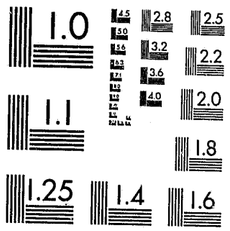

Department of Justice

POLICY PLANNING IN CRIMINAL JUSTICE:

THE NEW COMPREHENSIVE CRIME CONTROL ACT

SPEECH

BY

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The Comprehensive Crime Control Act of 1984 was approved as Title II of House Joint Resolution 648, the so-called "Continuing Resolution" passed to enable most of the federal agencies to continue to spend money after the 98th Congress failed to enact appropriations bills for them. The Act's 220 single spaced pages contain the most significant changes in the federal criminal justice system ever enacted at one time. Its passage represents both a tremendous victory for the Administration in the House, and a culmination of over a decade of a bipartisan effort in the Senate to enact its most important provisions. It will have a major impact on the criminal justice system for years to come and the effort to achieve its enactment is a good example of how policy and planning can help improve that system.

Conceptually, the Act can be divided into two portions. The most important parts are in its first twelve Chapters and, as I will explain more fully, virtually all of this material was submitted and strongly supported by the Department of Justice as part of the President's Crime Control program. Let me briefly summarize these Chapters first.

Chapter I is a complete revision of the federal bail laws to permit courts to consider the defendant's danger to the community in setting pretrial release conditions and to deny bail altogether where the government establishes at a hearing that no condition of release will assure such safety. The chapter also provides that pretrial release may be denied if the government establishes that no condition of release, such as a very high

money bond, will assure that the defendant will not flee. Chapter I also provides for the jailing of persons -- again after a hearing -- who were released pending trial but who then commit another crime, and makes it much more difficult for persons convicted of crimes to obtain release on bail pending appeal and sentencing.

Chapter II provides for the complete revision of the federal sentencing system to eliminate parole and to narrow greatly the discretion that judges have in setting a sentence. This is the only major portion of the Act with a substantial delayed effective date. Within the next eighteen months a Presidentially appointed Sentencing Commission will be appointed and will work full time to establish narrow guidelines for sentences based on offense and offender characteristics. After the guidelines take effect following review by the GAO and the Congress judges will have to sentence defendants within the narrow guideline range or explain in writing any reason for the deviation. A defendant will have the right to appeal a sentence that is higher than that set in the guidelines and the government will be empowered to appeal a more lenient sentence.

Chapter III strengthens the forfeiture laws. These statutes are powerful weapons of great utility against top echelon organized crime figures and major drug traffickers. The new provisions make it clear that the profits and proceeds of

organized crime activities -- for example the profits of a bookmaking or loansharking operation -- can be forfeited to the government, thus codifying a recent Supreme Court case that held such profits forfeitable under the old statute. Chapter III also expands old law to permit forfeiture in all felony drug cases, allows the forfeiture of real property used in drug manufacture or distribution, and makes it easier for the government to prevent a person from transferring property to shield it from forfeiture at the conclusion of a judicial proceeding against him.

Chapter IV narrows the use of the insanity defense. Interestingly it is the first time in our history that Congress has addressed this issue. Under the new Act, the insanity defense is limited to those persons who, due to serious mental disease or defect, are unable to appreciate the nature or wrongfulness of their acts. The old law, developed entirely by the courts, permitted a successful insanity defense if the defendant could not appreciate the nature of his acts or could not control his conduct so as to conform to the law. The insanity defense chapter also reverses the old case law that required the government to prove that the defendant was sane by placing the burden on the defendant to prove he was insane by clear and convincing evidence. It prohibits experts from giving their opinions on the defendant's sanity, a practice which often served only to confuse

jurors. Finally, Chapter IV provides for the automatic commitment to a mental hospital of a person found not guilty by reason of insanity.

Also included in the first part of the Act is a chapter which generally strengthens the penalties applicable to narcotics offenses, a chapter which revises the labor racketeering statutes to make it tougher for convicted racketeers to exert control over unions or union trust funds, and a chapter which improves the statutes designed to prevent "money laundering" by organized crime figures and big time drug dealers.

Another chapter in the portion of the Act taken from the Administration's crime bill is designed to facilitate the donation of surplus federal property to state and local governments for new prison construction, while another chapter, which differs somewhat from what the Administration proposed, provides for modest financial assistance to states and municipalities to help finance anti-crime programs of proven effectiveness. This latter provision is essentially a scaled down version of the aid formerly provided by the Law Enforcement Assistance Administration.

Chapters X, XI, and XII, the final chapters of the Act to come essentially from the Administration's Crime Control Bill, contain 35 separate provisions that either amend substantive or procedural provisions in the federal criminal code to close

identified gaps or add new offenses that are needed to proscribe new forms of criminal activity. For example, the law setting out mandatory penalties for the use of a firearm in the commission of a crime of violence is purged of ambiguities that had rendered it almost useless; a new offense is added making it a federal crime to physically attack a close relative of a federal official or law enforcement officer; and government appeals of post-conviction new trial orders are authorized, to name just a few of the improvements made in these important chapters.

As I mentioned, Chapters I-XII of the Act were, in virtually all material respects, derived from the Administration's anti-crime bill. That bill was first introduced as S. 829 and H.R. 2151 on March 16, 1983. These provisions, as well as other portions of S. 829 that were not enacted, were prepared by the Department of Justice over a four month period between November, 1982, and February, 1983. However, the four key procedural chapters -- those on bail, sentencing, the insanity defense and forfeiture -- were by no means new when they were submitted to the Congress.

The bail and sentencing chapters were originally drafted over a decade ago during work on the bills to completely revise and update the federal criminal code that had been considered by the Senate Judiciary Committee since the early 1970's. The drafting was done by attorneys in the Criminal Division -- the

Division that did virtually all of the work on the code revision bills. As the 1970's wore on, code revision bills were introduced in the Senate in each Congress, and the bail and sentencing provisions, like most other parts, were the combined work of these attorneys in the Criminal Division acting under the guidance of the Department's political appointees and of the Senate Judiciary Committee staff who naturally reflected the views of their sponsoring Senators. Despite some changes along the way, these titles as introduced and as ultimately enacted were very similar to the bail and sentencing provisions that had been agreed on years ago by the Department and the Senate Judiciary Committee but had failed of enactment sooner because they were part of code revision bills that were never favored by the House Judiciary Committee.

The insanity defense chapter has a somewhat similar history. The procedural provisions -- for example the provisions governing examinations to determine competency to stand trial -- had generally been included in the line of code revision bills. However, the code bills had taken different positions on the insanity defense itself. In the 93rd and 94th Congresses the defense was essentially abolished and replaced with the so-called mens rea approach under which the defendant's mental condition would only have been a defense if it prevented the government from proving a required mental element of the offense, such as

that the defendant acted willfully. Later bills, such as S. 1437 which actually passed the Senate in 1976, and the code bills introduced in the Senate in the 96th and 97th Congresses left the insanity defense as it was under then current law.

Then the verdict in the Hinckley case in 1982 caused a renewed interest in the insanity defense and the Department prepared and worked for passage of separate legislation that would have adopted the mens rea approach. However, opposition, both at hearings and informally, by such groups as the American Bar Association and the American Psychiatric Association, which prepared an excellent short treatise on the proper role of psychiatrists in insanity defense cases, caused the Senate Judiciary Committee to favor merely limiting the defense, not abolishing it. Consequently, the Department felt obliged to support this approach and it was included in S. 1762.

As for forfeiture reform, during the 96th Congress, Senator Biden sponsored strong forfeiture legislation after holding hearings on the forfeiture of narcotics proceeds. Then in the 97th Congress, Senator Thurmond became Chairman of the Judiciary Committee and he introduced a forfeiture bill prepared by the Department that adopted and expanded on most of Senator Biden's proposals, and more hearings were held. The House Judiciary Committee had also been more receptive to forfeiture legislation than to most other major criminal justice reforms and a forfei-

ture reform title was included in a comprehensive crime bill that passed both Houses at the very end of the 97th Congress in December of 1982, but was pocket vetoed for reasons unrelated to forfeiture.

I might add that the Department of Justice, during both Republican and Democratic Administrations, has worked closely with the Senate Judiciary Committee staff for a long time in a bipartisan effort to enact criminal code revision bills. We are used to cooperating with that Committee and by the start of the 98th Congress, such a broad consensus had been reached on the four key procedural areas in the bill that they were supported by not only the Department of Justice but by Senators as diverse as Kennedy and Biden on the one hand, and Thurmond and Hatch on the other.

There were, however, other major provisions in S. 829 as it was drafted by the Department and introduced that did not enjoy such extensive support, even in the Senate. These other titles provided for the reinstitution of the death penalty in federal courts, the modification of the Fourth Amendment exclusionary rule, the reform of present habeas corpus procedures which allow almost endless review of state convictions in federal courts, and amendments of the Federal Tort Claims Act to make the federal government, rather than its individual employees, liable for torts committed in the course of their duties. They were so

controversial that after six days of hearings before various Senate Judiciary Subcommittees the full Committee deleted them when it reported out the remaining twelve titles on July 21, 1983 as a clean bill, S. 1762. Parenthetically, it should be noted that the death penalty, modification of the exclusionary rule, and the habeas corpus amendments all were reported out as separate bills and passed the Senate by substantial majority votes in February of 1984.

Once S. 1762 was reported out by the Judiciary Committee, accompanied by a thorough report prepared with great assistance from the Department of Justice, passage by the Senate was a virtual certainty. The only problem was waiting for floor time to consider the bill. That time became available when the Congress returned from its Christmas vacation in late January, and on February 2, 1984, S. 1762 was approved 91-1 by the Senate.

Such an early passage was most fortunate because attention could then be concentrated on the House where considerably tougher going was expected. For years the House Judiciary Committee has been much less receptive to legislation to facilitate federal criminal prosecutions than the Senate Judiciary Committee. The criminal code revision bills and separate bills dealing with such matters as bail reform, sentencing, and the insanity defense that had been introduced by some of its subcommittee chairmen seemed to indicate that the

Committee was also much more defendant-oriented than the House as a whole. For example, one subcommittee chairman was quoted in the press as saying that S. 1762 was "dead on arrival" in the House. In addition, the Judiciary Committee refused to consider the Administration's crime bill as a package, even with the more controversial titles such as the death penalty and the exclusionary rule modification removed, and instead divided up its key issues among several different subcommittees.

Throughout 1984, the House Judiciary Committee did consider some portions of the bill, but when the House returned from its long August recess, much remained to be done and there appeared little time in which to do it. At that time the House had passed none of the major procedural titles, although an acceptable bail reform bill had been reported by the Judiciary Committee, as had insanity defense and forfeiture bills that were somewhat similar to the provisions in S. 1762 but which contained several defects or omissions. Subsequently, on September 13, a sentencing bill was reported that contained determinate sentencing provisions roughly similar to those in S. 1762 but had so many other flaws that overall it would have been worse than existing law.

The other portions of S. 1762 were not faring much better. A bill to increase drug penalties that was actually a slight improvement on comparable provisions in S. 1762 was passed on September 18, but of the more than 30 miscellaneous provisions in

Titles X, XI, and XII, the House had passed only 11 as of that date. Most of the others had not even been the subject of hearings, and persons in the Department of Justice familiar with the legislation expected that at best only portions of the crime bill could be added to other bills and enacted in the closing days of the Congress. In fact, the Department was considering sending a letter to the Senate Judiciary Committee suggesting that this course be pursued.

However, September 18 proved to be a date that would bode well for the crime bill because on that occasion the House considered its insanity defense bill under Suspension of the Rules, a procedure which allows no amendments to the bill as reported and which requires a two-thirds vote for enactment. The bill failed by a vote of 225 to 171 with the opponents arguing that they should be given an opportunity to vote on amendments taken from S. 1762. The vote was generally seen as an indication that the House was favorably disposed to the types of reforms in other areas that were contained in S. 1762.

This view was borne out a week later when, on September 25, over the objection of the House leadership and of all but two of the Democrats on the Judiciary Committee, the House adopted an amendment offered by Congressman Dan Lungren to add the provi-

sions of S. 1762 in their entirety to the Continuing Resolution. By a vote 243 to 166 the twelve titles of S. 1762 were added as Chapters 1 - XII of Title II of the C.R.

Once it became clear that the Continuing Resolution would contain a major crime package, the Democratic members of the House Judiciary Committee sought to add several of their own proposals, some of which had been passed by the House as separate bills, and these provisions make up the bulk of Chapters XIII-XXIII. For example, chapters were added dealing with such matters as credit card fraud, computer crimes, compensation for victims of crime, and the creation of a "Drug Tsar" to coordinate the federal government's efforts to combat narcotics trafficking.[1] In addition, key House Judiciary Committee members were able to slightly modify some of the provisions in the first twelve chapters such as weakening the forfeiture provisions by eliminating a section providing for the forfeiture of substitute assets when the defendant has transferred otherwise forfeitable assets beyond the reach of the court.

All of these additions and modifications were possible because the Continuing Resolution differed from the House version on a number of purely monetary matters. Consequently, after the

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1 The Senate and the House favored different versions of the "Drug Tsar" bill. The Senate bill, which was acceptable to the Administration, was adopted.

25th of September, there was some opportunity for negotiation between the staffs of the Senate and House Judiciary Committees. However, most of these matters were worked out during a virtually continuous two days and nights of negotiations on Thursday and Friday, October Fourth and Fifth, when it appeared that the Continuing Resolution would be finalized on the intended adjournment date of the Fifth. As it turned out, the difficulty in resolving other matters in the Continuing Resolution necessitated the two Houses' returning the following week and the C.R. was not ready for the President's signature until the Twelfth, but the pressure of working out final details of the crime package in a two day period accounts for the occasionally imperfect blending of the provisions in Chapters I-XII with those in the final Chapters. Nevertheless, the key bail reform and insanity defense provisions were unaltered, only a few trivial changes were made in sentencing -- at the insistence of Senator Mathias, the lone dissenting vote when the Senate originally enacted S. 1762 -- and forfeiture reform was weakened only by the loss of the substitute assets provision.

During the week of October 8, when it became increasingly likely that the President would sign the Continuing Resolution, the Department of Justice turned its attention from passage of the Act to its implementation. Since the vast majority of the provisions had no delayed effective date and would become the law

the moment the President signed the C.R., the first task was to provide the 94 United States Attorneys Offices with copies of the Act and to advise them of its most significant features, particularly the new bail provisions which would have to be followed for every new arrest after the Act became law.

The Associate Attorney General's Office has coordinated this effort. The Criminal Division first prepared a fairly detailed memorandum explaining the new bail provisions and the Office of the U.S. Attorney for the District of Columbia -- which has had experience with a similar preventive detention statute in effect in the District -- also prepared a comprehensive memorandum that suggested arguments to be made to oppose expected constitutional and other legal challenges to this chapter and contained other practical advice. The Criminal Division also prepared memoranda explaining the effect of various parts of the Act on pending and ongoing cases, and other memoranda highlighting particularly noteworthy portions of immediate concern to the field. Another important document prepared by the Criminal Division was a capsule summary of the Act with a name and telephone number of an attorney in the Division responsible for answering questions from the field concerning each Chapter or subpart. All of this material, along with a xeroxed "cut and paste" version of the Act taken from the Congressional Record and xeroxed copies of the legislative history of the bail provisions,

were sent by Express Mail to all the United States Attorneys on Sunday, October 14 with a cover memorandum from the Associate Attorney General.

Because of the sheer size of the Act -- 220 pages -- United States Attorneys Offices had to use the "cut and paste" version of the Act until this week when bound copies were sent to all field offices. In addition, bound copies of the Senate Committee Reports which contain the relevant legislative history of the Act were also sent to the field this week. Detailed analyses of all portions of the Act are presently being prepared by attorneys in the Department -- with most of the work quite naturally being done in the Criminal Division.

Meanwhile, because of the expected constitutional challenges that will be mounted by defense counsel against the bail provisions, the United States Attorneys Offices were advised that special procedures should be instituted to ensure that cases presenting constitutional issues involved fact situations where there was no doubt as to the defendant's dangerousness. Obviously, we want to avoid the situation summed up in the old saw that "bad cases make bad law," and in fact we in the Criminal Division have met with the Solicitor General's Office to map strategy as to how, ideally, we would like to defend the bail provisions.

Consequently, in the cover memorandum from the Associate Attorney General transmitting the material that went out immediately after the C.R. was signed, the U.S. Attorneys were instructed that they were to personally review and approve all motions for pretrial detention based on dangerousness, and in addition the Criminal Division was to be consulted in all cases unless there is clear evidence of dangerousness such as prior instances of threats or violence directed toward victims or witnesses, or the crime for which the person has been arrested involves the commission of a violent crime or drug offense while on pretrial release. They were also told that the Criminal Division should be contacted in all bail cases involving questions of statutory interpretation, constitutionality and retrospective applicability.

In sum, then we think that the way in which the Department of Justice handled the Comprehensive Crime Control Act from the drafting of the core provisions of the bill, through efforts to obtain its passage, and finally the considerable task of its smooth implementation, presents a good example -- in fact a unique example in the area of criminal justice -- of how careful planning coupled with persistence can translate sound policies into new law.

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