communications

This section would amend 18 U.S.C. 2815(5) to make clear that foreign and state 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 doubtful whether this covers foreign and state government personnel as opposed to federal employees.

There is often great utility in permitting foreign and state 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. Section 746 would effect this result.

Sec. 747. Disclosure of Intercepted Communications to Foreign Law Enforcement Agencies

There has been a dramatic increase in recent years in the amount of international law enforcement interaction, necessitated by an increasingly sophisticated and active international criminal element. This has created a need for authority to disclose information obtained through electronic surveillance to foreign law enforcement agencies, in order to address effectively

international criminal activity, including international terrorism.

This section accordingly augments the definition of "investigative or law enforcement officer" in 18 U.S.C. 2510(7), for purposes of 18 U.S.C. 2517(1)-(2), so as to include foreign law enforcement officers. This would permit disclosure of intercepted communications to, and use of intercepted communications by, such officers in furtherance of the performance of their duties as provided in 18 U.S.C. 2517(1)-(2).

Sec. 748. Extension of Statute of Limitations for Certain Terrorism Offenses

This section extends the statute of limitations to ten years for certain offenses that are likely to be committed by terrorists overseas. Because of the difficulty in gaining sufficient evidence to prosecute overseas offenses, the extension of the statute of limitations is necessary to better ensure that international terrorists will be brought to justice. Of course, if the offense included within any of the listed statutes is a capital offense, no statute of limitations exists (18 U.S.C. 3281).

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VIII. SEXUAL VIOLENCE AND CHILD ABUSE

SEC. 801. ADMISSIBILITY OF EVIDENCE OF SIMILAR CRIMES IN SEXUAL ASSAULT AND CHILD MOLESTATION CASES

In cases where the defendant is accused of committing an offense of sexual assault or child molestation, courts in the United States have traditionally favored the broad admission at trial of evidence of the defendant's prior commission of similar crimes. The contemporary edition of Wigmore's treatise describes this tendency as follows (IA Wigmore's Evidence § 62.2 (Tillers rev. 1983)):

> [T]here is a strong tendency in prosecutions for sex offenses to admit evidence of the accused's sexual proclivities. Do such decisions show that the general rule against the use of propensity evidence against an accused is not honored in sex offense prosecutions? We think so.
>
> [S]ome states and courts have forthrightly and expressly recogniz[ed] a "lustful disposition" or sexual proclivity exception to the general rule barring the use of character evidence against an accused . . . . [J]urisdictions that do not expressly recognize a lustful disposition exception may effectively recognize such an exception by expansively interpreting in prosecutions for sex offenses various well-established exceptions to the character evidence rule. The exception for common scheme or design is frequently used, but other exceptions are also used.

More succinctly, the Supreme Court of Wyoming observed in Elliot v. State, 600 P.2d 1044, 1047-48 (1979):

> [I]n recent years a preponderance of the courts have sustained the admissibility of the testimony of third persons as to prior or subsequent similar crimes, wrongs or acts in cases involving sexual offenses . . . . [I]n cases involving sexual assaults, such as incest, and statutory rape with family members as the victims, the courts in recent years have almost uniformly admitted such testimony.

The willingness of the courts to admit similar crimes evidence in prosecutions for serious sex crimes is of great importance to effective prosecution in this area, and hence to the public's security against dangerous sex offenders. In a rape prosecution, for example, disclosure of the fact that the defendant has previously committed other rapes is frequently critical to the jury's informed assessment of the credibility of a claim by the defense that the victim consented and that the

defendant is being falsely accused.

The importance of admitting this type of evidence is still greater in child molestation cases. Such cases regularly present the need to rely on the testimony of child victim-witnesses whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, the public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense is truly compelling.

Notwithstanding the salutary tendency of the courts to admit evidence of other offenses by the defendant in such cases, the current state of the law in this area is not satisfactory. The approach of the courts has been characterized by considerable uncertainty and inconsistency. Not all courts have recognized the area of sex offense prosecutions as one requiring special standards or treatment, and those which have adopted admission rules of varying scope and rationale.

Moreover, even where the courts have traditionally favored admission of "similar crimes evidence" in sex offense prosecutions, the continuation of this approach has been jeopardized by recent developments. These developments include the widespread adoption by the states of codified rules of evidence modeled on the Federal Rules of Evidence, which make no special allowance for admitting similar crimes evidence in sex offense cases. They also include the limitation of evidence of other sexual activity by the victim under "rape victim shield laws," which has given rise to an argument that it would be unfair or inappropriate to be more permissive in admitting evidence of the commission of other sex crimes by the defendant.

Section 801 of title VIII would amend the Federal Rules of Evidence to ensure an appropriate scope of admission for evidence of similar crimes by defendants accused of serious sex crimes. The section adds three new Rules (proposed Rules 413, 414, and 415), which state general rules of admissibility for such evidence. The proposed new rules would apply directly in federal cases, and would have broader significance as a potential model for state reforms.

The remainder of this explanation of section 801 is set out in several parts. Part A briefly discusses the meaning and operation of the proposed new rules of evidence. Part B sets out the background of these rules in terms of the historical development and contemporary formulation of the rules of evidence, and explains why legislation addressing this issue is particularly critical at this point in time. Part C discusses the adequacy of the formulation of the proposed rules to meet concerns about the possibility of undue prejudice or other unfairness to defendants, and sets out affirmative considerations supporting the rules. Part D responds to the argument that "rape

victim shield laws," which limit admission of evidence of other acts by the victim, entail a like restriction on admission of similar crimes evidence in relation to the defendant. Part E responds to other objections that might be raised to the proposal.

A. The Proposed Rules

Proposed Rule 413 relates to criminal prosecutions for sexual assault. Paragraph (a) provides that evidence of the defendant's commission of other sexual assaults is admissible in such cases. If such evidence were admitted under the Rule, it could be considered for its bearing on any matter to which it is relevant. For example, it could be considered as evidence that the defendant has the motivation or disposition to commit sexual assaults, and a lack of effective inhibitions against acting on such impulses, and as evidence bearing on the probability or improbability that the defendant was falsely implicated in the offense of which he is presently accused. These grounds of relevance are more fully discussed in part C infra.

Paragraph (b) of proposed Rule 413 generally requires pretrial disclosure of evidence to be offered under the Rule. This is designed to provide the defendant with notice of the evidence that will be offered, and a fair opportunity to develop a response. The Rule sets a normal minimum period of 15 days notice, but the court could allow notice at a later time for good cause, such as later discovery of evidence admissible under the rule. In such a case, it would, of course, be within the court's authority to grant a continuance if the defense needed additional time for preparation.

Paragraph (c) makes clear that proposed Rule 413 is not meant to be the exclusive avenue for introducing evidence of other crimes by the defendant in sexual assault prosecutions, and that the admission and consideration of such evidence under other rules will not be limited or impaired. For example, evidence that could be offered under proposed Rule 413 will often be independently admissible for certain purposes under Rule 609 (impeachment) or Rule 404(b) (evidence of matters other than "character").

Paragraph (d) defines the term "offense of sexual assault." The definition would apply both in determining whether a currently charged federal offense is an offense of sexual assault for purposes of the Rule, and in determining whether an uncharged offense qualifies as an offense of sexual assault for purposes of admitting evidence of its commission under the Rule. The definition covers federal and state offenses involving the types of conduct prohibited by the chapter of the criminal code relating to sexual abuse (chapter 109A of title 18, U.S. Code) in

light of subparagraph (1), and other federal and state offenses that satisfy the general criteria set out in subparagraphs (2)-(5).

Rule 414 concerns criminal prosecutions for child molestation. Its provisions are parallel to those of the sexual assault rule (Rule 413), and should be understood in the same sense, except that the relevant class of offenses is child molestations rather than sexual assaults. The definition of child molestation offenses set out in paragraph (d) of this Rule differs from the corresponding definition of sexual assault offenses in Rule 413 in that (1) it provides that the offense must be committed in relation to a child, defined as a person below the age of fourteen, (2) it includes the child exploitation offenses of chapter 110 of the criminal code within the relevant category, and (3) it does not condition coverage of offenses on a lack of consent by the child-victim.

Rule 415 applies the same rules to civil actions in which a claim for damages or other relief is predicated on the defendant's alleged commission of an offense of sexual assault or child molestation. Evidence of the defendant's commission of other offenses of the same type would be admissible, and could be considered for its bearing on any matter to which it is relevant.

B. Background in the Law of Evidence

The common law has traditionally limited the admission of evidence of a defendant's commission of offenses other than the particular crime for which he is on trial. This limitation, however, has never been absolute. The Supreme Court has summarized the general position of the common law on this issue as follows:

> Alongside the general principle that prior offenses are inadmissible, despite their relevance to guilt . . . the common law developed broad, vaguely defined exceptions -- such as proof of intent, identity, malice, motive, and plan -- whose application is left largely to the discretion of the trial judge . . . . In short, the common law, like our decision in [Spencer v. Texas], implicitly recognized that any unfairness resulting from admitting prior convictions was more often than not balanced by its probative value and permitted the prosecution to introduce such evidence without demanding any particularly strong justification. (Marshall v. Lonberger, 459 U.S. 422, 438-39 n.6 (1983)).

The Federal Rules of Evidence -- which went into effect in 1975 -- follow the general pattern of traditional evidence rules, in that they reflect a general presumption against admitting evidence of uncharged offenses, but recognize various exceptions

to this principle. One exception is set out in Rule 609. Rule 609 incorporates a restricted version of the traditional rule admitting, for purposes of impeachment, evidence of a witness's prior conviction for felonies or crimes involving dishonesty or false statement. The other major provision under which evidence of uncharged offenses may be admitted is Rule 404(b). That rule provides that such evidence is not admissible for the purpose of proving the "character" of the accused, but that it may be admitted as proof concerning any non-character issue:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b), however, makes no special allowance for admission of evidence of other "crimes, wrongs, or acts" in sex offense prosecutions. There was perhaps little reason for the framers of the Federal Rules of Evidence to focus on this issue, since sex offense prosecutions were not, at the time, a significant category of federal criminal jurisdiction.

This omission has been widely reproduced in codified state rules of evidence, whose formulation has been strongly influenced by the Federal Rules. The practical effect of this development is that the authority of the courts to admit evidence of uncharged offenses in prosecutions for sexual assaults and child molestations has been clouded, even in states that have traditionally favored a broad approach to admission in this area.

The actual responses of the courts to this development have varied. For example, in State v. McKay, 787 P.2d 479 (Or. 1990), in which the defendant was accused of molesting his step-daughter, the court admitted evidence of prior acts of molestation by the defendant against the girl. The court reached this result by stipulating that evidence of a predisposition to commit sex crimes against the victim of the charged offense was not evidence of "character" for purposes of the state's version of Rule 404(b), although it apparently would have regarded evidence of a general disposition to commit sex crimes as impermissible "character" evidence.

In Elliot v. State, 600 P. 2d 1044 (1979), the Supreme Court of Wyoming reached a broader result supporting admission, despite a state rule that was essentially the same as Federal Rule 404(b). This was also a prosecution for child molestation. Evidence was admitted that the defendant had attempted to molest the older sister of the victim of the charged offense on a number of previous occasions. The court reconciled this result with Rule 404(b) by indicating that proof of prior acts of molestation

would generally be admissible as evidence of "motive" -- one of the traditional "exception" categories that is explicitly mentioned in Rule 404(b). Id. at 1048-49.

In contrast, in Getz v. State, 538 A.2d 726 (1988), the Supreme Court of Delaware overturned the defendant's conviction for raping his 11 year old daughter because evidence that he had also molested her on other occasions was admitted. The court stated that "a lustful disposition or sexual propensity exception to [Rule] 404(b)'s general prohibitions . . . is almost universally recognized in cases involving proof of prior incestuous relations between the defendant and the complaining victim," but that "courts which have rejected this blanket exception have noted that in the absence of a materiality nexus such propensity evidence is difficult to reconcile with the restrictive language of [Rule] 404(b)." The court went on to hold that the disputed evidence in the case was impermissible evidence of character and could not be admitted under the state's Rule 404(b).

The foregoing decisions illustrate the increased jeopardy that the current formulation of the Federal Rules of Evidence has created for effective prosecution in sex offense cases. While the law in this area has never been a model of clarity and consistency, the widespread adoption of codified state rules based on the Federal Rules has aggravated its shortcomings. In jurisdictions that have such codified rules, the courts are no longer free to recognize straightforwardly the need for rules of admission tailored to the distinctive characteristics of sex offense cases or other distinctive categories of crimes. Important evidence of guilt may consequently be excluded in such cases.

Where the courts do admit such evidence, it may require a forced effort to work around the language and standard interpretation of codified rules that restrict admission, or may depend on unpredictable decisions by individual trial judges to allow admission under other "exception" categories. The establishment of clear, general rules of admission, as set out in proposed Rules 413-415, would resolve these problems under current law in federal proceedings, and would provide a model for comparable reforms in state rules of evidence.

C. Evidence of Motivation and Probability

Rules restricting the admission of evidence of uncharged misconduct by the defendant have traditionally been justified on two main grounds:

First, there is the concern over lack of fair notice to the defendant, if evidence of "bad acts" with which he has not

formally been charged could freely be offered at trial. In the absence of limitations on such evidence, it has been argued, "a defendant could be confronted at trial with evidence implicating him in an unpredictable range of prior acts of misconduct extending over the whole course of his life, and would be denied a fair opportunity to prepare a defense to the accusations he would face at trial." The Admission of Criminal Histories at Trial, 22 U. Mich. J.L. Ref. 707, 728 (1989).

Second, there is the concern that evidence of other offenses or misconduct by the defendant is likely to be prejudicial or distracting, and that the potential for prejudice and distraction outweighs its probative value. Statements of this concern are sometimes accompanied by assertions that such evidence is of little probative value, merely being an indication of the defendant's "character." In light of the potential such evidence holds for prejudicing the defendant, it is argued, the general authority of the trial judge to exclude evidence that is unduly prejudicial or distracting (F.R.E. 403) is inadequate, and categorical rules of exclusion must be adopted for such evidence.

The first concern -- relating to fair notice -- can readily be answered in connection with proposed Rules 413-15. The Rules do not authorize an open-ended enquiry into all the "bad acts" the defendant may have committed in the course of his life, but only admit evidence of other serious criminal acts which are of the same type as the offense with which the defendant is formally charged. More importantly, the Rules specifically require prior disclosure to the defendant of the evidence that will be offered against him.

The second general concern about evidence of uncharged acts -- a risk of prejudice or distraction that generally outweighs its probative value -- is also adequately addressed by the limitations on the admission of evidence under the proposed rules. The rules do not admit evidence that merely indicates that the defendant is generally of "bad character," or even that he has a general disposition to engage in crime. Rather, to be admissible, the evidence must relate to other crimes by the defendant that are of the same type -- sexual assault or child molestation -- as the crime with which he is formally charged.

In general, the probative value of such evidence is strong, and is not outweighed by any overriding risk of prejudice. The relevance of such evidence will normally be apparent on at least two grounds -- as evidence that the defendant has the motivation or disposition to commit such offenses, and as evidence of the improbability that the defendant has been falsely or mistakenly accused of the crime.

Evidence of Motivation. One of the traditional "exception"

categories that has been explicitly carried forward in F.R.E. 404(b) is admission of evidence of "other crimes, wrongs, or acts" to establish "motive." For example, in a prosecution for embezzlement, evidence may be admitted of other acts by the defendant which indicate that he was in financial straits, to show that he would have had a motive for committing a crime that offered monetary gain. Or in a prosecution for a hate crime -- such as a lynching or assault with apparent racial motivation -- evidence may be admitted of other acts by the defendant that manifest a general animosity towards the victim's racial group for the purpose of establishing motive.

The admissibility of evidence of similar crimes under the proposed new rules is analogous to the current "motive" exception, and is justifiable on similar grounds. The proposed sexual assault rule (Rule 413), as noted above, does not indiscriminately admit evidence of other bad things the defendant may have done, but only evidence of his commission of other criminal sexual assaults. In other words, the evidence must be of such a character as to indicate that the defendant has the unusual combination of aggressive and sexual impulses that motivates the commission of such crimes, and a lack of effective inhibitions against acting on such impulses.

Where there is evidence that the defendant has such impulses -- and has acted on them in the past -- a charge of sexual assault has far greater plausibility than if there were no evidence of such a disposition on the part of the defendant. See generally The Admission of Criminal Histories at Trial, 22 U. Mich. J.L. Ref. 707, 725-26 (1989). This seems to be the main point underlying the judicial decisions that have straightforwardly admitted evidence of similar crimes in sex offense cases as evidence of the defendant's "lustful disposition."

The case for admission on these grounds is equally strong, if not stronger, in child molestation cases. Evidence of other acts of molestation indicates that the defendant has a type of desire or impulse -- a sexual or sado-sexual interest in children -- that simply does not exist in ordinary people. In such cases, the evidence is generally relevant as proof of "motive" in common sense terms, and admission could normally be sustained even under the current Rules on a sufficiently broad reading of the "motive" exception category. See Elliott v. State, 600 P.2d 1044, 1048-49 (Wyo. 1979).

Evidence of Improbability. Existing exceptions to the general presumption against admitting evidence of uncharged offenses are sometimes justified on grounds of probability (in Wigmore's terminology, the "doctrine of chances"). For example, one of the "exception" categories mentioned in F.R.E. 404(b) is for proof of "intent." Under this exception, evidence of similar

crimes may be admitted to rebut a defense that the defendant engaged in allegedly criminal conduct accidentally, or otherwise lacked the state of mind required for its commission. The rationale commonly given for this exception is the probative value such evidence has on account of the inherent improbability that a person will innocently or inadvertently engage in similar, potentially criminal conduct on a number of different occasions. See Imwinkelried, Uncharged Misconduct Evidence § 5.05 (1984).

Probabilistic reasoning of this type is not limited to proof of the mental element of the offense, but may also be used to support the admission of evidence establishing the defendant's commission of the charged criminal conduct:

> [For example, suppose] that the defendant is charged with arson. The defendant claims that the fire was accidental. The cases routinely permit the prosecutor to show other acts of arson by the defendant and even nonarson fires at premises owned by the defendant. In these cases, the courts invoke the doctrine of chances. The courts reason that as the number of incidents increases, the objective probability of accident decreases. Simply stated, it is highly unlikely that a single person would be victimized by so many similar accidental fires in a short period of time. The coincidence defies common sense and is too peculiar. (Imwinkelried, Uncharged Misconduct Evidence § 4.01 (1984)).

Turning to the case of sex offense prosecutions, similar considerations of probability provide support for a general rule of admission for similar crimes evidence. It is inherently improbable that a person whose prior acts show that he is in fact a rapist or child molester would have the bad luck to be later hit with a false accusation of committing the same type of crime, or that a person would fortuitously be subject to multiple false accusations by a number of different victims. These points may be seen more clearly by considering the major elements of a sex offense prosecution.

In general, to obtain a conviction for a sexual assault, the government must prove that (1) the alleged sexual conduct actually took place, (2) the victim did not consent, (3) the defendant was the person who engaged in the conduct, and (4) the defendant acted with the culpable state of mind required for the commission of the offense. The elements in a child molestation case are similar, except that proof of non-consent by the victim is normally not required.

With respect to the third and fourth elements -- the defendant's identity as the perpetrator and satisfaction of the mental element -- similar crimes evidence will often be admissible even under a codified rule modeled on F.R.E. 404(b). Proof of "identity", and proof of "intent" or "knowledge," are

explicitly mentioned as examples of permissible "non-character" uses of such evidence in the Rule.

In comparison, admission of such evidence on the first and second issues -- the occurrence of the alleged act and the victim's lack of consent -- is more problematic under a codified rule of this type. However, on these issues as well, similar crimes evidence is likely to have a high degree of probative value on grounds of probability.

For example, consider a case in which the defense attacks the victim's assertion that she did not consent, or represents that the whole incident was made up by the victim. Suppose further that there is practically conclusive evidence that the defendant has in fact committed one or more sexual assaults on other occasions, such as a prior conviction of the defendant on a charge of rape. In the presence of such evidence, the defense's claim of consent, or claim that the whole incident did not occur, would usually amount to a contention that the victim fabricated a false charge of rape against a person who just happened to be a rapist. The improbability of such a coincidence gives similar crimes evidence a high degree of probative value, and supports its admission, in such a case.

As a second example, consider a case like that described above, but with similar crimes evidence of a less conclusive character. For example, suppose the evidence is the testimony of another woman that the defendant raped her on a different occasion, though the defendant has not been prosecuted for that offense. In such a case, the defendant's alleged commission of rape on the earlier occasion, as well as his guilt of the presently charged offense, would be open to question.

Nevertheless, the "doctrine of chances" legitimately applies to such a case as well. If the defense concedes that the earlier rape occurred, then the case is essentially the same as the preceding one. If the defense disputes both the charged offense and the uncharged offense, this amounts to a claim that not just one but two women have made false charges of rape against the defendant. Here as well, the improbability of multiple false charges gives similar crimes evidence a high degree of probative value.

The force of the argument from improbability may be reduced if there is reason to believe that the formal charge and the accusation of an uncharged offense were not generated independently of each other. For example, where the identity of the offender is an issue, it may appear that a witness's identification of the defendant as the man who raped her could have been influenced by knowledge that the victim of the charged offense had previously identified the same man as her assailant.

In such a case, however, the defense would be free to bring out the possible connection of the charges, and the jury would consider that factor in assessing the significance of the evidence. Similar crimes evidence under the proposed rules is no different in this respect from other forms of regularly admissible evidence, whose normal probative force may also be reduced by special factors in some cases. In relation to evidence admissible under the proposed rules, as with other forms of evidence, the general standards of the Rules of Evidence and the processes of adversarial presentation and testing of evidence can properly be relied on to provide a fair picture of the relevant facts as the basis for the jury's decision.

D. The Import of Rape Victim Shield Laws

Within the past twenty years, virtually all American jurisdictions have adopted "rape victim shield laws," which limit enquiry in rape trials into the past sexual history of the victim. The shield laws have overturned earlier evidentiary rules and doctrines which tended to be highly permissive in allowing exploration of the victim's prior sexual activity in rape cases.

The pertinent provision in federal law is F.R.E. 412, which generally bars the admission in federal sexual abuse prosecutions of evidence of the victim's past sexual behavior. The Rule recognizes exceptions to this general presumption of non-admissibility for cases where admission of such evidence is constitutionally required or other specified circumstances give it an unusually high degree of relevance.

The argument has been made that the elimination of broad rules of admission for other acts of the victim in rape cases makes it improper to continue or adopt broad rules of admission for uncharged acts of the accused. If the victim is not to be taxed with evidence of unrelated conduct on her part, the argument goes, why should the defendant be taxed with evidence of other things he has done, which also have no direct relationship to the charged offense?

This argument, however, is not well-founded. The rules of evidence do not generally aim at a superficial neutrality between rules of admission affecting the victim and the defendant. Rather, the formulation of such rules must depend on a rational consideration of the relevant policies. The sound policies that underlie the rape victim shield laws provide no support for comparable restrictions in relation to the conduct of the defendant. The differences between the two contexts include the following:

First, there is a basic difference in the probative value of

the evidence that is subject to exclusion under such rules. In the ordinary case, enquiry by the defense into the past sexual behavior of the victim in a rape case will show at most that she has engaged in some sexual activity prior to or outside of marriage -- a circumstance that does not distinguish her from most of the rest of the population, and that normally has little probative value on the question whether she consented to the sexual acts involved in the charged offense. In contrast, evidence showing that the defendant has committed rapes on other occasions places him in a small class of depraved criminals, and is likely to be highly probative in relation to the pending charge. The difference in typical probative alone is sufficient to refute facile equations between evidence of other sexual behavior by the victim and evidence of other violent sex crimes by the defendant.

Second, the rape victim shield laws serve the important purpose of encouraging victims to report rapes and cooperate in prosecution by not requiring them to undergo public exposure of their personal sexual histories as a consequence of doing so. Rules limiting disclosure at trial of the defendant's commission of other rapes do not further any comparable public purpose, because the defendant's cooperation is not required to carry out the prosecution.

Third, the victim shield laws serve the important purpose of safeguarding the privacy of rape victims. The unrelated sexual activity of the victim is generally no one's business but her own, and should not be exposed in the absence of compelling justification. In contrast, violent sex crimes are not private acts, and the defendant can claim no legitimate interest in suppressing evidence that he has engaged in such acts when it is relevant to the determination of a later criminal charge.

E. Other Issues

This final part of this explanation of section 901 addresses two further objections to the proposed rules -- the objection that the prosecutor should be barred from introducing evidence of uncharged offenses in order to require him to formally charge all the offenses he wishes to prove at trial, and the objection that fairness to the defendant or other policies require that some time limit be imposed on the uncharged offenses that could be admitted under the proposed rules.

The decision whether to charge an offense. With respect to the first objection, it should be noted that the prosecutor has practical incentives to charge fully, regardless of any compulsion arising from the rules restricting evidence of uncharged misconduct. Charging a larger number of counts tends to reduce the risk that the defendant will be entirely acquitted if the jury is not persuaded concerning a particular charge or

charges. Moreover, charging more counts creates the possibility of conviction on a larger number of counts, and conviction on a larger number of counts tends to result in a higher penalty. Under the federal sentencing guidelines, for example, uncharged offenses may be given some weight in sentencing, but the largest determinants of the sentence are normally the offenses for which the defendant is convicted and his record of prior convictions.

Moreover, even if it were thought that additional incentives or requirements were needed to ensure fuller charging of available offenses, a general presumption against admitting evidence of uncharged offenses would be an unsound means of promoting this objective. In many cases it is impossible, or undesirable for entirely legitimate reasons, to charge certain offenses, but admitting evidence of such offenses is valid and important for their bearing on a charged offense.

For example, the uncharged offenses may have taken place in a different jurisdiction. This would occur in a state prosecution of a rapist or child molester whose earlier known crimes were committed in a different state. It would also occur in a federal prosecution of a rapist or molester whose earlier offenses were committed within the jurisdiction of a state or states, but outside of federal jurisdiction. In such a case, it is legally impossible for the prosecutor to charge the earlier offenses; if they are to be disclosed in the prosecution, it must be through uncharged misconduct evidence.

A second example is situations in which there is insufficient evidence or other practical difficulties in prosecuting all of the defendant's prior offenses as separate counts, but the evidence regarding the earlier offenses is legitimately relevant to proof of the charged offense.

A common fact-pattern of this type involves fathers or step-fathers who are accused of molesting their daughters. The formally charged offenses in such a case may be limited to a particular act of molestation or a limited number of acts that happened to come to the attention of an adult witness (such as the defendant's wife). However, the victim will often testify in such a case that the molestation had been going on for a long time. A sister or sisters of the victim of the charged offense may also testify that the father had molested them as well over an extended period of time.

Charging all the prior offenses in such a case may be neither feasible nor desirable. The acts of molestation may number in the hundreds; the victim may be unable to recall most of them with any specificity; and the evidence supporting them individually would only be the uncorroborated testimony of a child victim-witness. Nevertheless, evidence that the charged offense was part of a broader pattern of molestation may be

important to put the charge in perspective, and most courts have admitted such testimony by the victim. See, e.g., State v. Graham, 641 S.W.2d 102, 104-05 (Mo. 1982). As Getz v. State, 538 A.2d 726 (Del. 1988), illustrates, however, a court may regard such admission as problematic or simply prohibited under the restrictive standards of Rule 404(b).

Time limitation. Proposed Rules 413-15 do not place any particular time limit on the uncharged offenses that may be offered in evidence. The view underlying this formulation is that a lapse of time from the uncharged offense may properly be considered by the jury for any bearing it may have on the evidence's probative value, but that there is no justification for categorically excluding offenses that occurred before some arbitrarily specified temporal limit.

There is no magic line in time beyond which similar crimes evidence generally ceases to be relevant to the determination of a pending charge. This point is reflected in the current formulation of Rule 404(b), which does not specify any particular limit for admitting "non-character" evidence under the various categories it enumerates.

While there does not appear to be any precedent supporting a definite time limit on similar crimes evidence, some judicial decisions have given weight to the question of temporal proximity in a more flexible manner in deciding on the admission of such evidence in sex offense prosecutions. However, the rationales for this approach in such cases do not necessarily apply in connection with the proposed new rules. The admission of such evidence in past decisions has usually depended on ad hoc applications of other "exception" categories, such as proof of "a common scheme or plan," which come with their own built-in limitations. If admission is thought to depend on a showing that the charged offense and the uncharged offenses were part of a single on-going plan to engage in a series of sexual assaults, then too large a temporal spread among the offenses may weigh against such a finding. The theories of relevance underlying the proposed rules, however, do not depend on such a determination.

Concerns over fair notice to the defendant might also be thought to support a restrictive approach to admitting evidence of older offenses, on the view that there is a greater risk of unfair surprise if the defendant is initially confronted at trial with evidence of events that are far removed in time from the charged offense. Under the proposed rules, however, this concern is adequately met by the requirement of prior disclosure to the defendant of the evidence that will be offered.

Under the current rule admitting prior convictions for purposes of impeachment, as formulated in F.R.E. 609, prior convictions are presumptively inadmissible if they fall beyond a

ten-year time period. However, the traditional version of the impeachment rule automatically admitted evidence of prior felony and crimen falsi convictions without limitation of time, on the view that temporal proximity (or the lack of it) should go to probative value rather than admissibility. The validity of the codified federal rule's contrary approach is open to question. See generally The Admission of Criminal Histories at Trial, 22 U. Mich. J.L. Ref. 707, 769 (1989).

Moreover, the impeachment rule has sometimes been criticized on the ground that it theoretically admits prior convictions only for the limited purpose of impeachment, but that the jury may realistically consider this information as affirmative evidence of guilt once it is admitted. The suspicion that evidence admitted pursuant to the rule may be misused for purposes that are not legally authorized may partially explain the view that additional restrictions on the range of admissible convictions should be imposed, including the presumptive time limit that now appears in Rule 609.

No similar considerations support a time limit on admission under proposed Rules 413-15. The basic scope of the proposed rules is narrower than the impeachment rule in that their application is confined to sexual assault and child molestation cases, and only evidence of crimes of the same type as the charged offense may be shown. Within this clearly defined range, the normal probative value of similar crimes evidence is sufficiently great to support a general rule of admission, and consideration of such evidence for its bearing on any matter to which it is relevant. In contrast to the impeachment rule, there is no risk that evidence admitted under the proposed new rules will be considered for a prohibited purpose, since the rules do not limit the purposes for which such evidence may be considered.

SEC. 802. DRUG DISTRIBUTION TO PREGNANT WOMEN

21 U.S.C. 845 prescribes enhanced penalties for the distribution of controlled substances to persons below the age of twenty-one. Section 802 amends 21 U.S.C. 845 to make the same enhanced penalties apply to the distribution of controlled substances to pregnant women.

Conduct covered by this amendment frequently involves exploitation by the drug dealer of the pregnant mother's drug dependency or addiction to facilitate conduct on her part that carries a grave risk to her child of pre-natal injury and permanent impairment following birth. Such conduct by a trafficker in controlled substances is among the most serious forms of drug-related child abuse and plainly merits the enhanced penalties provided by 21 U.S.C. 845.

SEC. 803. DEFINITION OF SEXUAL ACT FOR VICTIMS BELOW 16

Section 803 amends the definitional section for federal sexual abuse offenses to provide greater protection for victims below the age of 16. Recently, the maximum penalty for engaging in a sexual act with a minor between the ages of 12 and 16 (by a person at least 4 years older than the victim) was raised from five to fifteen years' imprisonment (§ 322 of the Crime Control Act of 1990). Both the original Senate-passed and House-passed versions of this legislation -- § 2425 of S. 1970 and § 2919 of H.R. 5269 -- also contained amendments addressing deficiencies in the definition of the term "sexual act" in relation to victims below the age of 16. However, the enacted bill did not contain these amendments, presumably because of other differences in the sections in which they appeared.

Section 803 is the same as the corresponding amendments to the definition of "sexual act" in S. 1970 and H.R. 5269. It would extend the definition of "sexual act" to include intentional touching, not through the clothing, of the genitals of a person who is less than 16 years of age, provided the intent element common to the other touching offenses is present. This form of molestation can be as detrimental to a young teenager or child as the conduct currently covered by the term sexual act.

The current definitions of sexual act and sexual contact also involve a gender-based imbalance that effectively tends to give more lenient treatment to cases in which the victim is a boy. Under the current definitions, sexual touching that involves even a slight degree of penetration of a genital or anal opening constitutes a sexual act, rather than just a sexual contact, and the former is punished more severely than the latter under the existing statutory scheme. Since penetration is more likely with female than male victims, such conduct would more likely constitute sexual acts when committed with females than with males.

The amendment corrects this gender-based imbalance by treating all direct genital touching of children under the age of 16, with intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person as sexual acts, regardless of whether penetration has occurred. Moreover, it eliminates the difficulties of proving penetration for many sexual abuse offenses against children -- both boys and girls -- in which there are typically no adult witnesses.

SEC. 804. INCREASED PENALTIES FOR RECIDIVIST SEX OFFENDERS

Section 804 amends the penalties applicable under the sexual abuse chapter (chapter 109A) of title 18 of the United States

Code by providing that second or subsequent offenses are punishable by a term of imprisonment of up to twice that otherwise authorized. The prior conviction may be either a violation of the chapter or a violation of state law involving a type of conduct proscribed by chapter 109A. This amendment, which was passed by the Senate in S. 1970 (§ 2425), is designed to correct the inadequacy of current penalties with respect to recidivist sex offenders.

SEC. 805. RESTITUTION FOR VICTIMS OF SEX OFFENSES

Section 3663(b)(2) of title 18 currently authorizes restitution covering medical and therapeutic costs and lost income in cases involving "bodily injury" to a victim. However, the sex crimes defined in chapters 109A and 110 of title 18 do not necessarily involve physical damage to the body of the victim. For example, there may not be such physical damage where rape against an adult victim is committed through the threat of force, but without the actual use of force, or where a child molestation or exploitation offense is committed without physically injurious violence.

This section amends 18 U.S.C. 3663(b)(2) to make it clear that restitution is authorized in all federal sex offense cases, whether or not the offense involved "bodily injury" on a narrow interpretation of that phrase.

SEC. 806. HIV TESTING AND PENALTY ENHANCEMENT IN SEXUAL ABUSE CASES

The trauma of victims of sex crimes may be greatly magnified by the fear of contracting AIDS as a result of the attack. Section 1804 of the Crime Control Act of 1990 created a funding incentive for the states to require HIV testing of sex offenders and disclosure of the test results to the victim. There is, however, no comparable requirement or authorization for federal sex offense cases.

The provisions proposed in this section remedy this omission by requiring HIV testing in federal cases involving a risk of HIV transmission. They also include related provisions requiring enhanced penalties for federal sex offenders who risk HIV infection of their victims.

The section would add a new section (proposed § 2247) to the chapter of Title 18 of the United States Code that defines the federal crimes of sexual abuse (chapter 109A). Subsection (a) of proposed § 2247 would require HIV testing of a person charged with an offense under chapter 109A, at the time of the pre-trial release determination for the person, unless the judicial officer determines that the person's conduct created no risk of

transmission of the virus to the victim. The test would be conducted within 24 hours or as soon thereafter as feasible, and in any event before the person is released. Two follow-up tests would also be required (six and twelve months following the initial test) for persons testing negative. Under subsection (d), the results of the HIV test would be disclosed to the person tested, to the attorney for the government, and -- most important -- to the victim or the victim's parent or guardian.

In some instances testing may not be ordered pursuant to proposed 18 U.S.C. 2247(a) because the information available at the time of the pre-trial release determination indicated that the person's conduct created no risk of HIV transmission, but in light of information developed at a later time it may subsequently appear to the court that the person's conduct may have risked transmission of the virus to the victim. Subsection (b) of proposed 18 U.S.C. 2247 accordingly authorizes the court to order testing at a later time if testing did not occur at the time of the pre-trial release determination.

Subsection (c) of proposed 18 U.S.C. 2247 provides that a requirement of follow-up HIV testing is cancelled if the person tests positive -- in which case further testing would be superfluous -- or if the person is acquitted or all charges under chapter 109A are dismissed.

Subsection (e) of proposed 18 U.S.C. 2247 directs the Sentencing Commission to provide enhanced penalties for offenders who know or have reason to know that they are HIV-positive and who engage or attempt to engage in criminal conduct that creates a risk of transmission of the virus to the victim. This requirement reflects the higher degree of moral reprehensibility and depravity involved in the commission of a crime when it risks transmission of a lethal illness to the victim, and the exceptional dangerousness of sex offenders who create such a risk to the victims of their crimes. In such cases, increased penalties are warranted for incapacitative, deterrent, and retributive purposes.

SEC. 807. PAYMENT OF COST OF HIV TESTING FOR VICTIM

Section 503(c)(7) of the Victims' Rights and Restitution Act of 1990, enacted as part of the Crime Control Act of 1990, currently provides that a federal government agency investigating a sexual assault shall pay the costs of a physical examination of the victim, if the examination is necessary or useful for investigative purposes. This section extends this provision to require payment for up to two HIV tests for the victim in the twelve months following the sexual assault.

IX. DRUG TESTING

Sec. 901.

This section would create a nationwide program of drug testing for federal offenders on post-conviction release.

A testing program of this sort is plainly warranted for offenders who are to be released into the community in light of the likelihood that such persons will revert to criminality if they become involved with drugs, and the need for a meaningful means of detecting released offenders who possess and use drugs in light of provisions of current law that mandate revocation of release for such offenders. A drug testing requirement for federal offenders on post-conviction release was passed by the Senate as title XXV of S. 1970 in the 101st Congress. A detailed explanation of the policy considerations supporting the proposal of this section appears in Statement of Assistant Attorney General Edward S.G. Dennis, Jr., concerning the Firearms and Drug-Testing Provisions in H.R. 2709 before the House Judiciary Subcommittee on Crime (March 6, 1990).

Subsection (a) of section 901 adds a new section to the criminal code (proposed 18 U.S.C. 3608) requiring a drug-testing program for federal offenders on post-conviction release. Since the capacity to implement this program depends on the availability of appropriate personnel and/or contractors necessary to ensure quality control, this section allows a degree of flexibility and grants the Administrative Office of the United States Courts the latitude necessary to phase-in the program in stages as soon as practicable and feasible.

Subsection (b) amends existing statutes to provide that defendants placed on parole, probation or post-imprisonment supervised release will be subject to a mandatory condition that they refrain from illegal use of drugs and submit to drug tests. The class of defendants subject to this mandatory condition would include felons and misdemeanant firearms, drug, and violent offenders. The testing requirement could be suspended or ameliorated upon request of the Director of the Administrative Office or his designee.

Under the amendments of subsection (b), release could not be revoked for failure of a drug test unless the test was confirmed using gas chromatography/mass spectrometry techniques or other tests determined to be of equivalent reliability. However, in light of the high risk that a released offender who has been using drugs will become a fugitive if allowed to go after failing a preliminary test, detention of such a person would be allowed pending the results of a confirmation test.

Subsection (c) contains amendments which make revocation of release mandatory if an offender unlawfully uses drugs or refuses to cooperate in required drug testing. Current law mandates revocation of release if an offender possesses illegal drugs. See 18 U.S.C. 3565(a), 3583(g), 4214(f). Since use entails possession, mandatory revocation of release for unlawful use of drugs is already implicit in existing statutory requirements. The further requirement of revocation of release for non-cooperation in drug testing ensures that an offender will not be able to gain any advantage by refusing to cooperate.

Sec. 902.

This section generally conditions eligibility for federal justice assistance funding on a state's adoption of a drug-testing program for targeted classes of persons subject to charges, confinement, or supervision in the state's criminal justice system.

X. EQUAL JUSTICE ACT

This title, the "Equal Justice Act," provides effective safeguards against racial discrimination and racial bias in the administration of capital punishment and other penalties. It includes provisions that:

-- require administration of the death penalty and other penalties without regard to the race of the defendant or victim, and prohibit racial quotas and other statistical tests for imposing the death penalty or other penalties (section 1002);

-- guard against racial prejudice or bias through provisions for enquiry on voir dire concerning potential racial bias by jurors, change of venue to avoid racial bias, and prohibition of appeals to racial bias in statements before the jury (section 1003);

-- require in federal cases jury instructions and certifications guarding against consideration of race in capital sentencing decisions, and make the capital sentencing option consistently available for racially motivated murders in violation of the federal civil rights laws (section 1004); and

-- make provision of adequate resources to expeditiously carry out the death penalty in all appropriate cases an objective of federal justice assistance funding (section 1005).

The proposed Equal Justice Act provides a valid alternative to the so-called "Racial Justice Act" proposals that were advanced in the 101st Congress. While the "Racial Justice Act" legislation has been introduced in various formulations, all versions would have had the practical effect of abolishing the death penalty in the United States, or of requiring racially discriminatory charging and sentencing practices in capital cases to achieve the numerical proportions deemed proper by the "Racial Justice Act." The "Racial Justice Act" proposal was soundly defeated in the Senate in both the 100th and 101st Congresses, but it was passed by the House of Representatives on a closely divided vote as part of H.R. 5269 in the 101st Congress.

The main argument offered by proponents of the "Racial Justice Act" proposal is that empirical studies show that the death penalty is less frequently imposed in murder cases involving black victims. The somewhat bizarre remedy offered by the "Racial Justice Act" proposal for this statistical disparity is invalidation of capital sentences. In effect, this would redress alleged statistical "discrimination" against a class of murder victims through increased leniency towards their killers, as well as all other capital murderers.

Proponents of the "Racial Justice Act" have also sometimes suggested that there is widespread racial discrimination against black defendants in the administration of capital punishment. This claim is advanced with less force, however, since there is little reliable empirical study that even arguably suggests that black defendants are discriminated against in this context, and a number of studies indicate that white murder defendants are more likely to be sentenced to death than black murder defendants.

Both in relation to victims and defendants, the factual premises of the "Racial Justice Act" proposal are not well-founded. Rather, the weight of reliable empirical study indicates that racially neutral factors overwhelmingly account for apparent disparities relating to the race of the victim or the offender. Moreover, numerous safeguards against racial discrimination exist under current law, and these safeguards provide effective protection against the influence of racial considerations or other invidious factors in capital charging and sentencing decisions. These points have been fully set forth and explained in testimony by the Department of Justice. See Statement of Assistant Attorney General Edward S.G. Dennis, Jr., Concerning the Death Penalty before the House Judiciary Subcommittee on Civil and Constitutional Rights (May 3, 1990).

Nevertheless, there is a legitimate case for legislation in this area, as proposed in the Equal Justice Act. Proponents of the "Racial Justice Act," and other opponents of the death penalty, have mounted a vigorous campaign in recent years which is designed to create the impression that pervasive, unjustified racial disparities exist in capital punishment, and that existing legal standards and remedies are inadequate to deal with the alleged problem. Scurrilous charges of this type create a serious risk of undermining public confidence in the fairness and integrity of the criminal justice system. Moreover, the vote approving the "Racial Justice Act" proposal in the House of Representatives suggests that this disinformation campaign may also have misled some Members of Congress. Legislation that articulates clear rules and policies against racial discrimination in this area, and that sets out available remedies and safeguards against such abuse, is desirable to correct these misapprehensions.

Another reason for legislation is the threat to the objective of equal justice that has been created by the "Racial Justice Act" proposal itself. By fostering race-conscious charging and sentencing practices, the "Racial Justice Act" proposal jeopardizes over a century of progress in eliminating race as a relevant consideration in criminal justice decisions. If that proposal, with its death-by-the-numbers system of quota justice for capital cases, were adopted either by the federal government or through enactments in particular states, other

proposals would predictably follow to impose similar requirements of racial proportionality for penalties other than the death penalty.

The threat posed by the "Racial Justice Act" concept to the cause of equal rights, and to the overall operation of the nation's criminal justice systems, calls for a strong declaration of national policy that race is not an admissible consideration in decisions to seek or impose criminal penalties. The provisions of the Equal Justice Act embody and declare this policy.

Moreover, while there is no reason to believe that the existing remedies and safeguards against racial discrimination are generally inadequate, legitimate reforms can be identified that will further enhance the protection against racial bias.

The current standards have largely been developed by the courts through decisions that guard against invidious or biased conduct by jurors, judges, and prosecutors that may operate to the detriment of the defendant. In comparison, the rules constraining efforts by the defense to gain an advantage by exploiting racial bias may be less completely developed or less clearly articulated. The Equal Justice Act remedies this situation by stating evenhanded rules that guard against racial bias regardless of whether it would operate to the advantage of the defense or of the prosecution.

SEC. 1002. PROHIBITION OF RACIALLY DISCRIMINATORY POLICIES CONCERNING CAPITAL PUNISHMENT OR OTHER PENALTIES

Subsection (a) of section 1002 mandates neutrality with regard to race in policies and practices that affect capital punishment or other penalties. This codifies the constitutional principle of individualized justice, which bars treating race as a relevant factor in charging and sentencing decisions. See McCleskey v. Kemp, 481 U.S. 279 (1987); Wayte v. United States, 470 U.S. 598, 608 (1985).

Subsection (a) also explicitly prohibits racial quotas and other statistical tests for imposing the death penalty or other penalties. This is a necessary corollary of the general requirement of non-discriminatory, individualized justice. It rejects the underlying premise of the so-called "Racial Justice Act" that penalties should presumptively be imposed so as to achieve specified racial proportions, and explicitly prohibits the racial statistical tests that are the central feature of all versions of the "Racial Justice Act" proposal.

Subsection (b) contains definitions which clarify the scope and meaning of subsection (a). Paragraphs (1) and (2) of

subsection (b) make it clear that subsection (a)'s prohibition of race-conscious policies and practices applies to all American jurisdictions, and constrains the actions of all agencies and instrumentalities of federal, state, and local government. Paragraph (3) defines the concept of prohibited racial quotas and statistical tests to include all standards that require or authorize the imposition of penalties so as to achieve specified racial proportions, or that require or authorize the invalidation of penalties if specified racial proportions are not achieved.

SEC. 1003. GENERAL SAFEGUARDS AGAINST RACIAL PREJUDICE OR BIAS IN THE TRIBUNAL

Section 1003 sets out a number of rules and remedies that guard against racial prejudice or bias which may affect the imposition of capital punishment or other penalties.

Paragraph (1) addresses examination on voir dire of potential racial bias by jurors. In part, this provision codifies existing caselaw which requires such examination, at the request of the defense, if "under all of the circumstances presented there [is] a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be [impartial]." Turner v. Murray, 476 U.S. 28, 33 (1986); Ristaino v. Ross, 424 U.S. 589, 596 (1976).

Paragraph (2) addresses the remedy of change of venue. In most cases, risks of prejudice by jurors can be adequately guarded against through such means as examination on voir dire, excusing biased jurors for cause, and instructions of the court to the jury not to be influenced by invidious considerations. In cases of extreme, pervasive bias in a locality, however, these normal mechanisms may be inadequate, and a change of venue may be necessary to produce a constitutionally sustainable judgment. See Irvin v. Dowd, 366 U.S. 717 (1961). Paragraph (2) accordingly requires a change of venue if a party shows that an impartial jury cannot be obtained in the absence of such a change because of racial prejudice or bias.

Paragraph (3) prohibits appeals to racial prejudice or bias before the jury. Prejudicial remarks by a prosecutor may make a resulting conviction or sentence constitutionally invalid, and this point applies with particular force where such remarks are in derogation of a specific constitutional right. See Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Appeals to racial prejudice violate the specific constitutional right of equal protection, and paragraph (3) explicitly condemns such statements. If prejudicial statements in violation of paragraph (3) were made in a proceeding, it would be the duty of the trial judge to take appropriate corrective action requested by the adverse party, such as instructions to the jury counteracting the

statements, or, if necessary, declaring a mistrial.

Judicial decisions concerning the rules and remedies addressed in section 1003 have usually involved alleged prejudice or misconduct that would operate to the detriment of the defendant. However, the objective of equal justice may also be thwarted by racial bias in favor of the defendant or against the victim, or by defense misconduct that reduces the likelihood of a warranted conviction or penalty.

The formulation of section 1003 fully reflects this point, and applies evenhandedly to the defense and the prosecution. Hence, paragraph (1) requires examination of juror bias on motion of the prosecutor, as well as on motion of the defense. This provision could, for example, be invoked by the prosecutor if there were grounds for concern that a warranted death penalty might not be imposed because of bias against the racial group of the victim. Similarly, paragraph (2) allows the prosecutor as well as the defense attorney to move for a change of venue on grounds of racial bias, and paragraph (3) prohibits appeals to racial prejudice by both the defense attorney and prosecutor. These provisions are responsive to the allegations by proponents of the "Racial Justice Act" that the death penalty is not imposed with sufficient frequency in cases involving Black victims because of racial prejudice or bias.

SEC. 1004. FEDERAL CAPITAL CASES

Section 1004 states a number of special rules and standards for federal capital cases.

Subsection (a) requires instructions to the jury that prejudice or bias relating to the race of the defendant or victim must not affect a capital sentencing determination, and certification by all the jurors when a capital sentence is imposed that they complied with this instruction. This provision is substantially the same as instruction and certification requirements, as they relate to race, which were included in death penalty legislation passed by the Senate and the House of Representatives in the 101st Congress (titles I and XIV of S. 1970 and title II of H.R. 5269), and which appear in title I of this bill.

Both the Senate-passed and House-passed death penalty legislation in the 101st Congress, like title I of this bill, complied with current Supreme Court decisions governing capital punishment by limiting consideration of the death penalty to cases in which one or more aggravating factors from a specified statutory list are found to exist. The two existing federal statutes that contain detailed death penalty procedures -- 21 U.S.C. 848(e)-(r) (drug-related murders) and 49 U.S.C. App.

1473(c) (fatal aircraft hijackings) -- similarly condition consideration of the death penalty on the existence of specified statutory aggravating factors.

Subsection (b) of section 1004 provides that the fact that the killing of the victim was motivated by racial prejudice or bias is to be treated as an additional statutory aggravating factor whose existence permits consideration of the death penalty. This effectively extends the list of statutory aggravating factors in existing statutes to include racial motivation, and ensures that racial motivation will be counted as such a factor under any federal death penalty legislation that may be enacted in the future.

Subsection (c) authorizes the death penalty for violations of 18 U.S.C. 241, 242, and 245 that result in death. These are the principal criminal provisions of the federal civil rights laws. Each of these provisions currently authorizes imprisonment for any term of years or for life in cases in which death results. However, they do not authorize capital punishment in any case, although racially motivated killings that plainly may warrant consideration of the death penalty are often covered by these provisions. See, e.g., United States v. Price, 383 U.S. 787 (1966); United States v. Guest, 383 U.S. 745 (1966).

In conjunction with subsection (b), subsection (c) will ensure that the capital sentencing option is consistently available for racially motivated murders in violation of the federal civil rights laws. In addition to the intrinsic importance of authorizing the death penalty for the most heinous civil rights offenses, these provisions provide an additional element in the Act's response to the purported concern of proponents of the "Racial Justice Act" that the death penalty is not imposed with sufficient frequency for crimes against black victims.

SEC. 1005. FUNDING OBJECTIVE

Section 1005 makes it an objective of federal justice assistance funding to ensure that adequate resources and expertise are available to expeditiously carry out the death penalty in all appropriate cases. The proposed funding objective will help ensure that efforts to carry out the death penalty will not be impeded by resource constraints, thereby promoting the equal protection of all victims and potential victims from lethal criminal violence, regardless of race through the use of the death penalty.

The proposed funding objective particularly emphasizes the provision of support to state agencies that seek to uphold and secure the execution of death sentences through litigation in habeas corpus and other collateral or post-conviction

proceedings. This is responsive to an imbalance in litigation resources that has resulted from one-sided federal support of defendants' efforts to overturn capital sentences at these stages of litigation.

As President Bush observed in his signing statement on November 29, 1990, on the Comprehensive Crime Control Act of 1990, "in Public Law 101-515, the Congress appropriated substantial funds for 'Death Penalty Resource Centers.' Because S. 3266 does not include the reform of the habeas corpus system that I proposed, these Federal funds will inevitably be used in part to foster repetitive attacks on State court judgements and to delay unjustly the implementation of State sentences." The National Association of Attorneys General (NAAG), in a resolution adopted at its meeting of December 4-7, 1990, also noted the problems occasioned by this one-sided approach to federal funding in habeas litigation. In many cases, a State attorney general on a limited budget faces a large law firm operating pro bona and a federally funded capital resource center in federal habeas litigation. The NAAG resolution urges the Federal Government to provide the governmental unit which represents the state in such litigation the same amount of federal funds provided to the capital resource center in that state. The amendment proposed in section 1005 will further this objective by allowing Bureau of Justice Assistance grants to be used for this purpose.

SEC. 1006. EXTENSION OF PROTECTION OF CIVIL RIGHTS STATUTES

In United States v. Maravilla, 907 F.2d 216 (1st Cir. 1990), the court overturned the convictions of two customs agents for killing an alien who was briefly present in the United States. The rationale was that such a person did not qualify as an "inhabitant" for purposes of 18 U.S.C. 242. This section amends 18 U.S.C. 241 and 242 to ensure protection of all persons within the United States by these important provisions of the federal civil rights laws, regardless of whether they are "inhabitants."

XI. VICTIMS' RIGHTS

SEC. 1101. RESTITUTION AMENDMENTS

This section makes two amendments to the restitution statute, 18 U.S.C. 3663. First, it makes the offender liable for child care, transportation, and other costs to the victim that result from participation in the investigation or prosecution of the offense or attendance at proceedings in the case.

Second, it authorizes a judge to suspend the offender's eligibility for Federal benefits if the offender is delinquent in paying restitution. This provides an additional incentive for prompt payment of restitution obligations. This provision has a precedent in section 5301 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, which provides for denial of Federal benefits to persons convicted of certain drug offenses.

SEC. 1102. VICTIM'S RIGHT OF ALLOCUTION IN SENTENCING

Defendants in criminal cases have traditionally been accorded an opportunity to address the court prior to imposition of the sentence. This practice is codified in Fed. R. Crim. P. 32(a)(1)(C), which directs the sentencing judge to "address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence."

Section 1102 would amend Rule 32 to extend to the victim as well the right to address the court concerning the sentence, in cases involving violent crimes and crimes of sexual abuse. This right would normally be exercised directly by the victim -- defined as any individual against whom the offense was committed -- but it could be exercised instead by a parent or guardian if the victim was a minor or incompetent, or by one or more family members or relatives designated by the court if the victim was deceased or incapacitated.