
**3182** P.L. 98-473, CONTINUING APPROPRIATIONS, 1985-- COMPREHENSIVE CRIME CONTROL ACT OF 1984

SEE PAGE 98 STAT. 1837

HOUSE REPORT (APPROPRIATIONS COMMITTEE) NO. 98-1030, SEPT. 17, 1984 (TO ACCOMPANY H.J.RES. 648)

SENATE REPORT (APPROPRIATIONS COMMITTEE) NO. 98-634, SEPT. 25, 1984 (TO ACCOMPANY S.J.RES. 356)

HOUSE CONFERENCE REPORT NO. 98-1159, OCT. 10, 1984 (TO ACCOMPANY H.J.RES. 648)

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DATES OF CONSIDERATION AND PASSAGE
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SENATE OCTOBER 4, 11, 1984

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

SENATE REPORT NO. 98-225
AUG. 4, 1983


*1 **3184** THE COMMITTEE ON THE JUDICIARY, TO WHICH WAS REFERRED THE BILL (S. 1762) TO MAKE COMPREHENSIVE REFORMS AND IMPROVEMENTS IN THE FEDERAL CRIMINAL LAWS AND PROCEDURES, AND FOR OTHER PURPOSES, HAVING CONSIDERED THE SAME, REPORTS FAVORABLY THEREON AND RECOMMENDS THAT THE BILL DO PASS.

GENERAL STATEMENT

THE COMPREHENSIVE CRIME CONTROL ACT OF 1983 AS REPORTED BY THE COMMITTEE IS THE PRODUCT OF A DECADE LONG BIPARTISAN EFFORT OF THE SENATE COMMITTEE ON THE JUDICIARY, WITH THE COOPERATION AND SUPPORT OF SUCCESSIVE ADMINISTRATIONS, TO MAKE MAJOR COMPREHENSIVE IMPROVEMENTS TO THE FEDERAL CRIMINAL LAWS. SIGNIFICANT PARTS OF THE MEASURE, SUCH AS SENTENCING REFORM, BAIL REFORM, INSANITY DEFENSE AMENDMENTS, DRUG PENALTY AMENDMENTS, CRIMINAL FORFEITURE IMPROVEMENTS, AND NUMEROUS RELATIVELY MINOR AMENDMENTS, HAVE EVOLVED OVER THE ALMOST TWO-DECADE CONSIDERATION OF PROPOSALS TO ENACT A MODERN FEDERAL CRIMINAL CODE.

[FN1] IN ADDITION, SPECIALIZED *2 HEARINGS HAVE BEEN HELD ON NUMEROUS SUBJECTS COVERED BY THE BILL, SUCH AS SENTENCING, [FN2] BAIL REFORM, [FN3]
PORNOGRAPHY, [FN7] AND PHARMACY ROBBERY. [FN8] MOREOVER, THIS BILL
CONTAINS, WITH LITTLE SIGNIFICANT CHANGE, MOST OF THE PROVISIONS OF THE
VIOLENT CRIME AND DRUG ENFORCEMENT IMPROVEMENTS ACT OF 1982 (S. 2572)
THAT PASSED THE SENATE ON SEPTEMBER 30, 1982, BY A VOTE OF 95 TO 1, AS
WELL AS A NUMBER OF RELATIVELY MINOR NONCONTROVERSIAL MATTERS
DESIGNED TO MAKE CURRENT FEDERAL CRIMINAL LAWS MORE EFFECTIVE.
THE COMMITTEE ALSO NOTED THE MAJOR CONTRIBUTION TO THIS BILL BY THE
ADMINISTRATION. ON MARCH 16, 1983, THE PRESIDENT SENT TO THE CONGRESS A
42-POINT PROPOSAL WITH SIXTEEN MAJOR TITLES ENTITLED, AS IS THIS BILL, THE
'COMPREHENSIVE CRIME CONTROL ACT OF 1983' (S. 829). IN TRANSMITTING THE
PROPOSAL TO THE CONGRESS, THE ADMINISTRATION NOTED THAT IT WAS
'INTENDED TO SERVE AS A REFERENCE DOCUMENT TO SET OUT, IN A
COMPREHENSIVE FASHION, ALL OF THE VARIOUS CRIMINAL JUSTICE LEGISLATIVE REFORMS NEEDED TO RESTORE A PROPER BALANCE BETWEEN THE
FORCES OF LAW AND THE FORCES OF LAWLESSNESS.' SIX DAYS OF HEARINGS ON S.
829 AND OTHER RELATED BILLS WERE HELD-- 4 DAYS BY THE SUBCOMMITTEE ON
CRIMINAL LAW, 1 DAY JOINTLY BY THE SUBCOMMITTEES ON CRIMINAL LAW AND
JUVENILE JUSTICE, AND 1 DAY ON THE TORT CLAIMS ACT AMENDMENTS BY THE
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE. [FN9]
ON JULY 21, 1983, THE COMMITTEE ORDERED REPORTED A BILL CONSISTING OF
TWELVE TITLES DEALING WITH BAIL (TITLE I), SENTENCING (TITLE II), FORFEITURE
(TITLE III), THE INSANITY DEFENSE AND RELATED PROCEDURES (TITLE IV), DRUG
PENALTIES (TITLE V), JUSTICE ASSISTANCE (TITLE VI), LABOR RACKETEERING (TITLE
VIII), FOREIGN CURRENCY TRANSACTIONS (TITLE IX), MISCELLANEOUS VIOLENT
CRIME AMENDMENTS (TITLE X), MISCELLANEOUS NONVIOLENT OFFENSES (TITLE XI),
AND PROCEDURE AMENDMENTS (TITLE XII). [FN10] EACH OF THESE TITLES IS
DISCUSSED IN ORDER IN DETAIL BELOW.

*3 TITLE I-- BAIL REFORM

INTRODUCTION

TITLE I SUBSTANTIALLY REVISES THE BAIL REFORM ACT OF 1966 [FN11] IN ORDER
TO ADDRESS SUCH PROBLEMS AS (A) THE NEED TO CONSIDER COMMUNITY SAFETY
IN SETTING NONFINANCIAL PRETRIAL CONDITIONS OF RELEASE, (B) THE NEED TO
EXPAND THE LIST OF STATUTORY PRETRIAL RELEASE CONDITIONS, (C) THE NEED TO PERMIT
THE PRETRIAL DETENTION OF DEFENDANTS AS TO WHOM NO CONDITIONS OF
RELEASE WILL ASSURE THEIR APPEARANCE AT TRIAL OR ASSURE THE SAFETY OF THE
COMMUNITY OR OF OTHER PERSONS, (D) THE NEED FOR A MORE APPROPRIATE
BASIS FOR DECIDING ON POST-CONVICTION RELEASE, (E) THE NEED TO PERMIT
TEMPORARY DETENTION OF PERSONS WHO ARE ARRESTED WHILE THEY ARE ON A
FORM OF CONDITIONAL RELEASE OR WHO ARE ARRESTED FOR A VIOLATION OF THE
IMMIGRATION AND NATIONALITY ACT, AND (F) THE NEED TO PROVIDE PROCEDURES
FOR REVOCATION OF RELEASE FOR VIOLATION OF THE CONDITIONS OF RELEASE.
MANY OF THE CHANGES IN THE BAIL REFORM ACT INCORPORATED IN THIS BILL
REFLECT THE COMMITTEE'S DETERMINATION THAT FEDERAL BAIL LAWS MUST
ADDRESS THE ALARMING PROBLEM OF CRIMES COMMITTED BY PERSONS ON
RELEASE AND MUST GIVE THE COURTS ADEQUATE AUTHORITY TO MAKE RELEASE
DECISIONS THAT GIVE APPROPRIATE RECOGNITION TO THE DANGER A PERSON MAY
POSE TO OTHERS IF RELEASED. THE ADOPTION OF THESE CHANGES MARKS A
SIGNIFICANT DEPARTURE FROM THE BASIC PHILOSOPHY OF THE BAIL
REFORM ACT, WHICH IS THAT THE SOLE PURPOSE OF BAIL LAWS MUST BE TO
ASSURE THE APPEARANCE OF THE DEFENDANT AT JUDICIAL PROCEEDINGS.

SECTION-BY-SECTION ANALYSIS

SECTION 3141. RELEASE AND DETENTION AUTHORITY GENERALLY

THIS SECTION SPECIFIES WHICH JUDGES HAVE THE AUTHORITY TO ORDER THE RELEASE OF DETENTION OF PERSONS PURSUANT TO THIS CHAPTER. INSTEAD OF USING THE TERM 'BAIL', THIS PROVISION AND OTHER PROVISIONS IN THIS CHAPTER USE THE TERM 'RELEASE' IN ORDER TO DISTINGUISH BETWEEN MONEY BOND (I.E., 'BAIL') AND CONDITIONAL RELEASE (OFTEN REFERRED TO AS 'RELEASE ON BAIL'). SUBSECTION (A) DEALS WITH RELEASE AND DETENTION AUTHORITY TO ORDER THE ARREST OF A PERSON SHALL ORDER THAT AN ARRESTED PERSON BROUGHT BEFORE HIM BE RELEASED PURSUANT TO 18 U.S.C. 3041 OR DETAINED, PENDING JUDICIAL PROCEEDINGS, PURSUANT TO THIS CHAPTER. THE JUDICIAL OFFICERS AUTHORIZED TO ARREST A PERSON UNDER 18 U.S.C. 3041 INCLUDE ANY JUSTICE OR JUDGE OF THE UNITED STATES, UNITED STATES MAGISTRATE, AND THOSE STATE JUDICIAL OFFICERS WHO ARE AUTHORIZED TO ARREST AND COMMIT OFFENDERS. SIMILAR AUTHORITY IS SET OUT IN 18 U.S.C. 3141 UNDER CURRENT LAW, ALTHOUGH THAT PORTION OF THE PRESENT 18 U.S.C. 3141 WHICH LIMITS THE AUTHORITY TO SET BAIL IN CAPITAL CASES TO JUDGES OF COURTS OF THE UNITED STATES HAVING ORIGINAL JURISDICTION OVER THE CASE HAS NOT BEEN CARRIED FORWARD.

RELEASE AND DETENTION AUTHORITY PENDING SENTENCE AND APPEAL, WHICH IS ADDRESSED IN SUBSECTION (B), IS LIMITED TO A JUDGE OF A COURT HAVING ORIGINAL JURISDICTION OVER THE OFFENSE, OR A JUDGE OF A FEDERAL APPELLATE COURT. ALTHOUGH IT WOULD BE INAPPROPRIATE FOR A STATE JUDGE OR A MAGISTRATE TO MAKE A RELEASE DETERMINATION AFTER A FEDERAL CONVICTION, THE CURRENT FORM OF 18 U.S.C. 3141 MAKES NO DISTINCTION BETWEEN RELEASE AUTHORITY PENDING TRIAL AND THAT AFTER CONVICTION, DESPITE THE FACT THAT RULE 9(B) OF THE FEDERAL RULES OF APPELLATE PROCEDURE REQUIRES THAT AN APPLICATION FOR RELEASE PENDING APPEAL BE MADE IN THE FIRST INSTANCE BEFORE THE TRIAL COURT. [FN13] SECTION 3141(B) RESOLVES THIS AMBIGUITY.
SECTION 3142. RELEASE OR DETENTION OF A DEFENDANT PENDING TRIAL

THIS SECTION MAKES SEVERAL SUBSTANTIVE CHANGES IN THE BASIC PROVISIONS OF THE BAIL REFORM ACT OF 1966. THAT ACT, IN 18 U.S.C. 3146, ADOPTED THE CONCEPT THAT IN NONCAPITAL CASES A PERSON IS TO BE ORDERED RELEASED PRETRIAL UNDER THOSE MINIMAL CONDITIONS REASONABLY REQUIRED TO ASSURE HIS PRESENCE AT TRIAL. DANGER TO THE COMMUNITY *5 AND THE PROTECTION OF SOCIETY ARE NOT TO BE CONSIDERED AS RELEASE FACTORS UNDER THE CURRENT LAW.


THE PRIMARY PURPOSE OF THE ACT WAS TO DEEMPHASIZE THE USE OF MONEY BONDS IN THE FEDERAL COURTS, A PRACTICE WHICH WAS PERCEIVED AS RESULTING IN DISPROPORTIONATE AND UNNECESSARY **3188 PRETRIAL INCARCERATION OF POOR DEFENDANTS, AND TO PROVIDE A RANGE OF ALTERNATIVE FORMS OF RELEASE. THESE GOALS OF THE ACT-- CUTTING BACK ON THE EXCESSIVE USE OF MONEY BONDS AND PROVIDING FOR FLEXIBILITY IN SETTING CONDITIONS OF RELEASE APPROPRIATE TO THE CHARACTERISTICS OF INDIVIDUAL DEFENDANTS-- ARE ONES WHICH ARE WORTHY OF SUPPORT. HOWEVER, 15 YEARS OF EXPERIENCE WITH THE ACT HAVE DEMONSTRATED THAT, IN SOME RESPECTS, IT DOES NOT PROVIDE FOR APPROPRIATE RELEASE DECISIONS. INCREASINGLY, THE ACT HAS COME UNDER CRITICISM AS TOO LIBERALLY ALLOWING RELEASE AND AS PROVIDING TOO LITTLE FLEXIBILITY TO JUDGES IN MAKING APPROPRIATE RELEASE DECISIONS REGARDING DEFENDANTS WHO POSE SERIOUS RISKS OF FLIGHT OR DANGER TO THE COMMUNITY.

THE CONSTRAINTS OF THE BAIL REFORM ACT FAIL TO GRANT THE COURTS THE AUTHORITY TO IMPOSE CONDITIONS OF RELEASE GEARED TOWARD ASSURING COMMUNITY SAFETY, OR THE AUTHORITY TO DENY RELEASE TO THOSE DEFENDANTS WHO POSE AN ESPECIALLY GRAVE RISK TO THE SAFETY OF THE COMMUNITY. IF A COURT BELIEVES THAT A DEFENDANT POSES SUCH A DANGER, IT FACES A DILEMMA- EITHER IT CAN RELEASE THE DEFENDANT PRIOR TO TRIAL DESPITE THESE FEARS, OR IT CAN FIND A REASON, SUCH AS RISK OF FLIGHT, TO DETAIN THE DEFENDANT (USUALLY BY IMPOSING HIGH MONEY BOND). IN THE COMMITTEE'S VIEW, IT IS INTOLERABLE THAT THE LAW DENIES JUDGES THE TOOLS TO MAKE HONEST AND APPROPRIATE DECISIONS REGARDING THE RELEASE OF SUCH DEFENDANTS.


THIS BROAD BASE OF SUPPORT FOR GIVING JUDGES THE AUTHORITY TO WEIGH
RISKS TO COMMUNITY SAFETY IN PRETRIAL RELEASE DECISIONS IS A REFLECTION OF THE DEEP PUBLIC CONCERN, WHICH THE COMMITTEE SHARES, ABOUT THE GROWING PROBLEM OF CRIMES COMMITTED BY PERSONS ON RELEASE. 

In a recent study of release practices in eight jurisdictions, approximately one out of every six defendants in the sample studied were rearrested during the pretrial period— one-third of these defendants were rearrested more than once, and some were rearrested as many as four times. \[FN24\] Similar levels of pretrial criminality were reported in a study of release practices in the District of Columbia, where thirteen percent of all felony defendants released were rearrested. Among defendants released on surety bond, which under the District of Columbia Code, like the Bail Reform Act, is the form of release reserved for those defendants who are the most serious bail risks, pretrial rearrest occurred at the alarming rate of twenty-five percent. \[FN25\] The disturbing rate of recidivism among released defendants requires the law to recognize that the danger a defendant may pose to others should receive at least as much consideration in the pretrial release determination as the likelihood that he will not appear for trial. \[FN26\] In facing the problem of how to change current bail laws to provide appropriate authority to deal with dangerous defendants seeking release, the committee concluded that while such measures as permitting consideration of community safety in setting release conditions and providing for revocation of release upon the commission of a crime during the pretrial period may serve to reduce the rate of pretrial recidivism, and that these measures therefore should be incorporated in this chapter, there is a small but identifiable group of particularly dangerous defendants as to whom neither \*7 \[FN27\] the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial.

The decision to provide for pretrial detention is in no way a derogation of the importance of the defendant's interest in remaining at liberty prior to trial. However, not only the interests of the defendant, but also important societal interests are at issue in the pretrial release decision. Where there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate. This rationale— that a defendant's interest in remaining free prior to conviction is, in some circumstances, outweighed by the need to protect societal interests— has been used to support court decisions which, despite the absence of \**3190\ any statutory provision for pretrial detention, have recognized the implicit authority of the courts to deny release to defendants who have threatened jurors or witnesses, \[FN27\] or who pose significant risks of flight. \[FN28\] In these cases, the societal interest implicated was the need to protect the integrity of the judicial process. The need to protect the community from demonstrably dangerous defendants is a similarly compelling basis for ordering detention prior to trial.

The concept of pretrial detention has been the subject of extensive debate. \[FN29\] It should be noted that the legislative history of the Bail Reform Act indicates that although the issue of pretrial detention was then recognized as 'intimately related to the Bail Reform Problem,' the need to reform existing bail procedures was viewed as 'so pressing that such reform should not be delayed with the hope of enacting more

WHETHER A PRETRIAL DETENTION STATUTE WOULD IN PRACTICE BE OF THE UTILITY ARGUED BY ITS PROPO Nestors WAS AN ISSUE WHICH HAD PREVIOUSLY CONCERNED THE COMMITTEE IN LIGHT OF THE FACT THAT, IN THE PAST, THE PRETRIAL DETENTION PROVISION OF THE DISTRICT OF COLUMBIA CODE WAS RARELY USED.
However, in recent years, the use of this provision has been significantly expanded, in part because its constitutionality has been resolved by the local courts and in part because prosecutors are learning how to use it more efficiently and effectively. An additional concern of the committee, in assessing the practical utility of a pretrial detention statute, was the argument that stringent financial conditions of release, believed by many now to be used indirectly to detain dangerous defendants, would be used to avoid the limitations and procedural requirements that would necessarily be incorporated in a provision that directly authorized pretrial detention. Senator Kennedy, in particular, is of the view that current bail procedures often result in pretrial detention through the arbitrary use of high money bail as a way to assure a defendant's incarceration. The committee concluded that, by providing both a workable pretrial detention statute and restrictions on the use of financial conditions of release, this problem could be effectively addressed. This issue is discussed in further detail below.

The question whether future criminality can be predicted, an assumption implicit in permitting pretrial detention based on perceived defendant dangerousness, is one which neither the experience under the District of Columbia detention statute nor empirical analysis can conclusively answer. If a defendant is detained, he is logically precluded from engaging in criminal activity, and thus the correctness of the detention decision cannot be factually determined. However, the presence of certain combinations of offense and offender characteristics, such as the nature and seriousness of the offense charged, the extent of prior arrests and convictions, and a history of drug addiction, have been shown in studies to have a strong positive relationship to predicting the probability that a defendant will commit a new offense while on release. While predictions which attempt to identify those defendants who will pose a significant danger to the safety of others if released are not infallible, the committee believes that judges can, by considering factors such as those noted above, make such predictions with an acceptable level of accuracy.

Predictions of future behavior with respect to the issue of appearance are already required in all release decisions under the bail reform act, yet one study on pretrial release suggests that pretrial rearrest may be more susceptible to more accurate prediction than nonappearance. Furthermore, as noted in testimony before the committee, current law authorizes judges to detain defendants in capital cases and in post-conviction situations based on predictions of future misconduct. Similarly, a federal magistrate may detain a juvenile under 18 U.S.C. 5034 pending a juvenile delinquency proceeding in order to assure the safety of others. The committee agrees that there is no reason that assessments of the probability of future criminality should not also be permitted in the case of adult defendants awaiting trial.

In sum, the committee has concluded that pretrial detention is a necessary and constitutional mechanism for incapacitating, pending trial, a reasonably identifiable group of defendants who would pose a serious risk to the safety of others if released. While providing statutory authority for pretrial detention is a substantial change in federal law, it is well known that a substantial minority of federal defendants in the past have in fact been detained pending trial, primarily because of an inability to meet conditions of release. Under the bail reform act, it is permissible for a defendant to be detained if he is unable to meet conditions of release
THAT HAVE BEEN DETERMINED BY A JUDGE TO BE REASONABLY NECESSARY TO
ASSURE HIS APPEARANCE. HOWEVER, IT HAS BEEN SUGGESTED THAT THE
PHENOMENON OF PRETRIAL DETENTION UNDER THE BAIL REFORM ACT IS OFTEN THE
RESULT OF INTENTIONAL IMPOSITION OF EXCESSIVELY STRINGENT RELEASE
CONDITIONS, AND IN PARTICULAR EXTRAORDINARILY HIGH MONEY BONDS, IN
ORDER TO ACHIEVE DETENTION. FURTHERMORE, IT HAS BEEN SUGGESTED THAT IN
MANY CASES, WHILE THE IMPOSITION OF SUCH CONDITIONS HAS APPARENTLY BEEN
FOR THE PURPOSE OF ASSURING THE DEFENDANT'S APPEARANCE AT TRIAL, THE
UNDERLYING CONCERN HAS BEEN THE NEED TO DETAIN A PARTICULARLY
DANGEROUS DEFENDANT, A CONCERN WHICH THE BAIL REFORM ACT FAILS TO
ADDRESS.
ALTHOUGH THERE IS A QUESTION OF THE EXTENT TO WHICH THE AUTHORITY TO
SET CONDITIONS OF RELEASE MAY HAVE BEEN ABUSED TO ACHIEVE DETENTION OF
PARTICULARLY DANGEROUS DEFENDANTS, IN VIEW OF THE BAIL REFORM ACT'S
FAILURE TO GIVE JUDGES ANY MECHANISM TO ADDRESS THE INELIGIBLE AND
APPROPRIATE CONCERN THEY WOULD HAVE ABOUT RELEASING AN ARRESTED
PERSON WHO APPEARS TO POSE A SERIOUS RISK TO COMMUNITY SAFETY, IT IS, AS
RECENTLY NOTED BY SENATOR HATCH, '(N)O WONDER MANY JUDGES LABORING
UNDER THIS LAW ADMIT USING 'EXTREME RATIONALIZATIONS IN CIRCUMVENTING'
THIS POLICY.' [FN44] A SIMILAR VIEW OF THIS PROBLEM WAS EXPRESSED IN
TESTIMONY OF THE DEPARTMENT OF JUSTICE:
THAT SUCH INSTANCES OF DE FACTO DETENTION OF DANGEROUS DEFENDANTS
WOUlD OCCUR IS HARDLY SURPRISING. * * * (C)URRENT LAW PLACES OUR JUDGES
IN A DESPERATE DILEMMA WHEN FACED WITH A CLEARLY DANGEROUS DEFENDANT
SEEKING RELEASE. ON THE ONE HAND, THE COURTS MAY ABIDE BY THE LETTER OF
THE LAW AND ORDER THE DEFENDANT RELEASED SUBJECT ONLY TO CONDITIONS
THAT WILL ASSURE HIS APPEARANCE AT TRIAL. ON THE OTHER HAND, THE COURTS
MAY STRAIN THE LAW, AND IMPOSE A HIGH MONEY BOND OSTENSIBLY FOR THE
PURPOSE OF ASSURING APPEARANCE, BUT ACTUALLY TO PROTECT THE PUBLIC.
CLEARLY, NEITHER ALTERNATIVE IS SATISFACTORY. THE FIRST LEAVES THE
COMMUNITY *11 OPEN TO CONTINUED VICTIMIZATION. THE SECOND, WHILE IT MAY
ASSURE COMMUNITY SAFETY, CASTS DOUBT ON THE FAIRNESS OF RELEASE
PRACTICES. [FN45]

**3194 THE COMMITTEE DOES NOT SANCTION THE USE OF HIGH MONEY BONDS TO
DETAiN DANGEROUS DEFENDANTS; BUT CRITICISM OF THIS PRACTICE SHOULD BE
FOCUSED NOT ON THE JUDICIARY, BUT RATHER ON THE DEFICIENCIES OF THE LAW
ITSELF, AND INDEED, ON THE DELAY IN AMENDING THE LAW TO CURE THIS
PROBLEM.
PROVIDING STATUTORY AUTHORITY TO CONDUCT A HEARING FOCUSING ON THE
ISSUE OF A DEFENDANT'S DANGEROUSNESS, AND TO PERMIT AN ORDER OF
DETENTION WHERE A DEFENDANT POSES SUCH A RISK TO OTHERS THAT NO FORM
OF CONDITIONAL RELEASE IS SUFFICIENT, WOULD ALLOW THE COURTS TO ADDRESS
THE ISSUE OF PRETRIAL CRIMINALITY HONESTLY AND EFFECTIVELY. IT WOULD ALSO
BE FAiRER TO THE DEFENDANT THAN THE INDIRECT METHOD OF ACHIEVING
DETENTION THROUGH THE IMPOSITION OF FINANCIAL CONDITIONS BEYOND HIS
REACH. THE DEFENDANT WOULD BE FULLY INFORMED OF THE ISSUE BEFORE THE
COURT, THE GOVERNMENT WOULD BE REQUIRED TO COME FORWARD WITH
INFORMATION TO SUPPORT A FINDING OF DANGEROUSNESS, AND THE DEFENDANT
WOULD BE GIVEN AN OPPORTUNITY TO RESPOND DIRECTLY. THE NEW BAIL
PROCEDURES PROMOTE CANDOR, FAIRNESS, AND EFFECTIVENESS FOR SOCIETY,
THE VICTIMS OF CRIME-- AND THE DEFENDANT AS WELL.
IT IS THE INTENT OF THE COMMITTEE THAT THE PRETRIAL DETENTION PROVISIONS
OF SECTION 3142 ARE TO REPLACE ANY EXISTING PRACTICE OF DETAINING
DANGEROUS DEFENDANTS THROUGH THE IMPOSITION OF EXCESSIVELY HIGH
MONEY BOND. BECAUSE OF CONCERN THAT THE OPPORTUNITY TO USE FINANCIAL
CONDITIONS OF RELEASE TO ACHIEVE PRETRIAL DETENTION WOULD PROVIDE A

THE CORE PRETRIAL DETENTION PROVISIONS OF SECTION 3142 ARE SET OUT IN SUBSECTIONS (E) AND (F). THESE AND THE OTHER SUBSECTIONS OF SECTION 3142 ARE EACH DISCUSSED IN DETAIL BELOW. ALTHOUGH SECTION 3142-- BY PERMITTING THE CONSIDERATION OF DANGEROUSNESS GENERALLY AND BY PROVIDING, IN LIMITED CIRCUMSTANCES, FOR PRETRIAL DETENTION-- REPRESENTS A SIGNIFICANT DEPARTURE FROM THE BAIL REFORM ACT, MANY IMPROVEMENTS MADE BY THE BAIL REFORM ACT HAVE BEEN RETAINED. **3195 

SUBSECTION (A) PROVIDES THAT WHEN A PERSON CHARGED WITH AN OFFENSE IS BROUGHT BEFORE A JUDICIAL OFFICER, THE JUDICIAL OFFICER IS REQUIRED TO PURSUE ONE OF FOUR ALTERNATIVE COURSES OF ACTION. HE MAY RELEASE THE PERSON ON HIS PERSONAL RECOGNIZANCE, OR UPON HIS EXECUTION OF AN UNSECURED APPEARANCE BOND, PURSUANT TO SECTION 3142(B), HE MAY RELEASE THE PERSON SUBJECT TO ONE OR MORE OF THE CONDITIONS LISTED IN SUBSECTION (C); HE MAY, IF THE ARRESTED PERSON IS ALREADY ON A FORM OF CONDITIONAL RELEASE OR MAY BE SUBJECT TO DEPORTATION OR EXCLUSION ORDER, TEMPORARILY DETAINED THE PERSON PURSUANT TO SUBSECTION (D); OR HE MAY PURSUANT TO SUBSECTION (E), ORDER THE DETENTION OF THE PERSON. THE FIRST TWO FORMS OF PRETRIAL RELEASE ARE LIKE THOSE NOW SET FORTH IN THE BAIL REFORM ACT. [FN49] IT IS ANTICIPATED THAT THEY WILL CONTINUE TO BE APPROPRIATE FOR THE MAJORITY OF FEDERAL DEFENDANTS. NEITHER DETENTION PROVISION HAS A PRECEDENT IN THE BAIL REFORM ACT, ALTHOUGH THERE ARE SIMILAR PROVISIONS NOW INCORPORATED IN THE DISTRICT OF COLUMBIA CODE. [FN50] SUBSECTION (B) REQUIRES THE JUDICIAL OFFICER TO RELEASE THE PERSON ON HIS OWN RECOGNIZANCE, OR UPON EXECUTION OF AN UNSECURED APPEARANCE BOND IN A SPECIFIED AMOUNT, UNLESS THE JUDICIAL OFFICER DETERMINES THAT SUCH RELEASE WILL NOT REASONABLY ASSURE THE APPEARANCE OF THE DEFENDANT AS REQUIRED OR WILL ENDANGER THE SAFETY OF ANY OTHER PERSON OR THE COMMUNITY. LIKE THE CURRENT SECTION 18 U.S.C. 3146(A), SUBSECTION (A) EMPHASIZES RELEASE ON PERSONAL RECOGNIZANCE OR UNSECURED APPEARANCE BOND FOR PERSONS WHO ARE DEEMED TO BE GOOD PRETRIAL RELEASE RISKS. HOWEVER, UNLIKE CURRENT LAW, IN MAKING THE DETERMINATION WHETHER RELEASE UNDER THIS SUBSECTION IS APPROPRIATE, THE JUDICIAL OFFICER IS TO CONSIDER NOT ONLY WHETHER THESE FORMS OF RELEASE ARE ADEQUATE TO ASSURE THE APPEARANCE OF THE DEFENDANT, BUT ALSO WHETHER THEY ARE APPROPRIATE IN LIGHT OF ANY DANGER THE DEFENDANT MAY POSE TO OTHERS. AS DISCUSSED ABOVE, THE COMMITTEE HAS DETERMINED THAT DANGER TO THE COMMUNITY IS AS VALID A CONSIDERATION IN THE PRETRIAL RELEASE DECISION AS IS THE PRESENTLY PERMITTED CONSIDERATION OF RISK OF FLIGHT. Thus,
SUBSECTION (A), LIKE THE OTHER PROVISIONS OF SECTION 3142, PLACES THE
CONSIDERATION OF DEFENDANT DANGEROUSNESS ON AN EQUAL FOOTING WITH
THE CONSIDERATION OF APPEARANCE.
THE CONCEPT OF DEFENDANT DANGEROUSNESS IS DESCRIBED THROUGHOUT THIS
CHAPTER BY THE TERM 'SAFETY OF ANY OTHER PERSON OR THE COMMUNITY.' THE
REFERENCE TO SAFETY OF ANY OTHER PERSON IS INTENDED TO COVER THE
SITUATION IN WHICH THE SAFETY OF A PARTICULAR IDENTIFIABLE INDIVIDUAL,
PERHAPS A VICTIM OR WITNESS, IS OF CONCERN, WHILE THE LANGUAGE REFERRING
TO THE SAFETY OF THE COMMUNITY REFERS TO THE DANGER THAT THE DEFENDANT
MIGHT ENGAGE IN CRIMINAL ACTIVITY TO THE DETRIMENT OF THE COMMUNITY. THE
COMMITTEE INTENDS THAT THE CONCERN ABOUT SAFETY BE GIVEN A BROADER
CONSTRUCTION THAN MERELY DANGER OF HARM INVOLVING PHYSICAL VIOLENCE.
THIS PRINCIPLE WAS RECENTLY ENDORSED IN UNITED STATES V. PROVENZANO AND
ANDRETTA, [FN51] IN *13 WHICH IT WAS HELD THAT THE CONCEPT OF 'DANGER' AS
USED IN CURRENT 18 U.S.C. 3148 EXTENDED TO NONPHYSICAL HARMS SUCH AS
CORRUPTING A **3196 UNION. THE COMMITTEE ALSO EMPHASIZES THAT THE RISK
THAT A DEFENDANT WILL CONTINUE TO ENGAGE IN DRUG TRAFFICKING
CONSTITUTES A DANGER TO THE 'SAFETY OF ANY OTHER PERSON OR THE
COMMUNITY.' [FN52]
IF RELEASED UNDER SUBSECTION (A) A PERSON IS SUBJECT TO THE MANDATORY
CONDITION THAT HE NOT COMMIT A FEDERAL, STATE, OR LOCAL CRIME WHILE ON
RELEASE. PERSONS RELEASED UNDER THE DISCRETIONARY CONDITIONS SET OUT IN
SUBSECTION (C) ARE ALSO SUBJECT TO THIS MANDATORY CONDITION, WHICH IS
NEW TO THE LAW. WHILE IT MAY BE SELF-EVIDENT THAT SOCIETY EXPECTS ALL OF
ITS CITIZENS TO BE LAW-ABIDING, IT IS PARTICULARLY APPROPRIATE, GIVEN THE
PROBLEM OF CRIMES COMMITTED BY THOSE ON PRETRIAL RELEASE, THAT THIS
REQUIREMENT BE STRESSED TO ALL DEFENDANTS AT THE TIME OF THEIR RELEASE.
[FN53] IN ADDITION, THE ESTABLISHMENT OF PROBABLE CAUSE TO BELIEVE THAT A
PERSON ON PRETRIAL RELEASE HAS COMMITTED A CRIME WILL BE SUFFICIENT TO
TRIGGER THE PROVISIONS OF SECTION 3148 IN THIS CHAPTER, PERMITTING
REVOCATION OF RELEASE AND THE USE OF THE COURT'S CONTEMPT POWER.
SUBSECTION (C) PROVIDES THAT IF THE JUDICIAL OFFICER DETERMINES THAT
RELEASE ON PERSONAL RECOGNIZANCE OR UNSECURED APPEARANCE BOND WILL
NOT REASONABLY ASSURE THE APPEARANCE OF THE PERSON OR WILL ENDANGER
THE SAFETY OR ANY OTHER PERSON OR THE COMMUNITY, THE PERSON MAY BE
RELEASED SUBJECT TO THE MANDATORY CONDITION THAT HE NOT COMMIT AN
OFFENSE WHILE ON RELEASE, AND SUBJECT TO THE LEAST RESTRICTIVE
CONDITION, OR COMBINATION OF CONDITIONS, SET OUT IN SUBSECTION (C)(2)
THAT WILL PROVIDE SUCH ASSURANCE. EXCEPT FOR FINANCIAL CONDITIONS THAT
CAN BE UTILIZED ONLY TO ASSURE APPEARANCE, ANY OF THE DISCRETIONARY
CONDITIONS LISTED IN SUBSECTION (C)(2) MAY BE IMPOSED EITHER TO ASSURE
APPEARANCE OR TO ASSURE COMMUNITY SAFETY.
CURRENT 18 U.S.C. 3146 SETS FORTH FIVE SPECIFIC CONDITIONS, INCLUDING A
CATCH-ALL PERMITTING IMPOSITION OF 'ANY OTHER CONDITION DEEMED
REASONABLY NECESSARY TO ASSURE APPEARANCE AS REQUIRED.' [FN54] THE
COMMITTEE HAS DETERMINED TO MAINTAIN THESE FIVE CONDITIONS WITH ONLY
MINOR MODIFICATIONS, AND TO INCREASE THE NUMBER OF EXPLICITLY STATED
CONDITIONS BY ADDING NINE MORE. ALTHOUGH EACH OF THE ADDITIONAL
CONDITIONS COULD APPROPRIATELY BE IMPOSED TODAY UNDER THE CATCH-ALL IN
CURRENT LAW, SPELLING THEM OUT IN DETAIL IS INTENDED TO ENCOURAGE THE
COURTS TO UTILIZE THEM IN APPROPRIATE CIRCUMSTANCES. UNDER UTILIZATION
OF SOME OF THESE CONDITIONS TODAY MAY OCCUR BECAUSE THEY ARE MORE
RELEVANT TO THE QUESTION OF DANGER TO THE COMMUNITY THAN THEY ARE TO
THE RISK OF FLIGHT. SINCE THE COURT WILL BE ALLOWED TO CONSIDER DANGER
to the community in setting release conditions, some of these specified
conditions will become of more utility, being more directly related to
THIS NEW BASIS FOR QUALIFICATIONS ON RELEASE. IT MUST BE EMPHASIZED THAT ALL CONDITIONS ARE NOT APPROPRIATE TO EVERY DEFENDANT AND THAT THE COMMITTEE DOES NOT INTEND THAT ANY OF THESE CONDITIONS BE IMPOSED ON ALL DEFENDANTS, EXCEPT FOR THE MANDATORY CONDITION SET OUT IN SUBSECTION (C)(1). THE COMMITTEE INTENDS THAT THE JUDICIAL OFFICER WEIGH EACH OF THE DISCRETIONARY CONDITIONS SEPARATELY WITH REFERENCE TO THE CHARACTERISTICS AND CIRCUMSTANCES OF THE DEFENDANT BEFORE HIM AND TO THE OFFENSE CHARGED, AND WITH SPECIFIC REFERENCE TO THE FACTORS SET FORTH IN SUBSECTION (G).

THE FIRST CONDITION EXPLICITLY SET FORTH IN SUBSECTION (C)(2) IS THE FAMILIAR THIRD PARTY CUSTODIAN PROVISION OF EXISTING 18 U.S.C. 3146(A)(1), WITH ONE MAJOR CHANGE. THE COMMITTEE ENDORSES THE USE OF THIRD PARTY CUSTODIANS IN APPROPRIATE CASES. HOWEVER, THE COMMITTEE IS AWARE OF SOME RECENT CRITICISM OF THE PRACTICE THAT INDICATES A HIGH INCIDENCE OF REARREST FOR THOSE RELEASED TO THIRD PARTY CUSTODIANS IN THE DISTRICT OF COLUMBIA. [FN55] TO ASSURE THAT THIRD PARTY CUSTODIANS ARE CHOSEN WITH CARE, THE CONDITION HAS BEEN AMENDED TO REQUIRE THAT THE CUSTODIAN AGREE TO REPORT ANY VIOLATION OF A RELEASE CONDITION AND THAT HE BE REASONABLY ABLE TO ASSURE THE JUDGE THAT THE PERSON WILL APPEAR AS REQUIRED AND THAT HE WILL NOT POSE A DANGER TO THE SAFETY OF ANY OTHER PERSON OR THE COMMUNITY. IT IS NOT INTENDED BY THIS PROVISION THAT THE CUSTODIAN BE HELD LIABLE IF THE PERSON TO BE SUPERVISED ABSconds OR COMMITS CRIMES WHILE UNDER THE CUSTODIAN'S SUPERVISION. RATHER IT IS INTENDED TO ALERT THE JUDICIAL OFFICER TO THE NECESSITY OF INQUIRING INTO THE ABILITY OF PROPOSED CUSTODIANS TO SUPERVISE THEIR CHARGES AND TO IMPRESS ON THE CUSTODIANS THE DUTY THEY OWE TO THE COURT AND TO THE PUBLIC TO CARRY OUT THE SUPERVISION TO WHICH THEY ARE AGREEING AND TO REPORT ANY VIOLATIONS TO THE COURT.

CONDITIONS SET OUT IN SUBPARAGRAPHS (B), (F), (H), (I), AND (J) ARE NEW AND DEAL RESPECTIVELY WITH EMPLOYMENT OR THE ACTIVE SEEKING OF EMPLOYMENT, REPORTING ON A REGULAR BASIS TO A DESIGNATED LAW ENFORCEMENT OFFICER, REFRAINING FROM POSSESSING DANGEROUS WEAPONS, REFRAINING FROM EXCESSIVE USE OF ALCOHOL OR ANY USE OF A CONTROLLED SUBSTANCE WITHOUT A PRESCRIPTION, AND UNDERGOING AVAILABLE MEDICAL OR PSYCHIATRIC TREATMENT. THE CONDITIONS SET OUT IN SUBPARAGRAPH (C), DEALING WITH MAINTAINING OR COMMENCING AN EDUCATIONAL PROGRAM, COMPLEMENTS THE CONDITION CONCERNING EMPLOYMENT, FOR IT RECOGNIZES THAT, PARTICULARLY AMONG YOUTHFUL OFFENDERS, LACK OF BASIC EDUCATION OFTEN SIGNIFICANTLY IMPAIRS THEIR ABILITY TO FIND EMPLOYMENT. THE COMMITTEE BELIEVES THAT IN APPROPRIATE CASES EACH OF THESE CONDITIONS IS APPLICABLE TO INDIVIDUAL DEFENDANTS ON THE ISSUES OF FLIGHT OR ASSURING COMMUNITY SAFETY. THE CONDITION IN SUBPARAGRAPH (D) DEALS WITH RESTRICTIONS ON TRAVEL, ASSOCIATIONS, AND PLACE OF ABODE, AND IS DRAWN WITHOUT SUBSTANTIVE CHANGE FROM EXISTING 18 U.S.C. 3146(A)(2).

UNDER SUBPARAGRAPH (G), A PERSON MAY BE REQUIRED TO ABIDE BY A SPECIFIC CURFEW. ALTHOUGH THIS IS A NEW PROVISION, IT IS SIMILAR IN PURPOSE TO THE TRADITIONAL CONDITIONS RESTRICTING TRAVEL AND ASSOCIATION. THE CONDITION IN SUBPARAGRAPH (E) IS ALSO NEW. IT Requires THAT, WHEN IMPOSED, THE DEFENDANT AVOID ALL CONTACT WITH ALLEGED VICTIMS OF THE CRIME AND POTENTIAL WITNESSES WHO MAY TESTIFY CONCERNING THE OFFENSE. IT IS A CONTINUING COMPLAINT THAT VICTIMS AND WITNESSES ARE INTIMIDATED BY THOSE RELEASED ON BOND [FN56] AND, INDEED, UNDER CURRENT LAW, PRETRIAL DETENTION APPEARS APPROPRIATE IF WITNESSES ARE THREATENED. [FN57] THIS CONDITION ENABLES THE COURT TO RAISE THE ISSUE WITH THE DEFENDANT BEFORE ACTUAL INTIMIDATION HAS OCCURRED. IN ADDITION, IN ALL RELEASES THE COURT WILL NOW BE REQUIRED TO WARN THE DEFENDANT OF THE


THE FINAL SENTENCE OF SECTION 3142(C) RETAINS THE AUTHORITY NOW SET FORTH IN 18 U.S.C. 3146(E) FOR THE COURT TO AMEND THE RELEASE ORDER AT ANY TIME TO IMPOSE DIFFERENT OR ADDITIONAL CONDITIONS OF RELEASE. THIS AUTHORIZATION IS BASED ON THE POSSIBILITY THAT A CHANGED SITUATION OR NEW INFORMATION MAY WARRANT ALTERED RELEASE CONDITIONS. IT IS CONTEMPLATED BY THE COMMITTEE THAT THE IMPOSITION OF ADDITIONAL OR DIFFERENT CONDITIONS MAY OCCUR AT AN EX PARTE HEARING IN SITUATIONS WHERE THE COURT MUST ACT QUICKLY IN THE INTEREST OF JUSTICE. IN SUCH A CASE, A SUBSEQUENT HEARING IN THE DEFENDANT’S PRESENCE SHOULD BE HELD PROMPTLY. [FN61] EITHER THE DEFENDANT OR THE GOVERNMENT MAY MOVE FOR AN AMENDMENT OF CONDITIONS, OR THE COURT MAY DO SO ON ITS OWN MOTION. [FN62]

SUBSECTION (D) PERMITS A JUDICIAL OFFICER TO DETAIN A DEFENDANT FOR A PERIOD OF UP TO TEN DAYS IF IT APPEARS THAT THE PERSON IS ALREADY IN A CONDITIONAL RELEASE STATUS OR IS NOT A CITIZEN OF THE UNITED STATES OR LAWFULLY ADMITTED FOR PERMANENT RESIDENCE UNDER THE IMMIGRATION AND NATURALIZATION ACT, AND THE JUDICIAL OFFICER FURTHER DETERMINES THAT THE PERSON MAY FLEE OR POSE A DANGER TO ANY OTHER PERSON OR TO THE COMMUNITY IF RELEASED. THE PROVISION APPLIES IF THE DEFENDANT, AT THE TIME OF APPREHENSION WAS ON PRETRIAL RELEASE FOR A FEDERAL STATE, OR LOCAL FELONY; WAS ON RELEASE PENDING IMPOSITION OR EXECUTION OF SENTENCE, APPEAL OF SENTENCE OR CONVICTION, OR COMPLETION OF SENTENCE, FOR ANY OFFENSE UNDER FEDERAL, STATE, OR LOCAL LAW; OR WAS ON PROBATION OR PAROLE FOR ANY FEDERAL, STATE, OR LOCAL OFFENSE; OR WAS NOT A CITIZEN OF THE UNITED STATES OR A LAWFUL PERMANENT RESIDENT. THE TEN-DAY PERIOD IS INTENDED TO GIVE THE GOVERNMENT TIME TO CONTACT THE APPROPRIATE COURT, PROBATION, OR PAROLE OFFICIAL, OR IMMIGRATION OFFICIAL AND TO PROVIDE THE MINIMAL TIME NECESSARY FOR SUCH OFFICIAL TO TAKE WHATEVER ACTION ON THE EXISTING CONDITIONAL RELEASE THAT OFFICIAL DEEMS APPROPRIATE. THIS PROVISION IS BASED LARGELY ON A PROVISION FOR A FIVE-DAY HOLD IN SIMILAR CIRCUMSTANCES THAT IS NOW THE LAW IN THE DISTRICT OF COLUMBIA. THE COMMITTEE DEEMS FIVE DAYS TO BE TOO SHORT A PERIOD IN WHICH TO EXPECT PROPER NOTIFICATION AND APPROPRIATE ACTION BY THE ORIGINAL RELEASING BODY AND THUS HAS OPTED FOR TEN DAYS. IT SHOULD ALSO BE NOTED THAT THE DISTRICT OF COLUMBIA MEASURE IS IN EFFECT A LOCAL PROVISION AND MOST OF THOSE UNDER ARREST TO WHOM IT APPLIES ARE LIKELY TO BE RELEASED EITHER
PRETRIAL IN THE DISTRICT OF COLUMBIA OR BE ON PAROLE OR PROBATION FOR A DISTRICT OFFENSE; THUS NOTIFICATION AND APPROPRIATE ACTION MIGHT MORE EASILY OCCUR WITHIN THE FIVE DAY PERIOD. THE FEDERAL BAIL LAW, ON THE OTHER HAND, HAS NATIONAL APPLICATION, AND IN INDIVIDUAL CASES THERE WILL BE NEED TO CONSULT AND NOTIFY OVER LONGER DISTANCES; THUS THE TIME FRAME OF TEN DAYS WAS ADOPTED. WHILE A DEPRIVATION OF LIBERTY OF UP TO TEN DAYS IS A SERIOUS MATTER, IT MUST BE BALANCED AGAINST THE FACT THAT THE DEFENDANT HAS BEEN ARRESTED BASED ON PROBABLE CAUSE TO BELIEVE THAT HE HAS COMMITTED A CRIME, THE FACT THAT HE IS EITHER ALREADY ON CONDITIONAL RELEASE, PRESUMABLY SUBJECT TO REVOCATION FOR A PRIOR OFFENSE OR HE IS NOT IN CONFORMITY WITH IMMIGRATION LAWS, AND THE FACT THAT THE COURT MUST FIND THAT HE MAY FLEE OR POSE A DANGER TO ANY OTHER PERSON OR TO THE COMMUNITY IF RELEASED. ON BALANCE THE COMMITTEE CONCLUDED THAT A DETENTION OF UP TO TEN DAYS IN THOSE CIRCUMSTANCES IS WARRANTED AND IS IN THE INTERESTS OF JUSTICE.

AS SPECIFIED BY THE LAST SENTENCE OF SUBPARAGRAPH (D), AN INDIVIDUAL TEMPORARILY DETAINED UNDER (1)(B) HAS THE BURDEN TO DEMONSTRATE TO THE COURT THAT HE IS A CITIZEN OR A LAWFUL PERMANENT RESIDENT. SUBSECTIONS (E) AND (F) SET FORTH THE FINDINGS AND PROCEDURES THAT ARE REQUIRED FOR AN ORDER OF DETENTION. THE STANDARD FOR AN ORDER OF DETENTION OF A DEFENDANT PRIOR TO TRIAL IS CONTAINED IN SUBSECTION (E), WHICH PROVIDES THAT THE JUDICIAL OFFICER IS TO ORDER THE PERSON DETAINED, *18 **3201 IF, AFTER A HEARING PURSUANT TO SUBSECTION (F), HE FINDS THAT NO CONDITION OR COMBINATION OF CONDITIONS OF RELEASE WILL REASONABLY ASSURE THE APPEARANCE OF THE DEFENDANT AS REQUIRED AND THE SAFETY OF ANY OTHER PERSON AND THE COMMUNITY. THE FACTS ON WHICH THE FINDING OF DANGEROUSNESS IS BASED MUST, UNDER SUBSECTION (F), BE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE. THUS, THIS SUBSECTION NOT ONLY CODIFIES EXISTING AUTHORITY TO DETAIN PERSONS WHO ARE SERIOUS FLIGHT RISKS, [FN63] BUT ALSO, AS DISCUSSED EXTENSIVELY ABOVE, CREATES NEW AUTHORITY TO DENY RELEASE TO THOSE DEFENDANTS WHO ARE LIKELY TO ENGAGE IN CONDUCT ENDANGERING THE SAFETY OF THE COMMUNITY EVEN IF RELEASED PENDING TRIAL ONLY UNDER THE MOST STRINGENT OF THE CONDITIONS LISTED IN SECTION 3142(C)(2).

PROBABILITY' TEST IS OUTWEIGHTED BY THE PRACTICAL PROBLEMS IN MEETING THIS REQUIREMENT AT THE STAGE AT WHICH THE PRETRIAL DETENTION HEARING IS HELD. [FN67] THUS, THIS CHAPTER CONTAINS NO 'SUBSTANTIAL PROBABILITY' FINDING.

IN DETERMINING WHETHER ANY FORM OF CONDITIONAL RELEASE WILL REASONABLY ASSURE THE APPEARANCE OF THE DEFENDANT AND THE SAFETY OF OTHER PERSONS AND THE COMMUNITY, THE JUDICIAL OFFICER IS REQUIRED TO CONSIDER THE FACTORS SET OUT IN SECTION 3142(G). THE OFFENSE AND OFFENDER CHARACTERISTICS THAT WILL SUPPORT THE REQUIRED FINDING FOR PRETRIAL DETENTION UNDER SUBSECTION (E) WILL VARY CONSIDERABLY IN EACH CASE. THUS THE COMMITTEE HAS, FOR THE MOST PART, REFRAINED FROM SPECIFYING WHAT KINDS OF INFORMATION ARE A SUFFICIENT BASIS FOR THE DENIAL OF RELEASE, AND HAS CHOSEN TO LEAVE THE RESOLUTION OF THIS QUESTION TO THE SOUND JUDGMENT OF THE COURTS ACTING ON A CASE-BY-CASE BASIS. HOWEVER, THE BILL DOES DESCRIBE TWO SETS OF CIRCUMSTANCES UNDER WHICH A STRONG PROBABILITY ARISES THAT NO FORM OF CONDITIONAL RELEASE WILL BE ADEQUATE.

THE FIRST OF THESE ARISES WHEN IT IS DETERMINED THAT A PERSON CHARGED WITH A SERIOUSLY DANGEROUS OFFENSE HAS IN THE PAST BEEN CONVICTED OF COMMITTING ANOTHER SERIOUS CRIME WHILE ON PRETRIAL RELEASE. SUCH A HISTORY OF PRETRIAL CRIMINALITY IS, ABSENT MITIGATING INFORMATION, A RATIONAL BASIS FOR CONCLUDING THAT A DEFENDANT POSSESSES A SIGNIFICANT THREAT TO COMMUNITY SAFETY AND THAT HE CANNOT BE TRUSTED TO CONFORM TO THE REQUIREMENTS OF THE LAW WHILE ON RELEASE. SECTION 3142(E) PROVIDES, THEREFORE, THAT IN A CASE IN WHICH A DEFENDANT IS CHARGED WITH ONE OF THE SERIOUS OFFENSES DESCRIBED IN SECTION 3142(F)(1) (A CRIME OF VIOLENCE, A CRIME PUNISHABLE BY DEATH, A CRIME FOR WHICH THE MAXIMUM TERM OF IMPRISONMENT OF TEN YEARS OR MORE IS PRESCRIBED IN THE CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT (21 U.S.C. 951) OR SEC. 1 OF THE ACT OF SEPT. 15, 1980 (21 U.S.C. 955A)), A REBUTTABLE PRESUMPTION ARISES THAT NO CONDITION OR COMBINATION OF CONDITIONS WILL REASONABLY ASSURE THE SAFETY OF ANY OTHER PERSON AND THE COMMUNITY, IF THE JUDICIAL OFFICER FINDS: (1) THAT THE DEFENDANT HAD BEEN CONVICTED OF ANOTHER OFFENSE DESCRIBED IN SUBSECTION (F)(1) (OR A STATE OR LOCAL OFFENSE THAT WOULD HAVE BEEN SUCH AN OFFENSE IF CIRCUMSTANCES GIVING RISE TO FEDERAL JURISDICTION HAD EXisted); (2) THAT THIS OFFENSE WAS COMMITTED WHILE THE PERSON WAS ON PRETRIAL RELEASE; AND (3) THAT NO MORE THAN FIVE YEARS HAVE ELAPSED SINCE THE DATE OF CONVICTION, OR THE DEFENDANT'S RELEASE FROM IMPRISONMENT, FOR THE OFFENSE, WHICHEVER IS LATER. THE COMMITTEE BELIEVES THAT IT IS APPROPRIATE IN SUCH CIRCUMSTANCES THAT THE BURDEN SHIFTS TO THE DEFENDANT TO ESTABLISH A BASIS FOR CONCLUDING THAT THERE ARE CONDITIONS OF RELEASE SUFFICIENT TO ASSURE THAT HE WILL NOT AGAIN ENGAGE IN DANGEROUS CRIMINAL ACTIVITY PENDING HIS TRIAL. THE TERM 'CRIME OF VIOLENCE' IS DEFINED IN SECTION 3156, AS AMENDED BY THIS TITLE.

THE COMMITTEE NOTES, MOREOVER, THAT A CASE MAY INVOLVE CIRCUMSTANCES THAT, WHILE NOT SET FORTH IN THE SECTION AS A BASIS FOR A REBUTTABLE PRESUMPTION OF DANGEROUSNESS, NEVERTHELESS ARE SO STRONGLY SUGGESTIVE OF A PERSON'S WILLINGNESS OR INCLINATION TO RESORT TO CRIMINAL VIOLENCE AS TO WARRANT THE INference THAT THE PERSON WOULD BE A DANGER TO SOCIETY EVEN IF RELEASED ON THE MOST RESTRICTIVE CONDITIONS. THE COMMITTEE HAS IN MIND, FOR EXAMPLE, THE CASE OF A PERSON CHARGED WITH AN OFFENSE INVOLVING THE POSSESSION OR USE OF A DESTRUCTIVE DEVICE. IN THE COMMITTEE'S VIEW, IT WOULD BE DIFFICULT NOT TO REGARD AS AN UNREASONABLE RISK TO THE SAFETY OF OTHERS A PERSON WHO USES SUCH A WEAPON IN THE COURSE OF COMMITTING A CRIME, OR WHO POSSESSES IT UNDER CIRCUMSTANCES INDICATING A READINESS OR WILLINGNESS TO USE IT TO CARRY
OUT THE CRIME.

THE SECOND REBUTTABLE PRESUMPTION ARISES IN CASES IN WHICH THE DEFENDANT IS CHARGED WITH FELONIES PUNISHABLE BY TEN YEARS OR MORE OF IMPRISONMENT DESCRIBED IN 21 U.S.C. 841, 952(A), 953(A), 955, AND 959 WHICH COVER OPIATE SUBSTANCES AND OFFENSES OF THE SAME GRAVITY INVOLVING NON-OPIATE CONTROLLED SUBSTANCES, OR AN OFFENSE UNDER 18 **20 **3203 U.S.C. 924(C) WHICH COVERS THE USE OF A FIREARM TO COMMIT A FELONY. THESE ARE SERIOUS AND DANGEROUS FEDERAL OFFENSES. THE DRUG OFFENSES INVOLVE EITHER TRAFFICKING IN OPIATES OR NARCOTIC DRUGS, OR TRAFFICKING IN LARGE AMOUNTS OF OTHER TYPES OF CONTROLLED SUBSTANCES. IT IS WELL KNOWN THAT DRUG TRAFFICKING IS CARRIED ON TO AN UNUSUAL DEGREE BY PERSONS ENGAGED IN CONTINUING PATTERNS OF CRIMINAL ACTIVITY. PERSONS CHARGED WITH MAJOR DRUG FELONIES ARE OFTEN IN THE BUSINESS OF IMPORTING OR DISTRIBUTING DANGEROUS DRUGS, AND THUS, BECAUSE OF THE NATURE OF THE CRIMINAL ACTIVITY WITH WHICH THEY ARE CHARGED, THEY POSE A SIGNIFICANT RISK OF PRETRIAL RECIDIVISM. FURTHERMORE, THE COMMITTEE RECEIVED TESTIMONY THAT FLIGHT TO AVOID PROSECUTION IS PARTICULARLY HIGH AMONG PERSONS CHARGED WITH MAJOR DRUG OFFENSES. [FN68] BECAUSE OF THE EXTREMELY LUCRATIVE NATURE OF DRUG TRAFFICKING, AND THE FACT THAT DRUG TRAFFICKERS OFTEN HAVE ESTABLISHED SUBSTANTIAL TIES OUTSIDE THE UNITED STATES FROM WHENCE MOST DANGEROUS DRUGS ARE IMPORTED INTO THE COUNTRY, THESE PERSONS HAVE BOTH THE RESOURCES AND FOREIGN CONTACTS TO ESCAPE TO OTHER COUNTRIES WITH RELATIVE EASE IN ORDER TO AVOID PROSECUTION FOR OFFENSES PUNISHABLE BY LENGTHY PRISON SENTENCES. EVEN THE PROSPECT OF FORFEITURE OF BOND IN THE HUNDREDS OF THOUSANDS OF DOLLARS HAS PROVEN TO BE INEFFECTIVE IN ASSURING THE APPEARANCE OF MAJOR DRUG TRAFFICKERS. IN VIEW OF THESE FACTORS, THE COMMITTEE HAS PROVIDED IN SECTION 3142(E) THAT IN A CASE IN WHICH THERE IS PROBABLE CAUSE TO BELIEVE THAT THE PERSON HAS COMMITTED A GRAVE DRUG OFFENSE, A REBUTTABLE PRESUMPTION ARISES THAT NO CONDITION OR COMBINATION OF CONDITIONS WILL REASONABLY ASSURE THE APPEARANCE OF THE PERSON AND THE SAFETY OF THE COMMUNITY. [FN69] SIMILAR OBVIOUS CONSIDERATIONS BASED UPON THE INHERENT DANGERS IN COMMITTING A FELONY USING A FIREARM SUPPORT A REBUTTABLE PRESUMPTION FOR DETENTION.

SUBSECTION (F) SPECIFIES THE CASES IN WHICH A DETENTION HEARING IS TO BE HELD AND Delineates THE PROCEDURES APPLICABLE IN SUCH A HEARING. PARAGRAPHS (1) AND (2) OF SUBSECTION (F) DESCRIBE THE CIRCUMSTANCES IN WHICH A PRETRIAL DETENTION HEARING IS REQUIRED. BECAUSE DETENTION MAY BE ORDERED UNDER SECTION 3142(E) ONLY AFTER A DETENTION HEARING PURSUANT TO SUBSECTION (F), THE REQUISITE CIRCUMSTANCES FOR INVOKING A DETENTION HEARING IN EFFECT SERVE TO LIMIT THE TYPES OF CASES IN WHICH DETENTION MAY BE ORDERED PRIOR TO TRIAL.

A PRETRIAL DETENTION HEARING TO DETERMINE WHETHER THERE IS ANY FORM OF CONDITIONAL RELEASE THAT WILL REASONABLY ASSURE THE APPEARANCE OF THE DEFENDANT AS WELL AS THE SAFETY OF ANY OTHER PERSON AND THE COMMUNITY SHALL BE HELD UPON THE MOTION OF THE GOVERNMENT IN A CASE IN WHICH THE DEFENDANT IS CHARGED WITH AN OFFENSE DESCRIBED IN SUBSECTION (F)(1). THE OFFENSES SET FORTH IN SUBSECTION (F)(1)(A) THROUGH (C) ARE CRIMES OF VIOLENCE, OFFENSES PUNISHABLE BY LIFE IMPRISONMENT OR DEATH, OR OFFENSES FOR WHICH A MAXIMUM 10-YEAR IMPRISONMENT IS PRESCRIBED IN THE CONTROLLED SUBSTANCES ACT, THE CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT OR SECTION 1 OF THE ACT OF SEPTEMBER 15, 1980. THESE OFFENSES ARE ESSENTIALLY THE SAME CATEGORIES OF OFFENSES DESCRIBED IN THE DISTRICT OF COLUMBIA CODE BY THE TERMS 'DANGEROUS CRIME' AND 'CRIME OF VIOLENCE' FOR WHICH A DETENTION HEARING MAY BE HELD UNDER THAT STATUTE. [FN70] SUBSECTION COMPRISE THE GREATEST RISK TO COMMUNITY
SAFETY. THE COMMITTEE HAS DETERMINED THAT WHENEVER A PERSON IS CHARGED WITH ONE OF THESE OFFENSES AND THE ATTORNEY FOR THE GOVERNMENT ELECTS TO SEEK PRETRIAL DETENTION, A HEARING SHOULD BE HELD SO THAT THE JUDICIAL OFFICER WILL FOCUS ON THE ISSUE OF WHETHER, IN LIGHT OF THE SERIOUSNESS OF THE OFFENSE CHARGED AND THE OTHER FACTORS TO BE CONSIDERED UNDER SUBSECTION (G), ANY FORM OF CONDITIONAL RELEASE WILL BE ADEQUATE TO ADDRESS THE POTENTIAL DANGER THE DEFENDANT MAY POSE TO OTHERS IF RELEASED PENDING TRIAL. BECAUSE THE REQUIREMENTS OF SUBSECTION (E) MUST BE MET BEFORE A DEFENDANT MAY BE DETAINED, THE FACT THAT THE DEFENDANT IS CHARGED WITH AN OFFENSE DESCRIBED IN SUBSECTION (F)(1)(A) THROUGH (C) IS NOT, IN ITSELF, SUFFICIENT TO SUPPORT A DETENTION ORDER. HOWEVER, THE SERIOUSNESS OF THE OFFENSES DESCRIBED IN SUBSECTION (F)(1)(A) THROUGH (C) COUPLED WITH THE GOVERNMENT MOTION IS A SUFFICIENT BASIS FOR REQUIRING AN INQUIRY INTO WHETHER DETENTION MAY BE NECESSARY TO PROTECT THE COMMUNITY FROM THE DANGER THAT MAY BE POSED BY A DEFENDANT CHARGED WITH ONE OF THESE CRIMES.

UNDER (F)(1), A DETENTION HEARING MAY ALSO BE SOUGHT WHEN A DEFENDANT Charged with a serious offense has a substantial history of committing dangerous offenses. Specifically, the category described in subsection (F)(1)(D) refers to those cases in which a person charged with a felony has been previously convicted of two or more of the particularly serious offenses described in subsection (F)(1)(A) through (C) or of state or local offenses that would have been offenses described in subsection (F)(1)(A) through (C) if a circumstance giving rise to federal jurisdiction had existed. This sort of criminal history is strongly indicative of a defendant's dangerousness, and thus is an adequate basis for convening a pretrial detention hearing.

UNDER SUBSECTION (F)(2), A PRETRIAL DETENTION HEARING MAY BE HELD UPON MOTION OF THE ATTORNEY FOR THE GOVERNMENT OR UPON THE JUDICIAL OFFICER'S OWN MOTION IN TWO TYPES OF CASES. THE TWO TYPES OF CASES INVOLVE EITHER A SERIOUS RISK THAT THE DEFENDANT WILL FLEE, OR A SERIOUS RISK THAT THE DEFENDANT WILL OBSTRUCT JUSTICE, OR THREATEN, INJURE, OR INTIMIDATE A PROSPECTIVE JUROR OR WITNESS, OR ATTEMPT TO DO SO, AND REFLECT THE SCOPE OF CURRENT CASE LAW THAT RECOGNIZES THE APPROPRIATENESS OF DENIAL OF RELEASE IN SUCH CASES. [FN71]

STATUTORY AUTHORITY TO PERMIT THE JUDICIAL OFFICER TO MOVE FOR A PRETRIAL DETENTION HEARING UNDER THE CIRCUMSTANCES DESCRIBED IN SUBSECTION (F)(2) MAKES IT CLEAR THAT THE JUDICIAL OFFICER WHO BELIEVES THAT THERE MAY BE A BASIS FOR DENYING RELEASE SHOULD NOT BE FORECLOSED FROM ADDRESSING THIS CONCERN ABSENT A MOTION FOR A DETENTION HEARING BY THE GOVERNMENT.

The procedural requirements for the pretrial detention hearing set forth in section 3142(f) are based on those of the District of Columbia statute [FN73] which were held to meet constitutional due process requirements in United States v. Edwards. [FN74] The person has a right to counsel, and to the appointment of counsel if he is financially unable to secure adequate representation. He is to be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. As is currently provided with respect to information offered in bail determinations, [FN75] the presentation and consideration of information at a detention hearing need not conform to the rules of evidence applicable in criminal trials. Pending the completion of the hearing, the defendant may be detained. Because of the importance of the interests of the defendant which are implicated in a pretrial detention hearing, the committee has specifically provided that the facts on which the judicial officer bases a finding that no form of conditional release is adequate reasonably to assure the safety of any other person and the community, must be supported by clear and convincing evidence. This provision emphasizes the requirement that there be an evidentiary basis for the facts that lead the judicial officer to conclude that a pretrial detention is necessary. Thus, for example, if the criminal history of the defendant is one of the factors to be relied upon, clear evidence such as records of arrest and conviction should be presented. (The committee does not intend, however, that the pretrial detention hearing be used as a vehicle to reexamine the validity of past convictions.) Similarly, if the dangerous nature of the current offense is to be a basis of detention, then there should be evidence of the specific elements or circumstances of the offense, such as possession or use of a weapon or threats to a witness, that tend to indicate that the defendant will pose a danger to the safety of the community if released.

**23**206 Subsection (g) enumerates the factors that are to be considered by the judicial officer in determining whether there are conditions of release that will reasonably assure the appearance of the person and the safety of any other person and the community. Since this determination is to be made whenever a person is to be released or detained under this chapter, consideration of these factors is required not only in proceedings concerning the pretrial release or detention of the defendant under section 3142, but also where release is sought after conviction under section 3143, where a determination to release or detain a material witness under section 3144 is to be made, or where a revocation hearing is held under section 3148(b). Most of the factors set out in subsection (g) are drawn from the existing bail reform act and include such matters as the nature and circumstances of the offense charged, the weight of the evidence against the accused, and the history and characteristics of the accused, including his character, physical and mental condition, family ties, employment, length of residence in the community, community ties, criminal history, [FN76] and record concerning appearance at court proceedings. [FN77] The committee has decided to expand upon this list and to indicate to a court other factors that it should consider. These additional factors for the most part go to the issue of community safety, an issue which may not be considered in the pretrial release decision under the bail reform act. The added factors include not only a general consideration of the nature and seriousness of the danger posed by the person's release but also the more specific factors of
WHETHER THE OFFENSE CHARGED IS A CRIME OF VIOLENCE OR INVOLVES A
NARCOTIC DRUG, WHETHER THE DEFENDANT HAS A HISTORY OF DRUG OR ALCOHOL
ABUSE, AND WHETHER HE WAS ON PRETRIAL RELEASE, PROBATION, PAROLE, OR
ANOTHER FORM OF CONDITIONAL RELEASE AT THE TIME OF THE INSTANT OFFENSE.
[FN78]

SUBSECTION (G) ALSO CONTAINS A NEW PROVISION DESIGNED TO ADDRESS A
PROBLEM THAT HAS ARISEN IN USING FINANCIAL CONDITIONS OF RELEASE TO
ASSURE APPEARANCE. THE RATIONALE FOR THE USE OF FINANCIAL CONDITIONS OF
RELEASE IS THAT THE PROSPECT OF FORFEITURE OF THE AMOUNT OF A BOND OR OF
PROPERTY USED AS COLLATERAL TO SECURE RELEASE IS SUFFICIENT TO DETER
FLIGHT. HOWEVER, WHEN THE PROCEEDS OF CRIME ARE USED TO POST BOND, THIS
RATIONALE NO LONGER HOLDS TRUE. IN RECENT YEARS, THERE HAS BEEN AN
INCREASING INCIDENCE OF DEFENDANTS, PARTICULARLY THOSE ENGAGED IN
HIGHLY LUCRATIVE CRIMINAL ACTIVITIES SUCH AS DRUG TRAFFICKING, WHO ARE
ABLE TO MAKE EXTRAORDINARILY HIGH MONEY BONDS, POSTING BAIL AND THEN
FLEEVING THE COUNTRY. AMONG SUCH DEFENDANTS, FORFEITURE *24 **3207 OF
BOND IS SIMPLY A COST OF DOING BUSINESS, AND IT APPEARS THAT THERE IS A
GROWING PRACTICE OF RESERVING A PORTION OF CRIME INCOME TO COVER THIS
COST OF AVOIDING PROSECUTION. [FN79]

THE SOURCE OF PROPERTY USED TO FULFILL A CONDITION OF RELEASE IS THUS AN
IMPORTANT CONSIDERATION IN A JUDICIAL OFFICER'S DETERMINATION OF
WHETHER SUCH A CONDITION WILL ASSURE THE APPEARANCE OF THE DEFENDANT.
[FN80] IN RECOGNITION OF THIS, THE COMMITTEE HAS PROVIDED IN SUBSECTION
(G) THAT THE JUDICIAL OFFICER, IN CONSIDERING THE CONDITIONS OF RELEASE
DESCRIBED IN SECTIONS 3142(C)(2)(K) AND 3142(C)(2)(L), MAY UPON HIS OWN
MOTION, OR SHALL UPON THE MOTION OF THE GOVERNMENT, CONDUCT AN INQUIRY
CONCERNING THE SOURCE OF PROPERTY TO BE DESIGNATED FOR POTENTIAL
FORFEITURE OR TO BE OFFERED AS COLLATERAL TO SECURE A BOND. THE
REFERENCE TO 'COLLATERAL TO SECURE A BOND' REFERS NOT ONLY TO PROPERTY
OF THE DEFENDANT OR A THIRD PARTY WHICH IS TO BE DIRECTLY USED TO SECURE
RELEASE, BUT ALSO MONEY OR OTHER PROPERTY WHICH MAY BE PLEDGED OR PAID
TO A SURETY IN ORDER TO SECURE HIS EXECUTION OF A BOND. THE JUDICIAL
OFFICER MUST DECLINE TO ACCEPT THE DESIGNATION OR USE OF PROPERTY THAT,
BECAUSE OF ITS SOURCE, WOULD NOT REASONABLY ASSURE THE APPEARANCE OF
THE DEFENDANT. [FN81]

SUCH INQUIRIES INTO THE SOURCE OF PROPERTY USED TO SECURE RELEASE ARE
CURRENTLY USED TO SOME EXTENT, AND ARE COMMONLY REFERRED TO AS NEBBIA
HEARINGS. [FN82] HOWEVER, BECAUSE OF A LACK OF CLEAR STATUTORY
AUTHORITY TO CONDUCT SUCH HEARINGS, PARTICULARLY WITH RESPECT TO
CORPORATE SURETIES, [FN83] MANY COURTS HAVE REFUSED GOVERNMENT
REQUESTS FOR ANY INQUIRY INTO THE SOURCE OF PROPERTY USED TO POST BOND.
THEREFORE, THE COMMITTEE HAS, IN SUBSECTION (G), PROVIDED FOR THIS
STATUTORY AUTHORITY SO THAT JUDICIAL OFFICERS MAY MAKE INFORMED
DECISIONS AS TO WHETHER FINANCIAL CONDITIONS OF RELEASE WILL BE
SUFFICIENT TO ASSURE APPEARANCE OF DEFENDANTS.

THE COMMITTEE ALSO NOTES, WITH RESPECT TO THE FACTOR OF COMMUNITY TIES,
THAT IT IS AWARE OF THE GROWING EVIDENCE THAT THE PRESENCE OF THIS
FACTOR DOES NOT NECESSARILY REFLECT A LIKELIHOOD OF APPEARANCE, [FN84]
AND HAS NO CORRELATION WITH THE QUESTION OF THE SAFETY OF THE
COMMUNITY. WHILE THE COMMITTEE CONSIDERED DELETING THE FACTOR
ALTOGETHER, IT HAS DECIDED TO RETAIN IT AT THIS TIME. HOWEVER, THE
COMMITTEE WISHES TO MAKE IT CLEAR THAT IT DOES NOT INTEND THAT A COURT
CONCLUDE THERE IS NO RISK OF FLIGHT ON THE BASIS OF COMMUNITY TIES
ALONE; INSTEAD, A COURT IS EXPECTED TO WEIGH ALL THE FACTORS IN *25
**3208 THE CASE BEFORE MAKING ITS DECISION AS TO RISK OF FLIGHT AND
DANGER TO THE COMMUNITY.
SUBSECTION (H) PROVIDES THAT IN ISSUING AN ORDER OF RELEASE UNDER SUBSECTION (B) OR (C), THE JUDICIAL OFFICER IS TO INCLUDE A WRITTEN STATEMENT SETTING FORTH ALL THE CONDITIONS OF RELEASE IN A CLEAR AND SPECIFIC MANNER. HE IS ALSO REQUIRED TO ADVISE THE PERSON OF THE PENALTIES APPLICABLE TO A VIOLATION OF THE CONDITIONS AND THAT A WARRANT FOR HIS ARREST WILL BE ISSUED IMMEDIATELY UPON SUCH VIOLATION. A SIMILAR PROVISION EXISTS IN CURRENT LAW. [FN85] HOWEVER, FAILURE TO RENDER SUCH ADVICE IS NOT A BAR OR DEFENSE TO PROSECUTION FOR BAIL JUMPING UNDER SECTION 3146, AS AMENDED BY THIS TITLE. THIS PRINCIPLE IS IN KEEPING WITH THE INTENT OF CONGRESS IN ENACTING THE BAIL REFORM ACT AND THE JUDICIAL INTERPRETATION OF THE ACT. [FN86] THE PURPOSE OF SUCH ADVICE IS SOLELY TO IMPRESS UPON THE PERSON THE SERIOUSNESS OF FAILING TO APPEAR WHEN REQUIRED; SUCH WARNINGS WERE NEVER INTENDED TO BE A PREREQUISITE TO A BAIL JUMPING PROSECUTION. SUBSECTION (H) ALSO REQUIRES THE COURT TO ADVISE A DEFENDANT BEING RELEASED OF THE PROVISIONS OF 18 U.S.C. 1503, 1510, 1512, AND 1513 DEALING WITH PENALTIES FOR TAMPERING WITH A WITNESS, VICTIM, OR INFORMANT. THIS IS INTENDED TO IMPRESS ON THE DEFENDANT THE SERIOUSNESS OF SUCH CONDUCT. THE ISSUANCE OF SUCH A WARNING IS NOT A PREREQUISITE TO A PROSECUTION UNDER THESE SECTIONS OF TITLE 18 DESIGNED TO PROTECT WITNESSES, VICTIMS, AND INFORMANTS.

SUBSECTION (I) REQUIRES THE COURT IN ISSUING AN ORDER OF DETENTION TO INCLUDE WRITTEN FINDINGS OF FACT AND A WRITTEN STATEMENT OR REFERENCE TO THE HEARING RECORD SPECIFYING REASONS FOR THE DETENTION. IT ALSO REQUIRES THE COURT TO DIRECT THAT THE PERSON DETAINED BE CONFINED, TO THE EXTENT PRACTICABLE, SEPARATELY FROM PERSONS AWAITING SENTENCE, SERVING A SENTENCE, OR BEING HELD IN CUSTODY PENDING APPEAL; [FN87] THAT THE PERSON BE AFFORDED REASONABLE OPPORTUNITY TO CONSULT WITH COUNSEL; AND THAT, UPON PROPER AUTHORITY, THE CUSTODIAN OF THE PERSON TRANSFER HIM TO THE UNITED STATES MARSHAL FOR APPEARANCE IN CONNECTION WITH COURT PROCEEDINGS. THE COURT MAY ALSO PERMIT, BY SUBSEQUENT ORDER, THE TEMPORARY RELEASE OF THE PERSON DETAINED TO THE EXTENT NECESSARY FOR PREPARATION OF HIS DEFENSE OR FOR OTHER COMPELLING REASONS. [FN88]

SUBSECTION (J) STATES THAT NOTHING IN THIS SECTION SHALL BE CONSTRUED AS MODIFYING OR LIMITING THE PRESUMPTION OF INNOCENCE. THE RULE OF EVIDENCE KNOWN AS THE PRESUMPTION OF INNOCENCE HAS BEEN FOUND BY THE SUPREME COURT TO HAVE 'NO APPLICATION TO A DETERMINATION OF THE RIGHTS OF A PRETRIAL DETAINEE DURING CONFINEMENT BEFORE HIS TRIAL HAS EVEN BEGUN.' [FN89] THUS, THIS PROVISION STATES WHAT THE COMMITTEE UNDERSTANDS TO BE THE CORRECT RELATIONSHIP OF THE PRESUMPTION OF INNOCENCE TO PRETRIAL RELEASE AND DETENTION AUTHORITY.

*26 **3209 SECTION 3143. RELEASE OR DETENTION OF A DEFENDANT PENDING SENTENCE OR APPEAL

REASON TO BELIEVE THAT NO ONE OR MORE CONDITIONS OF RELEASE WILL REASONABLY ASSURE THAT THE PERSON WILL NOT FLEET OR POSE A DANGER TO ANY OTHER PERSON OR TO THE COMMUNITY. IT HAS BEEN HELD THAT ALTHOUGH DENIAL OF BAIL AFTER CONVICTION IS FREQUENTLY JUSTIFIED, THE CURRENT STATUTE INCORPORATES A PRESUMPTION IN FAVOR OF BAIL EVEN AFTER CONVICTION. [FN91] IT IS THE PRESUMPTION THAT THE COMMITTEE WISHES TO ELIMINATE IN SECTION 3143.

IN DOING SO, THE COMMITTEE HAS LARGELY BASED SECTION 3143 ON A SIMILAR PROVISION ENACTED IN 1971 IN THE DISTRICT OF COLUMBIA CODE. [FN92] ONCE GUILT OF A CRIME HAS BEEN ESTABLISHED IN A COURT OF LAW, THERE IS NO REASON TO FAVOR RELEASE PENDING IMPOSITION OF SENTENCE OR APPEAL. THE CONVICTION, IN WHICH THE DEFENDANT'S GUILT OF A CRIME HAS BEEN ESTABLISHED BEYOND A REASONABLE DOUBT, IS PRESUMABLY CORRECT IN LAW.

SECOND, RELEASE OF A CRIMINAL DEFENDANT INTO THE COMMUNITY AFTER CONVICTION MAY UNDERMINE THE DETERRENT EFFECT OF THE CRIMINAL LAW, ESPECIALLY IN THOSE SITUATIONS WHERE AN APPEAL OF THE CONVICTION MAY DRAG ON FOR MANY MONTHS OR EVEN YEARS. SECTION 3143, THEREFORE, SEPARATELY TREATS RELEASE PENDING SENTENCE, RELEASE PENDING APPEAL BY THE DEFENDANT, AND RELEASE PENDING APPEAL BY THE GOVERNMENT.

AS TO RELEASE PENDING SENTENCE, SUBSECTION (A) PROVIDES THAT A PERSON CONVICTED SHALL BE HELD IN OFFICIAL DETENTION UNLESS THE JUDICIAL OFFICER FINDS BY CLEAR AND CONVINCING EVIDENCE THAT THE PERSON IS NOT LIKELY TO FLEE OR TO POSE A DANGER TO THE SAFETY OF ANY OTHER PERSON OR THE COMMUNITY.

SUBSECTION (A) ALSO COVERS THOSE AWAITING THE EXECUTION OF SENTENCE AS WELL AS ITS IMPOSITION. THIS IS TO MAKE IT CLEAR THAT A PERSON MAY BE RELEASED IN APPROPRIATE CIRCUMSTANCES FOR SHORT PERIODS OF TIME AFTER SENTENCE, WHEN THERE IS NO APPEAL PENDING, FOR SUCH MATTERS AS GETTING HIS AFFAIRS IN ORDER PRIOR TO SURRENDERING FOR SERVICE OF SENTENCE. BY AUTHORIZING RELEASE IN SUCH CIRCUMSTANCES UNDER SECTION 3143, THE SUBSECTION ESTABLISHES THAT ABSCONDING AFTER IMPOSITION OF SENTENCE, BUT PRIOR TO ITS EXECUTION, IS A VIOLATION OF THE BAIL JUMPING STATUTE [FN93] WHICH APPLIES TO RELEASE PURSUANT TO THIS SECTION AS WELL AS SECTION 3142.

SUBSECTION (B) DEALS WITH RELEASE AFTER SENTENCE OF A DEFENDANT WHO HAS FILED AN APPEAL OR A PETITION FOR A WRIT OF CERTIORARI. SUCH PERSON IS ALSO TO BE DETAINED UNLESS THE JUDICIAL OFFICER FINDS BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT IS NOT LIKELY TO FLEE OR POSE A DANGER TO THE SAFETY OF ANY OTHER PERSON OR THE COMMUNITY. IN ADDITION, THE COURT MUST AFFIRMATIVELY FIND THAT THE APPEAL IS NOT TAKEN FOR THE PURPOSE OF DELAY AND THAT IT RAISES A SUBSTANTIAL QUESTION OF LAW OR FACT LIKELY TO RESULT IN REVERSAL OR AN ORDER FOR A NEW TRIAL. THIS IS A FURTHER RESTRICTION ON POST CONVICTION RELEASE. UNDER THE CURRENT 18 U.S.C. 3148, RELEASE CAN BE DENIED IF IT APPEARS THAT THE APPEAL IS FRIVOLOUS OR TAKEN FOR DELAY. THE CHANGE IN SUBSECTION (B) REQUIRES AN AFFIRMATIVE FINDING THAT THE CHANCE FOR REVERSAL IS SUBSTANTIAL. THIS GIVES RECOGNITION TO THE BASIC PRINCIPLE THAT A CONVICTION IS PRESUMED TO BE CORRECT.

UNDER BOTH SUBSECTIONS (A) AND (B), IF THE PRESUMPTION IN FAVOR OF DETENTION CAN BE OVERCOME, THE DEFENDANT IS TO BE TREATED PURSUANT TO THE PROVISIONS OF SECTION 3142(B) OR (C). THE COMMITTEE INTENDS THAT IN OVERCOMING THE PRESUMPTION IN FAVOR OF DETENTION THE BURDEN OF PROOF RESTS WITH THE DEFENDANT. UNDER RULE 9(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE THE BURDEN OF PROVING THAT THE DEFENDANT WILL NOT FLEE OR POSE A DANGER TO ANY OTHER PERSON OR TO THE COMMUNITY RESTS ON THE DEFENDANT. [FN94] THIS HAS BEEN QUESTIONED.
AS NOT REFLECTING THE PROPER RELEASE PRESUMPTION OF THE BAIL REFORM ACT. [FN95]

WHETHER THAT IS CORRECT OR NOT, THE BURDEN UNDER THIS SUBSECTION IS ON THE DEFENDANT TO ESTABLISH NOT ONLY THAT HE WILL NOT FLEE OR POSE A DANGER TO THE SAFETY OF ANY OTHER PERSON OR THE COMMUNITY, BUT ALSO THAT HIS APPEAL UNDER SUBSECTION (B) IS NOT TAKEN FOR PURPOSE OF DELAY AND RAISES A SUBSTANTIAL QUESTION OF LAW OR FACT LIKELY TO RESULT IN REVERSAL OR AN ORDER FOR A NEW TRIAL. [FN96]


*28 **3211 SECTION 3144. RELEASE OR DETENTION OF A MATERIAL WITNESS

THIS SECTION CARRIES FORWARD, WITH TWO SIGNIFICANT CHANGES, CURRENT 18 U.S.C. 3149 WHICH CONCERNS THE RELEASE OF A MATERIAL WITNESS. IF A PERSON'S TESTIMONY IS MATERIAL IN ANY CRIMINAL PROCEEDING, [FN98] AND IF IT IS SHOWN THAT IT MAY BECOME IMPRACTICABLE TO SECURE HIS PRESENCE BY SUBPOENA, THE GOVERNMENT IS AUTHORIZED TO TAKE SUCH PERSON INTO CUSTODY. [FN99] A JUDICIAL OFFICER IS TO TREAT SUCH A PERSON IN ACCORDANCE WITH SECTION 3142 AND TO IMPOSE THOSE CONDITIONS OF RELEASE THAT HE FINDS TO BE REASONABLY NECESSARY TO ASSURE THE PRESENCE OF THE WITNESS AS REQUIRED, OR IF NO CONDITIONS OF RELEASE WILL ASSURE THE APPEARANCE OF THE WITNESS, ORDER HIS DETENTION AS PROVIDED IN SECTION 3142. HOWEVER, IF A MATERIAL WITNESS CANNOT COMPLY WITH THE RELEASE CONDITIONS OR THERE ARE NO RELEASE CONDITIONS THAT WILL ASSURE HIS APPEARANCE, BUT HE WILL GIVE A DEPOSITION THAT WILL ADEQUATELY PRESERVE HIS TESTIMONY, THE JUDICIAL OFFICER IS REQUIRED TO ORDER THE WITNESS' RELEASE AFTER THE TAKING OF THE DEPOSITION IF THIS WILL NOT RESULT IN A FAILURE OF JUSTICE.

THE FIRST CHANGE IN CURRENT LAW IS THAT, IN PROVIDING THAT A MATERIAL WITNESS IS TO BE TREATED IN ACCORDANCE WITH SECTION 3142, SECTION 3144 WOULD PERMIT THE JUDICIAL OFFICER TO ORDER THE DETENTION OF THE WITNESS IF THERE WERE NO CONDITIONS OF RELEASE THAT WOULD ASSURE HIS APPEARANCE. CURRENTLY, 18 U.S.C. 3149 AMBIGUOUSLY REQUIRES THE CONDITIONAL RELEASE OF THE WITNESS IN THE SAME MANNER AS FOR A DEFENDANT AWAITING TRIAL, YET THE LANGUAGE OF THE STATUTE RECOGNIZES THAT CERTAIN WITNESSES WILL BE DETAINED BECAUSE OF AN INABILITY TO MEET THE CONDITIONS OF RELEASE IMPOSED BY THE JUDICIAL OFFICERS. THE COMMITTEE BELIEVES THAT JUDICIAL OFFICERS SHOULD HAVE THE AUTHORITY TO DETAIN MATERIAL WITNESSES AS TO WHOM NO FORM OF CONDITIONAL RELEASE WILL ASSURE THEIR APPEARANCE, IN THE SAME MANNER AS PROVIDED IN SECTION 3142 FOR DEFENDANTS AWAITING TRIAL. [FN100] HOWEVER, THE COMMITTEE STRESSES THAT WHENEVER POSSIBLE, THE DEPOSITIONS OF SUCH WITNESSES SHOULD BE OBTAINED SO THAT THEY MAY BE RELEASED FROM CUSTODY.

THE OTHER CHANGE THE COMMITTEE HAS MADE IS TO GRANT THE JUDICIAL
OFFICER NOT ONLY THE AUTHORITY TO SET RELEASE CONDITIONS FOR A DETAINED MATERIAL WITNESS, OR, IN AN APPROPRIATE CASE, TO ORDER HIS DETENTION PENDING HIS APPEARANCE AT THE CRIMINAL PROCEEDING, BUT TO AUTHORIZE THE ARREST OF THE WITNESS IN THE FIRST INSTANCE. IT IS ANOMALOUS THAT CURRENT LAW AUTHORIZES RELEASE CONDITIONS BUT AT THE SAME TIME DOES NOT AUTHORIZE THE INITIAL ARREST. IN ONE CASE DEALING WITH THIS PROBLEM, THE NINTH CIRCUIT FOUND THE POWER TO ARREST A MATERIAL WITNESS TO BE IMPLIED IN THE GRANT OF AUTHORITY TO RELEASE HIM ON CONDITIONS UNDER 18 U.S.C. 3149. [FN101] IN ITS RESEARCH ON THE LAW, THE COURT DISCOVERED THAT SPECIFIC ARREST AUTHORITY EXISTED IN FEDERAL LAW FROM 1790 TO 1948. THE COURT CONCLUDED THAT THE DROPPING OF THE AUTHORITY IN THE 1948 REVISION OF FEDERAL CRIMINAL LAWS WAS INADVERTENT. THE COMMITTEE AGREES WITH THAT CONCLUSION AND **29** **3212** EXPRESSLY APPROVES THE FINDING OF THE IMPLIED RIGHT TO ARREST IN THE AUTHORITY GRANTED TO THE JUDICIAL OFFICER TO RELEASE ON CONDITIONS THAT IS SET FORTH IN 18 U.S.C. 3149. TO CURE THIS AMBIGUITY, THE COMMITTEE HAS ADDED TO SECTION 3144 (THE SUCCESSOR TO 18 U.S.C. 3149) SPECIFIC LANGUAGE AUTHORIZING THE JUDGE TO ORDER THE ARREST OF A MATERIAL WITNESS.

SECTION 3145. REVIEW AND APPEAL OF A RELEASE OR DETENTION ORDER

SECTION 3145 SETS FORTH THE PROVISIONS FOR THE REVIEW AND APPEAL OF RELEASE AND DETENTION ORDERS. SUBSECTIONS (A) AND (B) PROVIDE FOR THE REVIEW OF RELEASE AND DETENTION ORDERS BY THE COURT HAVING ORIGINAL JURISDICTION OVER THE OFFENSE IN SITUATIONS IN WHICH THE ORDER IS INITIALLY ENTERED BY A MAGISTRATE, OR OTHER COURT NOT HAVING ORIGINAL JURISDICTION OVER THE OFFENSE (OTHER THAN A FEDERAL APPELLATE COURT). THE REVIEW OF RELEASE ORDERS IS GOVERNED BY SUBSECTION (A), WHICH PERMITS THE DEFENDANT TO FILE A MOTION FOR AMENDMENT OF THE CONDITIONS OF HIS RELEASE AND PERMITS THE GOVERNMENT TO FILE A MOTION FOR AMENDMENT OF THE RELEASE CONDITIONS OR FOR REVOCATION OF THE RELEASE ORDER. SUBSECTION (B) GIVES THE DEFENDANT A RIGHT TO SEEK REVIEW OF A DETENTION ORDER ANALOGOUS TO HIS RIGHT TO SEEK REVIEW OF A RELEASE ORDER UNDER SUBSECTION (A)(2).

SUBSECTION (C) GRANTS BOTH THE DEFENDANT AND THE GOVERNMENT A RIGHT TO APPEAL RELEASE OR DETENTION ORDERS, OR DECISIONS DENYING THE REVOCATION OR AMENDMENT OF SUCH ORDERS. APPEALS UNDER THIS SECTION ARE TO BE GOVERNED BY 28 U.S.C. 1291 IN THE CASE OF AN APPEAL BY THE DEFENDANT AND BY 18 U.S.C. 3731 IN THE CASE OF AN APPEAL BY THE GOVERNMENT. SECTION 104 OF THIS TITLE AMENDS 18 U.S.C. 3731 TO PROVIDE SPECIFIC AUTHORITY FOR THE GOVERNMENT TO APPEAL RELEASE DECISIONS. SINCE BOTH 28 U.S.C. 1291 AND 18 U.S.C. 3731, AS AMENDED BY THE BILL, PROVIDE ONLY FOR APPEALS DECISIONS OR ORDERS OF A DISTRICT COURT, IF THE RELEASE OR DETENTION ORDER WAS NOT ORIGINALLY ENTERED BY A JUDGE OF A DISTRICT COURT, REVIEW BY THE DISTRICT COURT MUST FIRST BE SOUGHT UNDER SECTION 3145(A) OR (B) BEFORE AN APPEAL MAY BE FILED UNDER SECTION 3145(C). THIS CONCEPT, NOT INCLUDED IN 18 U.S.C. 3148, PROMOTES A MORE ORDERLY AND RATIONAL DISPOSITION OF ISSUES INVOLVING RELEASE DETERMINATION. LIKE MOTIONS FOR REVIEW OF DETENTION OR RELEASE ORDERS UNDER SUBSECTIONS (A) AND (B), APPEALS UNDER SUBSECTION (C) ARE TO BE DETERMINED PROMPTLY. [FN102]

ALTHOUGH BASED IN PART ON THE CURRENT 18 U.S.C. 3147, SECTION 3145 MAKES TWO SUBSTANTIVE CHANGES IN PRESENT LAW. FIRST, SECTION 3145 PERMITS REVIEW OF ALL RELEASES AND DETENTION ORDERS. UNDER 18 U.S.C. 3147, REVIEW IS CONFINED TO THOSE SITUATIONS IN WHICH THE DEFENDANT HAS BEEN
DETAINED OR HAS BEEN ORDERED RELEASED SUBJECT TO THE CONDITION THAT HE RETURN TO CUSTODY AFTER SPECIFIED HOURS, AND APPEALS TO THE COURTS OF APPEALS ARE PERMITTED ONLY AFTER THE DEFENDANT HAS SOUGHT A CHANGE IN THE CONDITIONS FROM THE TRIAL COURT. SECTION 3145 WOULD PROVIDE DEFENDANTS WITH THE OPPORTUNITY TO APPEAL THE CONDITIONS OF THEIR RELEASE IRRESPECTIVE OF WHETHER THEY WERE IN FACT DETAINED BECAUSE OF AN INABILITY TO MEET THOSE CONDITIONS, *30 **3213 AND IT WOULD PERMIT DIRECT APPEAL TO THE COURT OF APPEALS RATHER THAN REQUIRING THE DEFENDANT TO GO BACK TO THE TRIAL COURT. ONLY IF THE CONDITIONS WERE IMPOSED BY A COURT OTHER THAN THE TRIAL COURT WOULD THE DEFENDANT BE REQUIRED TO SEEK A CHANGE IN THE CONDITIONS FROM THE TRIAL COURT BEFORE APPEALING TO THE COURT OF APPEALS.


SECTION 3146. PENALTY FOR FAILURE TO APPEAR

THE PURPOSE OF SECTION 3146 IS TO DETER THOSE WHO WOULD OBSTRUCT LAW ENFORCEMENT BY FAILING KNOWINGLY TO APPEAR FOR TRIAL OR OTHER JUDICIAL APPEARANCES AND TO PUNISH THOSE WHO INDEED FAIL TO APPEAR. THE SECTION BASICALLY CONTINUES THE CURRENT LAW OFFENSE OF BAIL JUMPING.


A VIOLATION OF THE CURRENT BAIL JUMPING STATUTE REQUIRES, FIRST, THAT A PERSON, BE RELEASED PURSUANT TO THE PROVISIONS OF THE BAIL REFORM ACT, [FN105] AND, SECOND, THAT 'HE WILLFULLY FAIL * * * TO APPEAR BEFORE ANY COURT OR JUDICIAL OFFICER, AS REQUIRED.' THE WORD 'WILLFULLY' AS USED IN THE STATUTE HAS BEEN INTERPRETED TO MEAN THAT THE OMISSION OF
Failing to appear was 'voluntary * * * and with the purpose of violating
the law, and not by mistake, accident, or in good faith.' [FN106] Furthermore, actual notice of the appearance date has been held
unnecessary in the face of evidence of the defendant's willful failure
to appear. [FN107] The requirement that the person fail to appear 'before
any court or judicial officer' has led at least one court to hold that it
is not an offense under 18 U.S.C. 3150 to fail to surrender to a United
States marshal to begin service of sentence as ordered. [FN108] A violation of 18 U.S.C. 3150 carries a maximum term of five years in
prison if the defendant was released in connection with a charge of
felony, or if he was released while awaiting sentence, or pending appeal
or petition for certiorari after conviction for any offense. If the
defendant has been released on a charge of a misdemeanor or as a
material witness, bail jumping carries a maximum penalty of one year in
prison. The statute also calls for a forfeiture of any security given for
his release. However, such a forfeiture is not a condition precedent to
brining a prosecution for bail jumping. [FN109] Section 3146, as reported, basically continues the current law offense
of bail jumping although the grading has been enhanced to more nearly
parallel that of the underlying offense for which the defendant was
released. This enhanced grading provision is designed to eliminate the
temptation to a defendant to go into hiding until the government's case
for a serious felony grows stale or until a witness becomes
unavailable, often a problem with the passage of time in narcotics
offenses, and then to surface at a later date with criminal liability
limited to the less serious bail jumping offense. A specific provision has
been added to make clear that the failure to surrender for service of
sentence is covered as a form of bail jumping.
As noted, the basic offense set forth in section 3146 parallels current
law. Subsection (A) provides that a person commits an offense if after
having been released pursuant to the provisions of new chapter 207 of
title 18, (1) he knowingly fails to appear before a court as required by
the conditions of his release; or (2) he knowingly fails to surrender
for service of sentence pursuant to a court order. This would include
release of a material witness.
By use of the term 'knowingly' as a mental state requirement, the
committee intends to perpetuate the concept of 'willfully' which appears
in the current bail jumping statute as interpreted in *32 **3215 united
states v. depugh [FN110] and united states v. hall. [FN111] Often a
defendant realizes that he may have to appear but simply disappears,
moves and fails to leave a forwarding address, fails to keep in touch
with his attorney, or does not respond to notices and when later
apprehended defends on the grounds that he was out of town on the
designated appearance date, that he never received any notice, or the
like. Under the standard contemplated by the committee, the defendant
could be convicted for bail jumping upon a showing that he was aware
that an appearance date will be set and that there will be a resulting
failure to appear. Conduct involving a failure to keep in contact and in
touch with the situation amounts to a conscious disregard that an
appearance date will come and pass. A person released on bail can be
charged with a gross deviation from the standard of conduct
applicable to the ordinary person when he fails to keep in touch with
the status of his case or places himself out of reach of the authorities
and his attorney. [FN112] Subsection (C) provides that it is an affirmative defense that
'uncontrollable circumstances prevented the person from appearing or
SURRENDERING, AND THAT THE PERSON DID NOT CONTRIBUTE TO THE CREATION OF SUCH CIRCUMSTANCES IN RECKLESS DISREGARD OF THE REQUIREMENT THAT HE APPEAR OR SURRENDER, AND THAT THE PERSON APPEARED OR SURRENDERED AS SOON AS SUCH CIRCUMSTANCES CEASED TO EXIST. IT IS INTENDED THAT THE DEFENSE SHOULD APPLY WHERE, FOR EXAMPLE, A PERSON IS RECUPERATING FROM A HEART ATTACK AND TO LEAVE HIS BED WOULD IMPEL HIM LIFE, OR, AFTER HE HAD MADE CAREFUL PLANS FOR TRANSPORTATION TO THE COURT HOUSE, HIS VEHICLE BREAKS DOWN OR UNEXPECTED WEATHER CONDITIONS BRING TRAFFIC TO A HALT. THE REQUIREMENT OF APPEARANCE OR SURRENDER AS SOON AS CIRCUMSTANCES PERMIT WAS INCLUDED BY THE COMMITTEE FOR TWO REASONS: FIRST, IN ORDER TO CONFIRM THE DEFENDANT'S LACK OF BAD FAITH IN FAILING TO APPEAR OR SURRENDER; AND, SECOND, TO ENCOURAGE THE DEFENDANT TO APPEAR OR SURRENDER EVEN AFTER HE FAILS TO SO DO AS REQUIRED. SINCE THE DEFENSE IS DENOMINATED AS 'AFFIRMATIVE,' THE DEFENDANT, WILL BEAR THE BURDEN OF PROOF AS TO THE ELEMENTS THEREOF BY A PREPONDERANCE OF THE EVIDENCE. AFTER REQUIRING THAT THE OFFENDER HAS BEEN RELEASED PURSUANT TO THE PROVISIONS OF THIS CHAPTER, SUBSECTION (A)(1) GOES ON TO REQUIRE THAT THE RELEASED PERSON FAIL TO APPEAR BEFORE 'A COURT AS REQUIRED BY THE CONDITIONS OF HIS RELEASE.' THE WORD 'COURT' IS INTENDED TO INCLUDE THE PRESIDING JUDICIAL OFFICER, AND IS INTENDED TO INCLUDE ANY PERSON AUTHORIZED PURSUANT TO SECTION 3141 AND THE FEDERAL RULES OF CRIMINAL PROCEDURE TO GRANT BAIL OR OTHERWISE RELEASE A PERSON CHARGED WITH OR CONVICTED OF A CRIME OR WHO IS A MATERIAL WITNESS. [FN113] IT IS NOT INTENDED TO COVER SUCH LESSER COURT OFFICIALS AS PROBATION OFFICERS, MARSHALS, BAIL AGENCY PERSONNEL, AND THE LIKE. THE HOLDING IN UNITED STATES V. CLARK [FN114] THAT A PROBATION OFFICER IS NOT A JUDICIAL OFFICER SO THAT A FAILURE TO APPEAR BEFORE HIM AS REQUIRED BY THE COURT IS NOT BAIL JUMPING IS SPECIALLY ENDORSED, AND SECTION 3146 SHOULD BE INTERPRETED TO REACH THE SAME RESULTS. BAIL JUMPING *33 **3216 IS AN OFFENSE INTENDED TO APPLY TO ACTUAL COURT APPEARANCES BEFORE JUDGES OR MAGISTRATES AND NOT TO OTHER COURT PERSONNEL, WITH THE SOLE EXCEPTION OF A FAILURE TO SURRENDER FOR SERVICE OF SENTENCE, AS COVERED IN SUBSECTION (A)(2). IN THIS SITUATION THE COMMITTEE BELIEVES THAT THE FAILURE TO APPEAR IS TANTAMOUNT TO A FAILURE TO APPEAR BEFORE A COURT AND IS EQUALLY DESERVING OF PUNISHMENT. THE TERM 'AS REQUIRED' IN SUBSECTION (A)(1) HAS BEEN HELD NOT TO BE UNCONSTITUTIONALLY VAGUE WHEN COMBINED WITH A REQUIREMENT OF 'WILLFULLY,' [FN115] OR 'KNOWINGLY' IN THE CASE OF THIS BILL. AS INDICATED IN CONNECTION WITH THE DISCUSSION OF THE CULPABILITY STANDARD, IT IS OFTEN THE CASE THAT ACCUSED PERSONS WHO BY THEIR OWN ACTS PLACE THEMSELVES OUT OF TOUCH WITH THE AUTHORITIES DEFEND ON THE BASIS THAT THEY NEVER RECEIVED ACTUAL NOTICE OF A SCHEDULED APPEARANCE DATE AND THUS CANNOT BE CHARGED WITH A FAILURE TO APPEAR 'AS REQUIRED.' ACTUAL NOTICE OF AN APPEARANCE DATE, HOWEVER, IS NOT AN ELEMENT OF THE OFFENSE UNDER 18 U.S.C. 3150, THE LANGUAGE OF WHICH IS SIMILAR TO THAT OF PROPOSED SECTION 3146. [FN116] THE BURDEN ON THE GOVERNMENT IS ONLY TO SEE THAT REASONABLE EFFORTS ARE MADE TO SERVE NOTICE ON THE DEFENDANT AS TO ANY MANDATORY COURT APPEARANCE. IN UNITED STATES V. DEPUGH, SUPRA, THE DEFENDANT HAD GONE UNDERGROUND AND HAD LEFT NO FORWARDING ADDRESS WITH COURT OFFICIALS OR HIS ATTORNEY. NOTICE OF THE TRIAL DATE WAS GIVEN TO THE DEFENDANT'S WIFE AT HIS LAST KNOWN ADDRESS AND TO THE DEFENDANT'S ATTORNEY. SUCH NOTICE WAS DEEMED SUFFICIENT TO MAKE THE APPEARANCE 'AS REQUIRED.' IT WOULD ALSO SUFFICE UNDER SECTION 3146. CURRENT SECTION 3146(C) OF TITLE 18 OF THE U.S.C. PROVIDES THAT A JUDICIAL OFFICER AUTHORIZING A RELEASE UNDER THE BAIL REFORM ACT MUST ISSUE AN ORDER THAT, INTER ALIA, INFORMS THE RELEASED PERSON OF THE PENALTIES
APPLICABLE FOR VIOLATION OF THE CONDITIONS OF RELEASE. IN DEPUGH, IT WAS
ARGUED THAT ISSUANCE OF SUCH AN ORDER IS A CONDITION PREREQUISITE TO A
BAIL JUMPING PROSECUTION UNDER 18 U.S.C. 3150. THAT CONTENTION WAS
REJECTED. THE COURT CITED THE LEGISLATIVE HISTORY OF 18 U.S.C. 3150 TO FIND
THAT 18 U.S.C. 3146(C) IS DESIGNED TO ENHANCE THE DETERRENT VALUE OF
CRIMINAL PENALTIES BUT THAT IT WAS NOT INTENDED TO ESTABLISH THE
ISSUANCE OF THE ORDER AS PREREQUISITE TO SUBSEQUENT PROSECUTION. THAT
HISTORY AND THE DEPUGH HOLDING WITH RESPECT TO THE EFFECT OF 18 U.S.C.
3146(C) ARE SPECIFICALLY ENDORSED.

AS NOTED ABOVE, THE GRADING FOR THE NEW SECTION 3146 HAS BEEN DESIGNED
TO PARALLEL THE PENALTY FOR THE OFFENSE FOR WHICH THE DEFENDANT HAS
BEEN RELEASED. UNDER CURRENT 18 U.S.C. 3150, THE PENALTIES FOR BAIL
JUMPING ARE A $5,000 FINE AND FIVE YEARS OF IMPRISONMENT, WHERE THE
DEFENDANT WAS RELEASED IN CONNECTION WITH A FELONY CHARGE, AND A FINE
OF $1,000 AND ONE YEAR OF IMPRISONMENT, WHERE THE DEFENDANT WAS
RELEASED IN CONNECTION WITH A MISDEMEANOR OR IN THE CASE OF A FAILURE TO
APPEAR AS A MATERIAL WITNESS. THE DEPARTMENT OF JUSTICE STRONGLY URGED
THAT THE PENALTIES FOR BAIL JUMPING BE AMENDED TO MORE CLOSELY PARALLEL
THE PENALTIES FOR THE OFFENSE IN CONNECTION WITH WHICH THE DEFENDANT
WAS RELEASED. [FN117] THE COMMITTEE **3217 ENDORSES HIS SUGGESTION
AS A MEANS OF ENHANCING THE EFFECTIVENESS OF THE BAIL JUMPING OFFENSE AS
A DETERRENT TO FLIGHT. THUS, THE PENALTIES FOR BAIL JUMPING SET OUT IN
PROPOSED SECTION 3146, ARE TO BE (1) UP TO A $25,000 FINE AND TEN YEARS’
IMPRISONMENT WHERE THE OFFENSE WAS PUNISHABLE BY DEATH, LIFE
IMPRISONMENT, OR UP TO FIFTEEN YEARS OF IMPRISONMENT; (2) UP TO A $10,000
FINE OR IMPRISONMENT FOR 5 YEARS, WHERE THE OFFENSE WAS PUNISHABLE BY
MORE THAN FIVE, BUT LESS THAN FIFTEEN YEARS OF IMPRISONMENT; (3) A FINE OF
NOT MORE THAN $5,000 AND IMPRISONMENT FOR NOT MORE THAN TWO YEARS, IF
THE OFFENSE WAS ANY OTHER FELONY; AND (4) A FINE OF NOT MORE THAN $2,000
AND IMPRISONMENT FOR NOT MORE THAN ONE YEAR, IF THE OFFENSE WAS A
MISDEMEANOR. THE CURRENT PENALTIES FOR FAILURE TO APPEAR AS A MATERIAL
WITNESS, I.E., NOT MORE THAN A $1,000 FINE AND IMPRISONMENT FOR ONE YEAR
ARE RETAINED IN SECTION 3146(B)(2).

SUBSECTION (D) OF SECTION 3146, SIMPLY EMPHASIZES THAT IN ADDITION TO THE
PENALTIES OF FINE AND IMPRISONMENT PROVIDED FOR BAIL JUMPING, THE COURT
MAY ALSO ORDER THE PERSON TO FORFEIT ANY BOND OR OTHER PROPE TY HE HAS
PLEDGED TO SECURE HIS RELEASE IF HE HAS FAILED TO APPEAR. THIS SUBSECTION
ALSO MAKES IT CLEAR THAT SUCH FORFEITURE MAY BE ORDERED IRRESPECTIVE OF
WHETHER THE PERSON HAS BEEN CHARGED WITH THE OFFENSE OF BAIL JUMPING
UNDER SECTION 3146.

SECTION 3147. PENALTY FOR AN OFFENSE COMMITTED WHILE ON RELEASE.

SECTION 3147 IS DESIGNED TO DETER THOSE WHO WOULD POSE A RISK TO
COMMUNITY SAFETY BY COMMITTING ANOTHER OFFENSE WHEN RELEASED UNDER
THE PROVISIONS OF THIS TITLE AND TO PUNISH THOSE WHO INDEED ARE
CONVICTED OF ANOTHER OFFENSE. THIS SECTION ENFORCES THE SELF-EVIDENT
REQUIREMENT THAT ANY RELEASE ORDERED BY THE COURTS INCLUDE A CONDITION
THAT THE DEFENDANT NOT COMMIT ANOTHER CRIME WHILE ON RELEASE. GIVEN
THE PROBLEM OF CRIME COMMITTED BY THOSE ON PRETRIAL RELEASE THIS
REQUIREMENT NEEDS ENFORCEMENT. ACCORDINGLY, THIS SECTION PRESCRIBES A
PENALTY IN ADDITION TO ANY SENTENCE ORDERED FOR THE OFFENSE FOR WHICH
THE DEFENDANT WAS ON RELEASE. THIS ADDITIONAL PENALTY IS A TERM OF
IMPRISONMENT OF AT LEAST TWO YEARS AND NOT MORE THAN TEN IF THE OFFENSE
COMMITTED WHILE ON RELEASE IS A FELONY. IF THE OFFENSE COMMITTED WHILE
ON RELEASE IS A MISDEMEANOR, THIS ADDITIONAL PENALTY IS AT LEAST 90 DAYS AND NOT MORE THAN ONE YEAR.

SECTION 3148. SANCTIONS FOR VIOLATIONS OF RELEASE CONDITIONS

SECTION 3148 PROVIDES IN SUBSECTION (A) FOR TWO DISTINCT SANCTIONS THAT ARE APPLICABLE FOR PERSONS RELEASED PURSUANT TO SECTION 3142 [FN118] WHO VIOLATE A CONDITION OF THEIR RELEASE--REVOCATION OF RELEASE AND AN ORDER OF DETENTION, AND A PROSECUTION FOR CONTEMPT OF COURT. ONE OF THE CRITICISMS OF THE BAIL REFORM ACT HAS BEEN ITS FAILURE TO PROVIDE ADEQUATE SANCTIONS FOR VIOLATION OF RELEASE CONDITIONS; SECTION 3148 PROVIDES SUCH SANCTIONS.

SUBSECTION (B) SETS OUT THE PROCEDURE FOR REVOCATION OF RELEASE. SPECIFIC PROVISIONS FOR REVOCATION OF RELEASE ARE NEW TO FEDERAL BAIL LAW, ALTHOUGH A SIMILAR PROVISION EXISTS IN THE DISTRICT OF COLUMBIA CODE. [FN119] THE COMMITTEE HAS RECEIVED TESTIMONY RECOMMENDING SUCH A PROVISION, [FN120] AND HAS ADOPTED THE CONCEPT. [FN121] REVOCATION IS BASED UPON A BETRAYAL OF TRUST BY THE PERSON RELEASED BY THE COURT ON CONDITIONS THAT WERE TO ASSURE BOTH HIS APPEARANCE AND THE SAFETY OF THE COMMUNITY. IT SHOULD BE NOTED THAT, AS ALL PERSONS ARE RELEASED UNDER THE MANDATORY CONDITION UNDER SECTIONS 3142(B) AND 3142(C)(1) THAT THEY NOT COMMIT A FEDERAL, STATE, OR LOCAL CRIME DURING THE PERIOD OF RELEASE, ESTABLISHMENT OF PROBABLE CAUSE THAT A CRIME HAS BEEN COMMITTED WHILE A PERSON WAS RELEASED IS SUFFICIENT TO TRIGGER THE REVOCATION PROCEDURE OF SECTION 3148, AS IS A VIOLATION OF ANY OF THE DISCRETIONARY RELEASE CONDITIONS SET FOR THE DEFENDANT PURSUANT TO SECTION 3142(C)(2).

THE ATTORNEY FOR THE GOVERNMENT CAN INITIATE THE REVOCATION PROCEEDING BY FILING A MOTION TO THAT EFFECT WITH THE COURT. A JUDICIAL OFFICER MAY THEN ISSUE AN ARREST WARRANT AND HAVE THE PERSON BROUGHT BEFORE THE COURT IN THE DISTRICT IN WHICH HIS ARREST WAS ORDERED FOR A REVOCATION HEARING. AN ORDER OF REVOCATION AND DETENTION WILL ISSUE AT THIS HEARING IF THE COURT FINDS, FIRST, THAT THERE IS EITHER PROBABLE CAUSE TO BELIEVE THAT THE PERSON HAS COMMITTED A FEDERAL, STATE, OR LOCAL CRIME WHILE ON RELEASE OR CLEAR AND CONVINCING EVIDENCE THAT THE PERSON HAS VIOLATED ANY OTHER CONDITION OF HIS RELEASE; AND, SECOND, THAT EITHER NO CONDITION OR COMBINATION OF CONDITIONS CAN BE SET THAT WILL ASSURE THAT THE PERSON WILL NOT FLEE OR POSE A DANGER TO THE SAFETY OR ANY OTHER PERSON OR THE COMMUNITY OR THE PERSON WILL NOT ABIDE BY REASONABLE CONDITIONS. THIS LATTER PROVISION IS INTENDED TO REACH THE SITUATION IN WHICH A DEFENDANT CONTINUOUSLY FLOUTS THE COURT BY DISOBEYING CONDITIONS SUCH AS RESTRICTIONS ON HIS ASSOCIATION OR TRAVEL, AND IN WHICH IT IS CLEAR THAT HE WILL CONTINUE TO DO SO. IF THE COURT FINDS THAT THERE ARE CONDITIONS THAT WILL ASSURE BOTH APPEARANCE AND SAFETY AND THAT THE PERSON WILL ABIDE BY SUCH CONDITIONS, HE IS TO BE RELEASED PURSUANT TO SECTION 3142 ON APPROPRIATE CONDITIONS, WHICH MAY BE AN AMENDED VERSION OF THE EARLIER CONDITIONS.

IN TESTIMONY BEFORE THE COMMITTEE, THE DEPARTMENT OF JUSTICE RECOMMENDED THAT REVOCATION OF RELEASE BE REQUIRED IF THE PERSON COMMITTED ANOTHER SERIOUS CRIME WHILE ON RELEASE. [FN122] THE COMMISSION OF A SERIOUS CRIME BY A RELEASED PERSON IS PLAINLY INDICATIVE OF HIS INABILITY TO CONFORM TO ONE OF THE MOST BASIC CONDITIONS OF HIS RELEASE, I.E. THAT HE ABIDE BY THE LAW, AND OF THE DANGER HE POSES TO OTHER PERSONS AND THE COMMUNITY, FACTORS WHICH SECTION 3148 RECOGNIZES ARE APPROPRIATE BASES FOR THE REVOCATION OF RELEASE. NONETHELESS, THERE MAY BE CASES IN WHICH A DEFENDANT MAY BE ABLE TO DEMONSTRATE THAT, ALTHOUGH THERE IS PROBABLE
CAUSE TO BELIEVE THAT HE HAS COMMITTED A SERIOUS CRIME WHILE ON RELEASE, THE NATURE OR CIRCUMSTANCES OF THE CRIME ARE SUCH THAT REVOCATION OF RELEASE IS NOT APPROPRIATE. THUS, WHILE THE COMMITTEE IS OF THE VIEW THAT COMMISSION OF A FELONY DURING THE PERIOD OF RELEASE GENERALLY SHOULD RESULT IN THE REVOCATION OF THE PERSON'S RELEASE, IT CONCLUDED THAT THE DEFENDANT SHOULD NOT BE FORECLOSED FROM THE OPPORTUNITY TO PRESENT TO THE COURT EVIDENCE INDICATING THAT THIS SANCTION IS NOT MERITED. HOWEVER, THE ESTABLISHMENT OF PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT HAS COMMITTED A SERIOUS CRIME WHILE ON RELEASE CONSTITUTES COMPPELLING EVIDENCE THAT THE DEFENDANT POSES A DANGER TO THE COMMUNITY, AND, ONCE SUCH PROBABLE CAUSE IS ESTABLISHED, IT IS APPROPRIATE THAT THE BURDEN REST ON THE DEFENDANT TO COME FORWARD WITH EVIDENCE INDICATING THAT THIS CONCLUSION IS NOT WARRANTED IN HIS CASE. THEREFORE, THE COMMITTEE HAS PROVIDED IN SECTION 3148(B) THAT IF THERE IS PROBABLE CAUSE TO BELIEVE THAT THE PERSON HAS COMMITTED A FEDERAL, STATE, OR LOCAL FELONY WHILE ON RELEASE, A REBUTTABLE PRESUMPTION ARISSES THAT NO CONDITION OR COMBINATION OF CONDITIONS WILL ASSURE THAT THE PERSON WILL NOT POSE A DANGER TO THE SAFETY OF ANY OTHER PERSON OR THE COMMUNITY. SUBSECTION (C) EMPHASIZES THAT THE COURT MAY IMPOSE CONTEMPT SANCTIONS IF THE PERSON HAS VIOLATED A CONDITION OF HIS RELEASE. THIS CARRIES FORWARD THE PROVISIONS OF EXISTING 18 U.S.C. 3151.

SECTION 3149. SURRENDER OF AN OFFENDER BY A SURETY

EXCEPT FOR MINOR WORD CHANGES, THIS PROVISION IS IDENTICAL TO 18 U.S.C. 3142. THE SECTION PROVIDES THAT IN CASES WHERE A PERSON IS RELEASED ON AN APPEARANCE BOND WITH A SURETY, SUCH PERSON MAY BE ARRESTED BY HIS SURETY AND DELIVERED TO A UNITED STATES MARSHAL AND BROUGHT BEFORE THE COURT. THE PERSON SO RETURNED WILL BE RETAINED IN CUSTODY UNTIL RELEASED PURSUANT TO THIS CHAPTER OR UNDER OTHER PROVISIONS OF LAW. THE LANGUAGE IS AMENDED TO DELETE AS OUTMODED THE AUTHORITY OF THE SURETY TO REQUEST DETENTION OF THE DEFENDANT, AND TO SUBSTITUTE A REQUIREMENT THAT THE JUDGE DETERMINE WHETHER TO REVOKE RELEASE IN ACCORD WITH SECTION 3148.

SECTION 3150. APPLICABILITY TO A CASE REMOVED FROM A STATE COURT

THIS SECTION SPECIFIES THAT THE RELEASE PROVISIONS OF NEW CHAPTER 207 OF TITLE 18, UNITED STATES CODE, ARE TO APPLY TO A CASE REMOVED TO A FEDERAL COURT FROM A STATE COURT. CURRENT 18 U.S.C. 3144, RELATING TO DETENTION OF A STATE PRISONER WHOSE CASE IS BEFORE THE UNITED STATES SUPREME COURT, IS DELETED. IT IS EXPECTED THAT DECISIONS ON RELEASE IN SUCH CASES WILL ORDINARILY BE MADE BY THE STATE COURTS UNDER STATE LAW.

*37 **3220 TITLE-- SENTENCING REFORM

GENERAL STATEMENT

TITLE II OF S. 1762 AND S. 668, A SEPARATE BILL IDENTICAL IN LANGUAGE EXCEPT FOR TECHNICAL CHANGES ALSO REPORTED TO THE SENATE ON AUGUST 4, 1983, REPRESENT THE FIRST COMPREHENSIVE SENTENCING LAW FOR THE FEDERAL SYSTEM. THEY ARE THE CULMINATION OF A REFORM EFFORT BEGUN MORE THAN A DECADE AGO BY THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL


*38 **3221 ATTORNEY GENERAL WILLIAM FRENCH SMITH IN HIS FIRST APPEARANCE BEFORE THE SENATE COMMITTEE ON THE JUDICIARY CONCERNING MAJOR CRIME LEGISLATION NOTED THE IMPORTANCE OF, AND COMMITTED THE SUPPORT OF THE CURRENT ADMINISTRATION TO, MAJOR SENTENCING REFORM: [FN127]OF THE IMPROVEMENTS (UNDER CONSIDERATION BY THE COMMITTEE) * * *

Perhaps the most important are those related to sentencing criminal offenders. These provisions introduce a totally new and comprehensive sentencing system that is based upon a coherent philosophy. They rely upon detailed guidelines for sentencing similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing. In the federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the parole commission is to determine when to release the prisoner because he is 'rehabilitated.' Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another-- convicted of the very same crime and possessing a comparable criminal history-- may be sentenced to a lengthy term of imprisonment. Even two such offenders who are
SENTENCED TO TERMS OF IMPRISONMENT FOR SIMILAR OFFENSES MAY RECEIVE WIDELY DIFFERING PRISON RELEASE DATES; ONE MAY BE SENTENCED TO A RELATIVELY SHORT TERM AND BE RELEASED AFTER SERVING MOST OF THE SENTENCE, WHILE THE OTHER MAY BE SENTENCED TO A RELATIVELY LONG TERM BUT BE DENIED PAROLE INDEFINITELY. [FN128]


IN ORDER TO ALLEVIATE THESE PROBLEMS, THE COMMITTEE SET SEVERAL GOALS THAT IT BELIEVES ANY SENTENCING REFORM LEGISLATION SHOULD MEET. FIRST, SENTENCING LEGISLATION SHOULD CONTAIN A COMPREHENSIVE AND CONSISTENT STATEMENT OF THE FEDERAL LAW OF SENTENCING, SETTING FORTH THE PURPOSES TO BE SERVED BY THE SENTENCING SYSTEM AND A CLEAR STATEMENT OF THE KINDS AND LENGTHS OF SENTENCES AVAILABLE FOR FEDERAL OFFENDERS.

SECOND, IT SHOULD ASSURE THAT SENTENCES ARE FAIR BOTH TO THE OFFENDER AND TO SOCIETY, AND THAT SUCH FAIRNESS IS REFLECTED BOTH IN THE INDIVIDUAL CASE AND IN THE PATTERN OF SENTENCES IN ALL FEDERAL CRIMINAL CASES.

THIRD, IT SHOULD ASSURE THAT THE OFFENDER, THE FEDERAL PERSONNEL CHARGED WITH IMPLEMENTING THE SENTENCE, AND THE GENERAL PUBLIC ARE CERTAIN ABOUT THE SENTENCE AND THE REASONS FOR IT.

FOURTH, IT SHOULD ASSURE THE AVAILABILITY OF A FULL RANGE OF SENTENCING OPTIONS FROM WHICH TO SELECT THE MOST APPROPRIATE SENTENCE IN A PARTICULAR CASE.

FIFTH, IT SHOULD ASSURE THAT EACH STAGE OF THE SENTENCING AND CORRECTIONS PROCESS, FROM THE IMPOSITION OF SENTENCE BY THE JUDGE, AND AS LONG AS THE OFFENDER REMAINS WITHIN THE CRIMINAL JUSTICE SYSTEM, IS GEARED TOWARD THE SAME GOALS FOR THE OFFENDER AND FOR SOCIETY.

UNFORTUNATELY, CURRENT FEDERAL LAW FAILS TO ACHIEVE ANY OF THESE GOALS. EACH PARTICIPANT IN THE PROCESS, FROM THE COURTS THROUGH THE PROBATION AND PAROLE SYSTEMS, DOES THE BEST IT CAN WITH THE LEGISLATIVE TOOLS AT HAND, BUT NONE IS ABLE TO REACH THESE GOALS WITHOUT SUBSTANTIAL SENTENCING REFORM LEGISLATION.

FOLLOWING IS A BRIEF DESCRIPTION OF CURRENT SENTENCING LAW AND THE ATTEMPTS OF THE FEDERAL CRIMINAL JUSTICE SYSTEM TO AMELIORATE THE PROBLEMS CAUSED BY THAT LAW. THAT DESCRIPTION IS FOLLOWED BY A SUMMARY OF THE SENTENCING REFORM PROPOSALS IN THE BILL, AS REPORTED, AND A DISCUSSION OF HOW THOSE PROPOSALS WILL ACHIEVE THE GOALS SET BY THE COMMITTEE. MORE DETAILED DESCRIPTIONS OF CURRENT LAW AND THE SENTENCING PROVISIONS ARE CONTAINED IN THE SECTION-BY-SECTION ANALYSIS.

CURRENT FEDERAL SENTENCING LAW

1. LACK OF COMPREHENSIVENESS AND CONSISTENCY
CURRENT FEDERAL LAW CONTAINS NO GENERAL SENTENCING PROVISION. INSTEAD, CURRENT LAW SPECIFIES THE MAXIMUM TERM OF IMPRISONMENT AND THE MAXIMUM FINE FOR EACH FEDERAL OFFENSE IN THE SECTION THAT DESCRIBES THE
OFFENSE. [FN130] THESE MAXIMUMS ARE USUALLY PRESCRIBED WITH LITTLE REGARD FOR THE RELATIVE SERIOUSNESS OF THE OFFENSE AS COMPARED TO SIMILAR OFFENSES. [FN131]


THE SENTENCING PROVISIONS OF CURRENT LAW WERE ORIGINALLY BASED ON A REHABILITATION MODEL IN WHICH THE SENTENCING JUDGE WAS EXPECTED TO SENTENCE A DEFENDANT TO A FAIRLY LONG TERM OF IMPRISONMENT. THE DEFENDANT WAS ELIGIBLE FOR RELEASE ON PAROLE AFTER SERVING ONE-THIRD OF HIS TERM. THE PAROLE COMMISSION WAS CHARGED WITH SETTING HIS RELEASE DATE IF IT CONCLUDED THAT HE WAS SUFFICIENTLY REHABILITATED. [FN137] AT PRESENT, THE CONCEPTS OF INDETERMINATE SENTENCING AND PAROLE RELEASE DEPEND FOR THEIR JUSTIFICATION EXCLUSIVELY UPON THIS MODEL OF 'COERCIVE' REHABILITATION-- THE THEORY OF CORRECTION THAT TIES PRISON RELEASE DATES TO THE SUCCESSFUL COMPLETION OF CERTAIN VOCATIONAL, EDUCATIONAL, AND COUNSELING PROGRAMS WITHIN THE PRISONS.

RECENT STUDIES SUGGEST THAT THIS APPROACH HAS FAILED, [FN138] AND MOST SENTENCING JUDGES AS WELL AS THE PAROLE COMMISSION AGREE THAT THE REHABILITATION MODEL IS NOT AN APPROPRIATE BASIS FOR SENTENCING DECISIONS. [FN139] WE KNOW TOO LITTLE ABOUT HUMAN BEHAVIOR TO BE ABLE TO REHABILITATE INDIVIDUALS ON A ROUTINE BASIS OR EVEN TO DETERMINE ACCURATELY WHETHER OR WHEN A PARTICULAR PRISONER HAS BEEN REHABILITATED. UNTIL THE PRESENT SENTENCING STATUTES ARE CHANGED, HOWEVER, JUDGES AND THE PAROLE COMMISSION ARE LEFT TO EXERCISE THEIR DISCRETION TO CARRY OUT WHAT EACH BELIEVES TO BE THE PURPOSES OF SENTENCING.

2. DISPARITY AND UNCERTAINTY IN CURRENT FEDERAL SENTENCING

A. PRACTICES OF THE FEDERAL JUDICIARY

THE ABSENCE OF A COMPREHENSIVE FEDERAL SENTENCING LAW AND OF STATUTORY GUIDANCE ON HOW TO SELECT THE APPROPRIATE SENTENCING OPTION CREATES INEVITABLE DISPARITY IN THE SENTENCES WHICH COURTS IMPOSE ON SIMILARLY SITUATED DEFENDANTS. [FN140] THIS OCCURS IN SENTENCES HANDED DOWN BY JUDGES IN THE SAME DISTRICT AND BY JUDGES FROM DIFFERENT DISTRICTS AND CIRCUITS IN THE FEDERAL SYSTEM. [FN141] ONE JUDGE MAY IMPOSE A RELATIVELY LONG PRISON TERM TO REHABILITATE OR INCAPACITATE THE OFFENDER. ANOTHER JUDGE, UNDER SIMILAR CIRCUMSTANCES, MAY SENTENCE THE DEFENDANT TO A SHORTER PRISON TERM SIMPLY TO PUNISH HIM, OR THE JUDGE MAY OPT FOR THE IMPOSITION OF A TERM OF PROBATION IN ORDER TO REHABILITATE HIM. [FN142] FOR EXAMPLE, IN 1974, THE AVERAGE FEDERAL SENTENCE FOR BANK ROBBERY WAS ELEVEN YEARS, BUT IN THE NORTHERN DISTRICT OF ILLINOIS IT WAS ONLY FIVE AND ONE-HALF YEARS. SIMILAR DISCREPANCIES IN FEDERAL SENTENCES FOR A NUMBER OF DIFFERENT OFFENSES WERE FOUND IN A LANDMARK STUDY BY THE UNITED STATES ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK.
[FN143] Further probative evidence may be derived from another 1974 study in which fifty federal district court judges from the second circuit were given twenty identical files drawn from actual cases and were asked to indicate what sentence they would impose on each defendant. [FN144] The variations in the judges' proposed sentences in each case were astounding, as shown in the following chart:

**3225 **42 2D Circuit Sentencing Study
Tabular or graphic material set forth at this point is not displayable

**43 **3226 2D Circuit Sentencing Study
*44 **3227 In one extortion case, for example, the range of sentences varied from twenty years imprisonment and a $65,000 fine to three years imprisonment and no fine. [FN145]

The findings of the second circuit study have been reconfirmed in a study performed for the Department of Justice in which 208 active federal judges specified the sentences they would impose in 16 hypothetical cases, 8 bank robbery cases, and 8 fraud cases. In only 3 of the 16 cases was there a unanimous agreement to impose a prison term. Even where most judges agreed that a prison term was appropriate, there was a substantial variation in the lengths of prison terms recommended. [FN146] In one fraud case in which the mean prison term was 8.5 years, the longest term was life in prison. In another case the mean prison term was 1.1 years, yet the longest prison term recommended was 15 years. [FN147]

The study also concluded that, while 45 percent of the variance in sentences for hypothetical cases was attributable to differences in offense and offender characteristics, 21 percent was directly attributable to the fact that some judges tend to give generally tough or generally lenient sentences, [FN148] and 22 percent of the variation was attributable to interactions between the 'judge favor' and other factors. For example, some judges sentence more harshly for a particular offense than other judges even though they do not sentence more harshly overall, and some judges sentence relatively more harshly than other judges if the defendant has a prior record. [FN149]

Following is the table from the report showing the differences in decisions whether to incarcerate and the length of incarceration:

**45 **3228 Exhibit III-8.-- Summary of Judges' Sentencing Recommendations for the 16 Scenarios
Tabular or graphic material set forth at this point is not displayable

**46 **3229 Exhibit III-8.-- Summary of Judges's Sentencing Recommendations for the 16 Scenarios-- continued
Tabular or graphic material set forth at this point is not displayable
In addition, as indicated in the following chart, a study of the two districts in each of the 11 federal judicial circuits that sentenced the greatest number of offenders in 1972 for a selected group of offenses shows widespread sentencing disparity:

Table 1.-- Average sentence length for selected offenses, in 1972

Tabular or graphic material set forth at this point is not displayable

The committee finds that this research makes clear that variation in offense and offender characteristics does not account for most of the disparity. [FN150]

Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public. A sentence that is unjustifiably high compared to sentences for similarly situated offenders is clearly unfair to the offender; a sentence...
THAT IS UNJUSTIFIABLY LOW IS JUST AS PLAINLY UNFAIR TO THE PUBLIC. SUCH SENTENCES ARE UNFAIR IN MORE SUBTLE WAYS AS WELL. SENTENCES THAT ARE DISPROPORTIONATE TO THE SERIOUSNESS OF THE OFFENSE CREATE A DISRESPECT FOR THE LAW. SENTENCES THAT ARE TOO SEVERE CREATE UNNECESSARY TENSIONS AMONG INMATES AND ADD TO DISCIPLINARY PROBLEMS IN THE PRISONS. [FN151]

B. POLICIES AND PRACTICES OF THE PAROLE COMMISSION


THE PAROLE COMMISSION GENERALLY WILL NOT PAROLE THE PRISONER; THUS, HE
SERVES THE MAXIMUM SENTENCE LESS GOOD TIME. [FN160]
IN THE THIRD EXAMPLE, THE JUDGE SENTENCES THE OFFENDER TO A PRISON TERM
OF FIFTEEN YEARS, AND AGAIN THE PAROLE GUIDELINES ARE CIRCUMVENTED. IN
THIS CASE THE PRISONER WILL NOT BE ELIGIBLE FOR PAROLE UNTIL HE SERVES
ONE-THIRD OF HIS SENTENCE (FIVE YEARS) UNLESS THE JUDGE SPECIFIES THAT
THE PRISONER SHOULD BE ELIGIBLE FOR AN EARLIER PAROLE DATE. [FN161] THE
FIVE-YEAR MINIMUM IS ABOVE THE RANGE PRESCRIBED BY THE GUIDELINES. HERE,
THE BEST THAT THE COMMISSION CAN DO TO ELIMINATE SENTENCE DISPARITY IS
to parole the prisoner as soon as he is eligible, that is, after he has
served five years of his sentence. These examples make it clear that,
operating under a guidelines system, the parole commission cannot
completely eliminate unwarranted sentencing disparity if the courts do
not cooperate. It should be added that even if the commission
abandoned its guidelines and attempted merely to carry out the courts' intentions regarding offenders sentenced to imprisonment, the chance of success *48 **3231 would be small. At present, judges need not
specify the reasons for their sentencing decisions, and usually they do
not indicate the length of time they expect an offender to spend in
prison. Thus, the commission seldom has enough information upon which
to base a release decision that conforms to the courts' intentions.
The problems with the present system do not end here, however. The
parole guidelines themselves contribute to disparity because the
offenses are grouped according to 'severity.' Offenses are rarely
distinguished according to such characteristics as the amount of harm
done by the offense, the criminal sophistication of the offender, or the
importance of the offender's role in an offense committed with others.
[FN162] Similarly, in classifying offenders according to their criminal histories, the guidelines make few distinctions between major and
minor previous offenses and give the same weight to all but very old
prior offenses. [FN163]
Additionally, the parole guidelines frequently fail in practice to
achieve their goal of reducing unwarranted sentencing disparities. In a
recent study by the general accounting office, 35 hearing examiners of
the parole commission were asked to indicate the release date they
would set for each of a sample of 30 cases. The study found substantial
disparities in the release dates. In 28 of the 30 cases there was a
variation of more than one year. [FN164] The GAO attributed the
inconsistencies to the lack of training of hearing examiners, who are
not lawyers, and to weaknesses in the guidelines themselves. [FN165]
Nor can the parole commission, by setting a presumptive release date
once an offender is within its jurisdiction, eliminate entirely the
uncertainty inherent in current sentencing procedures.
As the previous examples made clear, a court-imposed term of
imprisonment in excess of one year frequently has little to do with the
amount of time that an offender will spend in prison. The announced
term represents only the maximum length of time the offender may spend
in prison if he earns no good time credits [FN166] and if the parole
commission does not set a release date that falls before the date of
expiration of the sentence. [FN167]
*49 **3232 The presumptive release date set by the commission is also
subject to change, however. In a given case the commission may either
(1) tell a prisoner that he will be released at the expiration of his
sentence less good time or (2) set another tentative release date. In the
first case, the date of release is subject to constant adjustment by the
bureau of prisons because of the withholding or forfeiture of all or

C. CONCLUSION

THese accounts of the present practices of the federal courts and of the parole commission clearly indicate that sentencing in the federal courts is characterized by unwarranted disparity and by uncertainty about the length of time offenders will serve in prison. The lack of reasonable consistency in the sentences handed down by the courts is due in large part to the lack of a comprehensive federal sentencing law. Federal statutes should provide clear guidance to federal judges on how to select from among the available alternatives an appropriate sentence to impose upon the particular defendants before them. This disparity is fair neither to the offenders nor to the public. The efforts of the parole commission to alleviate this disparity unfortunately contribute to a second grave defect of present law: no one is ever certain how much time a particular offender will serve if he is sentenced to prison. The present system encourages judges to sentence with the parole guidelines in mind, and it encourages the parole commission to release prisoners with its own purposes--not those of the sentencing judge--in mind.

Even in those cases where the commission can adjust court-imposed sentences in order to bring the actual prison terms in line with those for similarly situated offenders across the country, the actual terms to be served are subject continually to the 'good time' adjustments by the bureau of prisons and to counter-adjustments by the parole commission. Thus, prisoners often do not really know how long they will spend in prison until the very day they are released. The result is that the existing federal system lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an effective deterrent against crime.

3. LIMITED AVAILABILITY OF SENTENCING OPTIONS

Current law is not particularly flexible in providing the sentencing judge with a range of options from which to fashion an appropriate sentence. The result is that a term of imprisonment may be imposed in some cases in which it would not be imposed if better alternatives were available. In other cases, a judge might impose a longer term than would ordinarily be appropriate simply because there were no available alternatives that served the purposes he sought to achieve with a long sentence. For example, maximum fines in current law are generally too small to provide punishment and deterrence to major offenders. [FN171] Frequently, a fine does not come close to the amount the defendant has gained by committing the offense. The statutes expressly suggest only a few possible conditions that may be placed upon a term of probation and
DO NOT PROVIDE SPECIFICALLY FOR ALTERNATIVES TO ALL OR PART OF A PRISON TERM SUCH AS COMMUNITY SERVICE OR BRIEF INTERVALS, SUCH AS EVENINGS OR WEEKENDS, IN PRISON. FINALLY, CURRENT LAW MAKES NO PROVISION FOR NOTIFYING VICTIMS OF A FRAUDULENT OFFENSE OF THE CONVICTION SO THAT THEY MAY SEEK CIVIL REMEDIES.

SENTENCING PROVISIONS IN THE BILL

1. COMPREHENSIVENESS AND CONSISTENCY

TITLE II OF S. 1762 CONTAINS A COMPREHENSIVE STATEMENT OF THE FEDERAL LAW OF SENTENCING. IT OUTLINES IN ONE PLACE THE PURPOSES OF SENTENCING, DESCRIBES IN DETAIL THE KINDS OF SENTENCES THAT MAY BE IMPOSED TO CARRY OUT THOSE PURPOSES, AND PRESCRIBES THE FACTORS THAT SHOULD BE CONSIDERED IN DETERMINING THE KIND OF SENTENCE TO IMPOSE IN A PARTICULAR CASE.

TITLE II GIVES CONGRESSIONAL RECOGNITION TO FOUR PURPOSES OF SENTENCING: (1) THE NEED TO REFLECT THE SERIOUSNESS OF THE OFFENSE, TO PROMOTE RESPECT FOR LAW, AND TO PROVIDE JUST PUNISHMENT; (2) THE NEED TO AFFORD ADEQUATE DETERRENCE TO CRIMINAL CONDUCT; (3) THE NEED TO PROTECT THE PUBLIC FROM FURTHER CRIMES OF THE DEFENDANT; AND (4) THE NEED TO PROVIDE THE DEFENDANT WITH EDUCATIONAL OR VOCATIONAL TRAINING, MEDICAL CARE, OR OTHER CORRECTIONAL TREATMENT IN THE MOST EFFECTIVE MANNER. [FN172]

TITLE II SPECIFIES THAT AN INDIVIDUAL MAY BE SENTENCED TO A TERM OF PROBATION, A FINE, OR A TERM OF IMPRISONMENT, OR TO A COMBINATION OF A FINE AND PROBATION OR A COMBINATION OF A FINE AND IMPRISONMENT. [FN173] AN ORGANIZATION MAY BE SENTENCED TO A TERM OF PROBATION OR A FINE, OR TO A COMBINATION OF THOSE. [FN174] EITHER AN INDIVIDUAL OR AN ORGANIZATION MAY BE ORDERED AS A PART OF THE SENTENCE TO FORFEIT ANY INTEREST IN A RACKETEERING SYNDICATE, [FN175] TO GIVE NOTICE TO VICTIMS OF A FRAUDULENT OFFENSE, [FN176] OR TO MAKE RESTITUTION TO THE VICTIM OF AN OFFENSE THAT CAUSES BODILY INJURY OR DEATH OR THAT RESULTS IN DAMAGE TO OR LOSS OR DESTRUCTION OF PROPERTY. [FN177]


THE BILL CREATES A SENTENCING GUIDELINES SYSTEM THAT IS INTENDED TO TREAT ALL CLASSES OF OFFENSES COMMITTED BY ALL CATEGORIES OF OFFENDERS CONSISTENTLY. [FN185] THIS APPROACH WILL ELIMINATE SPECIALIZED SENTENCING STATUTES THAT COVER NARROW CLASSES OF OFFENDERS AND WILL
Thus eliminate the problem created by an offender whose case might fall into more than one category. The sentencing guidelines will recommend to the sentencing judge an appropriate kind and range of sentence for a given category of offense committed by a given category of offender. The guidelines will be supplemented by policy statements that will address questions concerning the appropriate use of the sanctions of criminal forfeiture, order of notice to victims, and order of restitution and the use of conditions of probation and post-release supervision. The formulation of sentencing guidelines and policy statements will provide an unprecedented opportunity in the federal system to look at sentencing patterns as a whole to assure that the sentences imposed are consistent with the purposes of sentencing. At the same time, the use of sentencing guidelines and policy statements is intended to assure that each sentence is fair compared to all other sentences.

The sentencing guidelines system will not remove all of the judge's sentencing discretion. Instead, it will guide the judge in making his decision on the appropriate sentence. If the judge finds an aggravating or mitigating circumstance present in the case that was not adequately considered in the formulation of the guidelines and that should result in a sentence different from that recommended in the guidelines, the judge may sentence the defendant outside the guidelines. \[\text{[FN186]}\] A sentence that is above the guidelines may be appealed by the defendant; \[\text{[FN187]}\] a sentence below the guidelines may be appealed by the government. \[\text{[FN188]}\] The case law that is developed from these appeals may, in turn, be used to further refine the guidelines.

2. Assuring Fairness in Sentencing

A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity. \[\text{[FN189]}\] The bill requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing. \[\text{[FN190]}\] He is then to determine which sentencing guidelines and policy statements apply to the case. Either he may decide that the guideline recommendation appropriately reflects the offense and offender characteristics and impose sentence according to the guideline recommendation or he may conclude that the guidelines fail to reflect adequately a pertinent aggravating or mitigating circumstance and impose sentence outside the guidelines. \[\text{[FN191]}\] A sentence outside the guidelines is appealable, with the appellate court directed to determine whether the sentence is reasonable. \[\text{[FN192]}\] Thus, the bill seeks to assure that most cases will result in sentences within the guideline range and that sentences outside the guidelines will be imposed only in appropriate cases. \[\text{[FN193]}\] The committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. Indeed, the use of sentencing guidelines will actually enhance the individualization of sentences.

THE PAROLE COMMISSION HAS ARGUED THAT, EVEN IF A SENTENCING GUIDELINES SYSTEM IS ADOPTED, THE COMMISSION SHOULD BE RETAINED TO SET THE ACTUAL RELEASE DATE FOR A PERSON SENTENCED BY A JUDGE TO A TERM OF IMPRISONMENT. [FN195] UNDER ITS PROPOSAL, THE JUDGE, AFTER CONSIDERING THE SENTENCING GUIDELINES, WOULD DETERMINE WHETHER TO SEND A DEFENDANT TO PRISON AND, IF SO, WOULD SET THE MAXIMUM PRISON TERM THAT COULD BE SERVED BY THE DEFENDANT. SHORTLY AFTER THE DEFENDANT BEGINS HIS TERM, THE PAROLE COMMISSION, USING ITS OWN GUIDELINES, WOULD SET A PRESUMPTIVE RELEASE DATE SUBJECT TO GOOD BEHAVIOR AND COULD LATER ADJUST THAT DATE FOR NONCOMPLIANCE WITH PRISON RULES. IT BASES THIS BELIEF ON THE ARGUMENT THAT A SMALL COLLEGIAL BODY WILL BE BETTER ABLE THAN THE FEDERAL JUDGES TO ACHIEVE THE GOAL OF ELIMINATION OF UNWARRANTED SENTENCING DISPARITY. THE COMMITTEE STRONGLY DISAGREES WITH THE PAROLE COMMISSION. THE PROPOSAL IS BASED ON THE SAME DISCREDITED ASSUMPTIONS AS THE PRESENT SYSTEM AND IS ENTIRELY AT ODDS WITH THE RATIONALE OF THE PROPOSED GUIDELINES SYSTEM. [FN196] Moreover, it has several practical deficiencies *54 **3237 that would result in continuing some of the unfairness and uncertainty in the current system.

FIRST, IT WOULD PERPETUATE THE CURRENT PROBLEM THAT JUDGES DO NOT CONTROL THE DETERMINATION OF THE LENGTH OF A PRISON TERM EVEN THOUGH THIS FUNCTION IS PARTICULARLY JUDICIAL IN NATURE. [FN197] The better view is that sentencing should be within the province of the judiciary. Indeed, it is arguable that the parole commission by basing its decision on factors already known at the time of sentencing, has already usurped a function of the judiciary. [FN198]


THIRD, IT WOULD DRAW AN ARTIFICIAL LINE BETWEEN IMPRISONMENT AND PROBATION, FORCING THE SENTENCING GUIDELINES SYSTEM AND THE JUDGES TO FORMULATE SENTENCING POLICY THAT ASSUMES THAT A TERM OF IMPRISONMENT,
NO MATTER HOW BRIEF, IS NECESSARILY A MORE STRINGENT SENTENCE THAN A TERM OF PROBATION WITH RESTRICTIVE CONDITIONS AND A HEAVY FINE. SUCH AN ASSUMPTION WOULD BE A ROADBLOCK TO THE DEVELOPMENT OF SENSIBLE COMPREHENSIVE SENTENCING POLICY.

FOURTH, IT WOULD CONTINUE THE CURRENT LAW PROBLEM THAT ACTUAL TERMS OF IMPRISONMENT ARE DETERMINED IN PRIVATE RATHER THAN PUBLIC PROCEEDINGS. FIFTH, THE PAROLE COMMISSION MIGHT BE BASING DECISIONS ON A DIFFERENT SENTENCING PHILOSOPHY THAN IS REFLECTED IN THE SENTENCING GUIDELINES. THE PAROLE COMMISSION HAS SUGGESTED THAT, AT LEAST FOR THE FIRST FEW YEARS OF SENTENCING GUIDELINES, THE PAROLE COMMISSION SHOULD ISSUE ITS OWN GUIDELINES FOR LENGTHS OF PRISON TERMS RATHER THEN RELY ON GUIDELINES PROMULGATED BY THE SENTENCING COMMISSION.


THE COMMITTEE BELIEVES THAT THERE MAY BE UNUSUAL CASES IN WHICH AN EVENTUAL REDUCTION IN THE LENGTH OF A TERM OF IMPRISONMENT IS JUSTIFIED BY CHANGED CIRCUMSTANCES. THESE WOULD INCLUDE CASES OF SEVERE ILLNESS, CASES IN WHICH OTHER EXTRAORDINARY AND COMPPELLING CIRCUMSTANCES JUSTIFY A REDUCTION OF AN UNUSUALLY LONG SENTENCE, AND SOME CASES IN WHICH THE SENTENCING GUIDELINES FOR THE OFFENSE OF WHICH THE DEFENDER WAS CONVICTED HAVE BEEN LATER AMENDED TO PROVIDE A SHORTER TERM OF IMPRISONMENT. THE COMMITTEE BELIEVES, HOWEVER, THAT IT IS UNNECESSARY TO CONTINUE THE EXPENSIVE AND CUMBERSOME PAROLE COMMISSION TO DEAL WITH THE RELATIVELY SMALL NUMBER OF CASES IN WHICH THERE MAY BE JUSTIFICATION FOR REDUCING A TERM OF IMPRISONMENT. THE BILL, AS REPORTED, PROVIDES INSTEAD IN PROPOSED 18 U.S.C. 3583(C) FOR COURT DETERMINATION, SUBJECT TO CONSIDERATION OF SENTENCING COMMISSION STANDARDS, OF THE QUESTION WHETHER THERE IS JUSTIFICATION FOR REDUCING A TERM OF IMPRISONMENT IN SITUATIONS SUCH AS THOSE DESCRIBED.

3. CERTAINTY IN RELEASE DATE


THE PAROLE COMMISSION WILL HAVE NO JURISDICTION OVER OFFENDERS SENTENCED UNDER THE GUIDELINES SENTENCING SYSTEM. [FN204] THE COMMITTEE BELIEVES THAT, IN A GUIDELINES SENTENCING SYSTEM, NO USEFUL PURPOSE WILL BE SERVED BY CONTINUING THE COMMISSION. PRISON SENTENCES
IMPOSED WILL REPRESENT THE ACTUAL TIME TO BE SERVED AND THE PRISONERS AND THE PUBLIC WILL KNOW WHEN OFFENDERS WILL BE RELEASED FROM PRISON. PRISONERS’ MORALE WILL PROBABLY IMPROVE WHEN THE UNCERTAINTIES ABOUT RELEASE DATES ARE REMOVED. [FN205] PUBLIC RESPECT FOR THE LAW WILL GROW WHEN THE PUBLIC KNOWS THAT THE JUDICIALLY-IMPOSED SENTENCE ANNOUNCED IN A PARTICULAR CASE REPRESENTS THE REAL SENTENCE, RATHER THAN ONE SUBJECT TO CONSTANT ADJUSTMENT BY THE PAROLE COMMISSION. THE OTHER PURPOSES SERVED IN CURRENT LAW BY THE PAROLE RELEASE MECHANISM WILL ALSO BE BETTER ACHIEVED. FIRST, AS ALREADY DISCUSSED, THE SENTENCING GUIDELINES SYSTEM IS BETTER ABLE THAN THE PAROLE SYSTEM TO ACHIEVE FAIRNESS AND CERTAINTY IN SENTENCING.

SECOND, THE BILL REQUIRES THAT THE JUDGE DECIDE, BASED ON FACTORS KNOWN AT THE TIME OF SENTENCING, WHETHER A DEFENDANT WHO IS SENTENCED TO A TERM OF IMPRISONMENT WILL NEED POST-RELEASE SUPERVISION AND WHAT THE CONDITIONS OF THAT RELEASE SHOULD BE. [FN206] UNDER CURRENT LAW, A PRISONER IS PLACED ON PAROLE SUPERVISION IF HE IS RELEASED MORE THAN 180 DAYS BEFORE EXPIRATION OF HIS SENTENCE. [FN207] THIS DOES NOT ASSURE THAT THE PRISONER WHO WILL NEED POST-RELEASE SUPERVISION WILL RECEIVE IT, NOR DOES IT PREVENT PROBATION SYSTEM RESOURCES FROM BEING WASTED ON SUPERVISORY SERVICES FOR RELEASEES WHO DO NOT NEED THEM.

THIRD, BECAUSE OF THE INCREASED CERTAINTY OF RELEASE DATES, THE BILL SHOULD ENHANCE PRISON REHABILITATION EFFORTS BECAUSE PRISON OFFICIALS WILL BE ABLE TO WORK WITH PRISONERS TO DEVELOP REALISTIC WORK PROGRAMS AND GOALS WITHIN A SET TERM OF IMPRISONMENT. AS PROFESSOR NORVAL MORRIS OF THE UNIVERSITY OF CHICAGO LAW SCHOOL HAS ILLUSTRATED, PAROLE BOARDS ARE NOT ABLE TO PREDICT WITH ANY DEGREE OF CERTAINTY WHICH PRISONERS ARE LIKELY TO BE ‘GOOD’ RELEASE RISKS AND WHICH ARE NOT. [FN208] INDEED, SUCH DETERMINATIONS SEEM ESPECIALLY SUSPECT WHEN MADE ON THE BASIS OF HOW A PRISONER RESPONDS TO PRISON REHABILITATIVE PROGRAMS.

[FN209] FOURTH, THE BILL PROVIDES BETTER MECHANISMS THAN THE PAROLE SYSTEM FOR DEALING WITH INSTITUTION DISCIPLINE PROBLEMS. A PRISONER WILL CONTINUE TO RECEIVE CREDIT TOWARD HIS TERM, OR ‘GOOD TIME’ FOR SATISFACTORY INSTITUTIONAL BEHAVIOR, [FN210] BUT IT WILL NOT BE SUBJECT TO CONSTANT ADJUSTMENT BY PRISON OFFICIALS. NOR WILL AN AGENCY SUCH AS THE PAROLE COMMISSION BE ABLE TO SUPERSEDE THE DETERMINATION OF PRISON OFFICIALS REGARDING WHAT EFFECT DISCIPLINARY PROBLEMS SHOULD HAVE ON THE RELEASE DATE. IF A PRISONER IS AWARE THAT HIS BEHAVIOR WILL HAVE A DIRECT EFFECT ON HIS RELEASE DATE, HE CAN SET A PERSONAL GOAL FOR EARLY RELEASE BY DEMONSTRATING COMPLIANCE WITH PRISON RULES. THUS, PRISON DISCIPLINE SHOULD IMPROVE GREATLY. IT SHOULD BE NOTED THAT PRISON OFFICIALS NOW RELY ON A NUMBER OF DISCIPLINARY MEASURES, SUCH AS CHANGING INSTITUTIONS OR PRIVILEGES, IN ADDITION TO THE CURRENT INEFFECTIVE GOOD TIME ALLOWANCES, TO EFFECT GOOD INSTITUTIONAL BEHAVIOR. [FN211] FINALLY, UNDER THE BILL, THE BUREAU OF PRISONS IS REQUIRED TO ASSURE, TO THE EXTENT PRACTICABLE, THAT THE LAST TEN PERCENT OF A PRISON TERM IS SPENT ‘UNDER CONDITIONS THAT WILL AFFORD THE PRISONER A REASONABLE OPPORTUNITY TO ADJUST TO AND PREPARE FOR HIS RE-ENTRY INTO THE COMMUNITY.’ [FN212] THE BUREAU OF PRISONS HAS INSTITUTED AN EFFECTIVE PROGRAM IN WHICH TRANSITION SERVICES ARE MADE AVAILABLE TO MANY PRISONERS WHILE THEY ARE STILL SERVING THEIR SENTENCES. THUS, IT IS UNNECESSARY TO CONTINUE THE PAROLE SYSTEM TO CARRY OUT THIS PURPOSE. IN FACT, UNDER THE CURRENT PAROLE SYSTEM, FEWER THAN HALF THE PERSONS RELEASED AFTER SERVING TERMS OF IMPRISONMENT OF MORE THAN ONE YEAR ARE SUPERVISED. THUS, THE PAROLE SYSTEM CANNOT BE RELIED ON FOR NECESSARY TRANSITION SERVICES.
THE JUDICIAL CONFERENCE OF THE UNITED STATES, WHILE RECOMMENDING A DETERMINATE SENTENCING GUIDELINES SYSTEM, HAS PROPOSED LEGISLATION (S. 1182) THAT WOULD RETAIN THE UNITED STATES PAROLE COMMISSION TO CONTINUE SOME OF ITS FUNCTIONS UNDER CURRENT LAW. UNDER THE *58 **3241 JUDICIAL CONFERENCE PROPOSAL, THE SENTENCING GUIDELINES, IN RECOMMENDING A TERM OF IMPRISONMENT, WOULD RECOMMEND BOTH A DATE FOR RELEASE ON PAROLE OF A PRISONER WHO SUBSTANTIALLY COMPLIES WITH PRISON RULES AND A MAXIMUM TERM OF IMPRISONMENT THAT WOULD BE SERVED. THE SENTENCING JUDGE, AFTER CONSIDERING THE SENTENCING GUIDELINES, WOULD THEN SPECIFY BOTH THE PAROLE RELEASE DATE, ASSUMING GOOD INSTITUTIONAL BEHAVIOR, AND THE MAXIMUM TERM THAT COULD BE SERVED BY A PARTICULAR PRISONER IF HE DID NOT MEET THAT REQUIREMENT. A PRISONER WOULD BE

RELEASED ON HIS PAROLE ELIGIBILITY DATE UNLESS THE PAROLE COMMISSION FOUND AT A HEARING HELD SHORTLY BEFORE THAT DATE THAT THE PRISONER HAD NOT ‘SUBSTANTIALLY OBSERVED THE RULES OF THE INSTITUTION * * * TO WHICH HE HAS BEEN CONFINEd.’ IF SUCH A FINDING WERE MADE, THE PAROLE COMMISSION WOULD SET A RELEASE DATE, PURSUANT TO ITS OWN GUIDELINES, AT A LATER DATE WITHIN THE MAXIMUM SENTENCE. THE PAROLE COMMISSION WOULD ALSO BE RESPONSIBLE FOR SETTING RELEASE CONDITIONS FOR PAROLEES, FOR REVOKING PAROLE IF THE CONDITIONS WERE VIOLATED, AND FOR RE- PAROLING A PRISONER WHOSE PAROLE WAS REVOKED.

THE COMMITTEE HAS GIVEN THIS SUGGESTION CAREFUL CONSIDERATION BUT HAS REJECTED IT ON THREE GROUNDS. FIRST, THE PAROLE COMMISSION IS A COSTLY AND CUMBERSOME INSTITUTION; AND IT IS UNLIKELY THAT THE COST OR COMPLEXITY OF THE COMMISSION WOULD BE REDUCED SUBSTANTIALLY IF ITS FUNCTION OF SETTING RELEASE DATES WERE ELIMINATED. IT WOULD STILL HAVE TO HOLD AT LEAST ONE HEARING IN EVERY CASE IN WHICH A DEFENDANT WAS SENTENCED TO A TERM OF IMPRISONMENT OF MORE THAN ONE YEAR; THE PURPOSE OF THE HEARING WOULD SIMPLY BE CHANGED. SECOND, THE JUDICIAL CONFERENCE PROPOSAL WOULD NOT ELIMINATE A SIGNIFICANT PROBLEM WITH THE CURRENT LAW; THAT IS, A PRISONER WHO NEEDS POST-RELEASE SUPERVISION MAY NOT RECEIVE IT BECAUSE HE HAS SERVED HIS ENTIRE TERM OF IMPRISONMENT, WHILE A PRISONER WHO DOES NOT REQUIRE SUPERVISION MIGHT BE PLACED ON PAROLE MERELY BECAUSE PART OF HIS TERM REMAINS UNSERVED WHEN HE IS RELEASED. [FN213]

THIRD, THE JUDICIAL CONFERENCE PROPOSAL RETAINS VESTIGES OF THE REHABILITATION THEORY UPON WHICH CURRENT LAW IS EXCLUSIVELY BASED. UNDER THE PROPOSAL, PRISON RELEASE REMAINS CONDITIONAL UNTIL THE DEFENDANT SERVES HIS FULL TERM OF IMPRISONMENT IN A COMBINATION OF IMPRISONMENT AND PAROLE RELEASE. ONLY IF THE OFFENDER DEMONSTRATES THAT HE IS FULLY ‘REHABILITATED’ BY COMPLYING WITH THE TERMS OF RELEASE WILL HE HAVE COMPLETED HIS PRISON TERM. UNDER TITLE II AS REPORTED, A PRISONER HAS COMPLETED HIS PRISON TERM WHEN RELEASED EVEN IF HE IS RELEASED TO SERVE A TERM OF SUPERVISED RELEASE. IF HE COMMITS A TECHNICAL VIOLATION OF HIS RELEASE CONDITIONS, THOSE CONDITIONS CAN BE MADE MORE SEVERE. IF HE COMMITS A SERIOUS VIOLATION, HE CAN, DEPENDING ON THE CIRCUMSTANCES OF THE CASE, BE PUNISHED FOR CONTEMPT OF COURT OR BE HELD PENDING TRIAL IF THE VIOLATION IS A NEW CRIMINAL OFFENSE. [FN214]

*59 **3242 4. AVAILABILITY OF SENTENCING OPTIONS

THE COMPREHENSIVE SENTENCING PROVISIONS OF THE BILL PROVIDE A FULL RANGE OF SENTENCING OPTIONS. THE SENTENCING COMMISSION IN
PROMULGATING GUIDELINES AND THE SENTENCING JUDGE IN IMPOSING SENTENCE MAY FASHION A SENTENCE THAT SUITS THE CHARACTERISTICS OF EACH OFFENSE AND OFFENDER.

AS NOTED EARLIER, THE ONLY TYPE OF SENTENCE FOR WHICH CURRENT LAW PROVIDES A FULL RANGE OF OPTIONS IS THE TERM OF IMPRISONMENT. THIS PROBABLY RESULTS IN TOO MUCH RELIANCE ON TERMS OF IMPRISONMENT WHEN OTHER TYPES OF SENTENCES WOULD SERVE THE PURPOSE OF SENTENCING EQUALLY WELL WITHOUT THE DEGREE OF RESTRICTION ON LIBERTY THAT RESULTS FROM IMPRISONMENT. [FN215]

UNDER THE BILL, MAXIMUM FINES HAVE BEEN SUBSTANTIALLY INCREASED FROM CURRENT LAW. [FN216] THIS WILL PERMIT THE IMPOSITION OF A SUBSTANTIAL FINE IN LIEU OF PART OR ALL OF A PRISON TERM IN APPROPRIATE CASES.

THE BILL TREATS PROBATION AS A FORM OF SENTENCE WITH CONDITIONS [FN217] RATHER THAN AS A DEFERRAL OF IMPOSITION OR EXECUTION OF A SENTENCE, AND IT REQUIRES THAT IN FELONY CASES IT BE ACCOMPANIED BY A FINE, AN ORDER TO PAY RESTITUTION, OR AN ORDER TO ENGAGE IN COMMUNITY SERVICE. [FN218] THE COMMITTEE ENCOURAGES THE FASHIONING OF CONDITIONS OF PROBATION IN ORDER TO MAKE PROBATION A USEFUL ALTERNATIVE TO A TERM OF IMPRISONMENT. A FULL RANGE OF POSSIBLE PROBATION CONDITIONS IS SUGGESTED IN THE BILL. [FN219] FOR EXAMPLE, THE BILL PERMITS NIGHTS OR WEEKENDS TO BE SPENT IN A PENAL OR CORRECTIONAL FACILITY AS A CONDITION OF PROBATION. IT CONTINUES THE ABILITY TO REQUIRE THAT THE DEFENDANT RESIDE AT, OR PARTICIPATE IN A PROGRAM OF, A COMMUNITY CORRECTIONAL FACILITY.

THE BILL ADDS A NEW SANCTION THAT MAY BE IMPOSED IN ADDITION TO A TERM OF PROBATION, IMPRISONMENT, OR A FINE. IT PERMITS THE JUDGE TO ORDER THAT A DEFENDANT CONVICTED OF AN OFFENSE OF FRAUD OR OTHER INTENTIONAL DECEPTIVE PRACTICES GIVE REASONABLE NOTICE AND EXPLANATION OF THE CONVICTION TO THE VICTIMS OF THE OFFENSE SO THAT THEY MAY SEEK APPROPRIATE CIVIL REDRESS. [FN220] IN ADDITION, IT CARRIES FORWARD THE NEWLY CREATED REMEDY OF AN ORDER OF RESTITUTION THAT PERMITS THE JUDGE TO ORDER A DEFENDANT FOUND GUILTY OF AN OFFENSE THAT CAUSED BODILY INJURY OR PROPERTY DAMAGE, DESTRUCTION, OR LOSS TO MAKE RESTITUTION TO THE VICTIM. [FN221]

5. CONSISTENCY OF PURPOSE

FOR THE FIRST TIME, FEDERAL LAW WILL ASSURE THAT THE FEDERAL CRIMINAL JUSTICE SYSTEM WILL ADHERE TO A CONSISTENT SENTENCING PHILOSOPHY. FURTHER, EACH PARTICIPANT IN THE SYSTEM WILL KNOW WHAT PURPOSE IS TO BE ACHIEVED BY THE SENTENCE IN EACH PARTICULAR CASE.


6. MISCELLANEOUS SENTENCING ISSUES

A. INTRODUCTION

SINCE FEDERAL SENTENCING REFORM LEGISLATION WAS FIRST INTRODUCED MORE THAN SIX YEARS AGO, A NUMBER OF CONCERNS HAVE BEEN EXPRESSED. THESE INCLUDE, IN PARTICULAR, CONCERNS THAT THE GUIDELINE SENTENCES MAY BE TOO HIGH OR TOO LOW; THAT THEY MAY RESULT IN PRISON OVERCROWDING; THAT THE GUIDELINES SYSTEM MAY SHIFT DISCRETION FROM THE JUDGES TO THE PROSECUTORS; THAT THE SENTENCING COMMISSION MAY HAVE TOO MUCH POWER; AND THAT THE AUTHORITY FOR THE DEPARTMENT OF JUSTICE TO APPEAL A SENTENCE BELOW THE GUIDELINES IS INAPPROPRIATE. SINCE THE TIME THESE SENTENCING PROPOSALS WERE FIRST INTRODUCED IN 1977 THE COMMITTEE HAS SUSPECTED THAT THESE CONCERNS WERE NOT WELL-FOUNDED. HOWEVER, SINCE 1977 A GROWING NUMBER OF STATES AND LOCALITIES HAVE IMPLEMENTED SENTENCING REFORM LEGISLATION OR VOLUNTARY GUIDELINES SYSTEMS AND PRELIMINARY INDICATIONS BASED ON THEIR EXPERIENCES SUPPORT THE WORKABILITY OF A SENTENCING GUIDELINES SYSTEM AND, IN PARTICULAR, THE ADVANTAGES OF THE SYSTEM PROPOSED BY THE COMMITTEE AS COMPARED TO OTHER FORMS OF SENTENCING REFORM. [FN228] FOLLOWING IS A DISCUSSION OF THESE ISSUES AND, WHERE RELEVANT, A DESCRIPTION OF STATE EXPERIENCE IN THE AREA.

B. GUIDELINES SENTENCES AND IMPACT ON THE CRIMINAL JUSTICE SYSTEM

SOME CRITICS HAVE EXPRESSED CONCERN THAT SENTENCES UNDER THE GUIDELINES WILL BE EITHER TOO LOW TO PROTECT THE PUBLIC OR SO HIGH THAT THEY WILL RESULT IN PRISON OVERCROWDING. IN ORDER TO AVOID THESE PROBLEMS, THE BILL DIRECTS THE SENTENCING COMMISSION BOTH TO ASCERTAIN CURRENT SENTENCING PRACTICE AND TO BE MINDFUL OF THE CAPACITY OF THE PRISONS AND OTHER PARTS OF THE CRIMINAL JUSTICE SYSTEM. [FN229] IT SHOULD BE MADE CLEAR THAT THESE PROVISIONS ARE NOT DESIGNED TO REQUIRE THE SENTENCING COMMISSION TO RECOMMEND A CONTINUATION OF CURRENT SENTENCING PRACTICES; THEY ARE INCLUDED TO ASSURE THAT THE COMMISSION STUDIES CURRENT PRACTICE SUFFICIENTLY TO AVOID INADVERTENT CHANGES IN THAT PRACTICE. AS THE BILL NOTES, 'IN MANY CASES CURRENT SENTENCES DO NOT ACCURATELY REFLECT THE SERIOUSNESS OF THE OFFENSE.' [FN230] THE COMMITTEE IS OF THE VIEW THAT THE SENTENCING COMMISSION WILL PROBABLY FIND, FOR EXAMPLE, THAT THE SENTENCES FOR SOME VIOLENT OFFENDERS ARE TOO LOW AND THAT THE SENTENCES FOR SOME PROPERTY OFFENDERS ARE TOO HIGH TO SERVE THE PURPOSES OF SENTENCING. BY DEVELOPING COMPLETE INFORMATION ON CURRENT PRACTICES, THE SENTENCING COMMISSION WILL BE ABLE, IF NECESSARY, TO CHANGE THOSE PRACTICES WITH A
FULL AWARENESS OF THEIR POTENTIAL IMPACT ON THE CRIMINAL JUSTICE SYSTEM. 
THE BILL ALSO REQUIRES THAT THE INITIAL SENTENCING GUIDELINES BE 
SUBMITTED TO THE CONGRESS SIX MONTHS BEFORE THEY GO INTO EFFECT, DURING 
WHICH TIME THE GENERAL ACCOUNTING OFFICE IS REQUIRED TO STUDY THE 
GUIDELINES AND COMPARE THEIR POTENTIAL IMPACT WITH THE EXISTING 
SENTENCING AND PAROLE SYSTEM. [FN231] IF, BASED ON THIS INFORMATION, THE 
CONGRESS CONCLUDES THAT THE GUIDELINES REFLECT SENTENCES THAT ARE 
EITHER TOO HIGH OR TOO LOW FROM EITHER A PRACTICAL OR A PHILOSOPHICAL 
STANDPOINT, IT CAN REJECT THEM BY ENACTING THE APPROPRIATE LEGISLATION. 
[FN232] 
SEVERAL JURISDICTIONS HAVE RECENTLY ADOPTED SENTENCING REFORM 
LEGISLATION OR OTHER SENTENCING REFORM MEASURES. ONLY ONE STATE, 
MINNESOTA, [FN233] IS OPERATING UNDER A DETERMINATE SENTENCING SYSTEM 
WITH SENTENCING GUIDELINES. ONE OTHER STATE, WASHINGTON, [FN234] HAS 
ENACTED LEGISLATION TO CREATE A DETERMINATE SENTENCING GUIDELINES 
SYSTEM; WASHINGTON'S GUIDELINES ARE UNDER DEVELOPMENT AND ARE 
SCHEDULED TO GO INTO EFFECT IN THE MIDDLE OF 1984. WHILE SEVERAL OTHER 
STATES HAVE ENACTED SENTENCING REFORM LEGISLATION IN RECENT YEARS, NONE 
OF THE OTHER STATE SENTENCING SYSTEMS ARE SIMILAR TO THE PROPOSED 
FEDERAL SENTENCING SYSTEM IN ALL IMPORTANT RESPECTS. THE 
*62 **3245 
[FN238] STATUTES, AMONG OTHERS, CREATE A DETERMINATE SENTENCING SYSTEM 
BUT CREATE A SYSTEM OF SPECIFIC LEGISLATED SENTENCES RATHER THAN A MORE 
FLEXIBLE SENTENCING GUIDELINES SYSTEM. THE MAINE STATUTE [FN239] 
ABOLISHES PAROLE BUT DOES NOT CREATE EITHER A SENTENCING GUIDELINES 
SYSTEM OR LEGISLATED SENTENCES. SOUTH CAROLINA HAS ESTABLISHED A 
SENTENCING COMMISSION THAT IS IN THE PROCESS OF DEVELOPING GUIDELINES 
IN THE CONTEXT OF AN INDETERMINATE SENTENCING SYSTEM. [FN240] SEVERAL 
STATES, INCLUDING MARYLAND, MASSACHUSETTS, AND NEW JERSEY, [FN241] AND 
NUMEROUS LOCAL COURTS HAVE ADOPTED SUCH GUIDELINES. [FN242] 
THE NATIONAL ACADEMY OF SCIENCES HAS RECENTLY PUBLISHED AN EXTENSIVE 
STUDY AND EVALUATION OF ALL THE RESEARCH THAT HAS BEEN DONE ON STATE 
AND LOCAL SENTENCING REFORM EFFORTS. [FN243] THAT STUDY CONCLUDED THAT, 
IN EVERY RESPECT STUDIED, THE MINNESOTA SENTENCING REFORM HAD BEEN 
MORE SUCCESSFUL THAN ANY OTHER STATE OR LOCAL REFORM EFFORT IN 
ACHIEVING ITS GOALS OF REDUCING UNWARRANTED SENTENCING DISPARITY, 
INCREASING EMPHASIS ON PUNISHMENT FOR VIOLENT OFFENDERS, AND AVOIDING 
UNINTENDED BURDENS ON THE PRISON SYSTEM. [FN244] THIS FINDING IS 
ESPECIALLY IMPORTANT TO THE CONSIDERATION OF THIS BILL BECAUSE OF THE 
SUBSTANTIAL SIMILARITY BETWEEN THE MINNESOTA LEGISLATION AND THIS 
FEDERAL SENTENCING REFORM MEASURE. 
THE NATIONAL ACADEMY OF SCIENCES STUDY CONCLUDED THAT THE MINNESOTA 
SENTENCING GUIDELINES SYSTEM WAS MORE SUCCESSFUL IN CHANGING 
SENTENCING BEHAVIOR TO REDUCE UNWARRANTED SENTENCING DISPARITIES FOR 
THREE REASONS. FIRST, THE SENTENCING GUIDELINES WERE REQUIRED BY 
LEGISLATION RATHER THAN ADOPTED VOLUNTARILY BY THE COURTS. SECOND, THE 
GUIDELINES PRESCRIBED WHAT SENTENCING BEHAVIOR OUGHT TO BE RATHER 
THAN MERELY DESCRIBING PAST SENTENCING PRACTICES. AND THIRD, THE 
MINNESOTA STATUTE INCLUDED A MECHANISM-- AVAILABILITY OF APPELLATE 
REVIEW OF ALL SENTENCES OUTSIDE THE GUIDELINES-- TO ASSURE JUDICIAL 
COMPLIANCE WITH THE GUIDELINES. THE STUDY ALSO FOUND THAT MINNESOTA 
WAS ABLE TO CREATE A MODEL OF ITS CRIMINAL SENTENCING SYSTEM THAT 
PERMITTED IT TO TEST THE IMPACT OF ANY GIVEN SET OF SENTENCING GUIDELINES 
ON ITS PRISON SYSTEM, THUS ENABLING IT TO FASHION GUIDELINES THAT 
AVOITED ANY UNINTENDED IMPACT ON THE PRISON SYSTEM.
C. SENTENCING GUIDELINES AND PROSECUTORIAL DISCRETION

Some critics expressed the concern that a sentencing guidelines system will simply shift discretion from sentencing judges to prosecutors. [FN245] The concern is that the prosecutor will use the plea bargaining process to circumvent the guidelines recommendation if he doesn’t agree with the guidelines recommendation.

The bill contains a provision designed to avoid this possibility. Under proposed 28 U.S.C. 994(A)(2)(D), the sentencing commission is directed to issue policy statements for consideration by federal judges in deciding whether to accept a plea agreement. This guidance will assure that judges can examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines. Professor Stephen J. Schulhofer, who initially raised the question of whether sentencing guidelines would shift too much discretion to prosecutors, has stated that judicial review of plea bargaining under such policy statements should alleviate any potential problem in this area. [FN246]

D. MAKEUP AND AUTHORITY OF THE SENTENCING COMMISSION

Title II as reported creates a United States sentencing commission whose duty is to promulgate sentencing guidelines and policy statements. The sentencing commission would be in the judicial branch and would consist of seven members appointed by the president with the advice and consent of the Senate. Two of the members would be active federal judges. [FN247] The president would consult representatives of judges, prosecutors, defense attorneys, and others for recommendations on who should be members of the commission. The chairman of the commission would hold a full-time position and would be paid at the annual rate of judges of the United States courts of appeals. The other six positions would also be full-time until the end of the first six years that the guidelines are in effect. These positions would then become part-time. Individuals occupying full-time positions would be compensated at the rate of the judges of the United States courts of appeals. Part-time members would receive the daily rate at which United States courts of appeals judges are paid. [FN248] The judicial conference of the United States, concerned that the sentencing commission would have too much power and would duplicate efforts of the staffs of the Federal Judicial Center and the administrative office of the United States courts, has proposed alternative legislation (S. 1182). That bill specifies that sentencing guidelines would be issued by the judicial conference after considering guidelines recommended by a committee on sentencing of the judicial conference. The committee on sentencing would consist of seven part-time members selected by the judicial conference. Four of the members would be active federal judges, while three other members would be persons who had never been judges and one of them would be a non-lawyer. Non-government members would be paid at the daily rate for GS-18 federal employees. The proposed legislation contains no language concerning the staff of the committee, but the supporting materials indicate that the staff would be provided by the Federal Judicial Center and the administrative office of the United States courts.

The committee has given careful consideration to these
RECOMMENDATIONS OF THE JUDICIAL CONFERENCE BUT HAS CONCLUDED THAT THE
PROVISIONS FOR A SENTENCING COMMISSION THAT ARE CONTAINED IN S. 1762
ARE PREFERABLE FOR A NUMBER OF REASONS.
FIRST, THE REPORTED BILL REQUIRES ALL THREE BRANCHES OF GOVERNMENT,
RATHER THAN ONLY THE JUDICIAL BRANCH, TO PARTICIPATE IN THE SELECTION OF
MEMBERS OF THE SENTENCING COMMISSION. THIS PERMITS LEGISLATIVE BRANCH
PARTICIPATION IN THE SELECTION OF MEMBERS OF THE BODY TO WHICH CONGRESS
WILL BE DELEGATING SOME OF ITS AUTHORITY TO SET SENTENCING POLICY.
PRESIDENTIAL APPOINTMENT OF THE MEMBERS ASSURES HIGH VISIBILITY OF THE
COMMISSION, WHICH THE COMMITTEE THINKS IS IMPORTANT TO THE
COMMISSION'S ROLE IN GUIDING THIS EXTENSIVE CHANGE IN FEDERAL
SENTENCING POLICY. FINALLY, THE BILL DOES ASSURE THE JUDICIARY A ROLE IN
THE SELECTION OF THE MEMBERS AND DOES PLACE THE COMMISSION IN THE
JUDICIAL BRANCH.
SECOND, THE JUDICIAL CONFERENCE BILL WOULD PRECLUDE MEMBERSHIP ON THE
GUIDELINES DRAFTING AGENCY OF FORMER OR SENIOR FEDERAL JUDGES AND OF
NON-FEDERAL JUDGES. SINCE SEVERAL JUDGES IN THESE CATEGORIES HAVE BEEN
AMONG THE MOST ARTICULATE SPOKESMEN FOR SENTENCING REFORM, THE
COMMITTEE THINKS IT IS UNDESIRABLE TO PRECLUDE THEM FROM CONSIDERATION.
THIRD, THE COMMITTEE THINKS THAT THE GUIDELINES DRAFTING AGENCY SHOULD
HAVE FULL-TIME MEMBERS AT LEAST UNTIL THE INITIAL GUIDELINES ARE IN PLACE
DURING ITS FIRST FEW YEARS. WHILE THE FIRST SET OF GUIDELINES IS BEING
DRAFTED AND IMPLEMENTED, THE COMMISSION MEMBERS WILL BE VERY BUSY
STUDYING CURRENT SENTENCING PRACTICES, DETERMINING THE EXTENT TO WHICH
THESE PRACTICES SHOULD BE CHANGED OR FOLLOWED, AND DETERMINING
WHETHER THEY NEED FINE-TUNING AFTER THEY ARE IMPLEMENTED. IN ADDITION,
because of the importance of the work of the commission, that work
should not be subordinated to other work of the members of the
commission.
FINALLY, THE COMMITTEE STRONGLY BELIEVES THAT THE SENTENCING COMMISSION
SHOULD HAVE ITS OWN STAFF. OF COURSE, THAT STAFF SHOULD COORDINATE
WITH AND DRAW ON THE EXPERTISE OF THE STAFFS OF THE FEDERAL JUDICIAL
CENTER AND THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, AND
THE BILL REQUIRES THIS COORDINATION. [FN249] THESE STAFFS HAVE HIGHLY
COMPETENT PERSONNEL WHO HAVE ENGAGED IN SENTENCING RESEARCH,
PUBLISHED SENTENCING DATA, AND BEGUN EXTENSIVE DATA COLLECTION FOR
ASSISTANCE IN IMPLEMENTING SENTENCING GUIDELINES. IT WOULD BE A MISTAKE
FOR THE SENTENCING COMMISSION TO FAIL TO DRAW ON THESE RESOURCES.
HOWEVER, THE STAFFS OF THE FEDERAL JUDICIAL CENTER AND THE
ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS HAVE NUMEROUS OTHER
RESPONSIBILITIES; THE COMMITTEE BELIEVES THAT IT IS IMPORTANT THAT THERE
BE A STAFF ASSIGNED ONLY TO SENTENCING REFORM RESPONSIBILITIES WITHOUT
CONFLICTING DEMANDS ON THEIR TIME.

*65 **3248 E. GOVERNMENT APPEAL OF SENTENCE

ANOTHER FREQUENT CRITICISM LEVELED AT THE BILL IS THAT IT SHOULD NOT
PROVIDE THE GOVERNMENT WITH THE POWER TO APPEAL A SENTENCE. IF THE
REFORMS ARE TO BE EFFECTIVE IN REDUCING UNWARRANTED SENTENCING
DISPARITY AND ACHIEVING OVERALL FAIRNESS, HOWEVER, IT IS ESSENTIAL THAT
THERE BE A MECHANISM TO APPEAL ON BEHALF OF THE PUBLIC THOSE SENTENCES
WHICH FALL BELOW THE APPLICABLE GUIDELINES. [FN250] IF THE DEFENDANT
ALONE CAN APPEAL, THERE WILL BE NO EFFECTIVE OPPORTUNITY FOR THE
REVIEWING COURTS TO CORRECT AN INJUSTICE ARISING FROM A SENTENCE THAT
IS PATENTLY TOO LENIENT. APPELLATE REVIEW FOR THE DEFENDANT ALONE WOULD
NOT BE AN EFFECTIVE WEAPON TO FIGHT DISPARITY, SINCE THE APPELLATE COURT COULD REDUCE EXCESSIVE SENTENCES BUT NOT RAISE INADEQUATE ONES. THE EFFORT TO ACHIEVE GREATER UNIFORMITY, THEREFORE, MIGHT UNINTENTIONALLY RESULT IN A GRADUAL SCALING DOWN OF SENTENCES TO THE LEVEL OF THE MORE LENIENT ONES.

CONCLUSION

THE SHAMEFUL DISPARITY IN CRIMINAL SENTENCES IS A MAJOR FLAW IN THE EXISTING CRIMINAL JUSTICE SYSTEM, AND MAKES IT CLEAR THAT THE SYSTEM IS RIPE FOR REFORM. CORRECTING OUR ARBITRARY AND CAPRICIOUS METHOD OF SENTENCING WILL NOT BE A PANACEA FOR ALL OF THE PROBLEMS WHICH CONFRONT THE ADMINISTRATION OF CRIMINAL JUSTICE, BUT IT WILL CONSTITUTE A SIGNIFICANT STEP FORWARD.

THE BILL, AS REPORTED, MEETS THE CRITICAL CHALLENGE OF SENTENCING REFORM. THE BILL'S SWEEPING PROVISIONS ARE DESIGNED TO STRUCTURE JUDICIAL SENTENCING DISCRETION, ELIMINATE INDETERMINATE SENTENCING, PHASE OUT PAROLE RELEASE, AND MAKE CRIMINAL SENTENCING FAIRER AND MORE CERTAIN. THE CURRENT EFFORT CONSTITUTES AN IMPORTANT ATTEMPT TO REFORM THE MANNER IN WHICH WE SENTENCE CONVICTED OFFENDERS. THE COMMITTEE BELIEVES THAT THE BILL REPRESENTS A MAJOR BREAK-THROUGH IN THIS AREA.

SECTION-BY-SECTION ANALYSIS

SECTION 201 OF THE BILL STATES THAT THIS TITLE MAY BE CITED AS THE 'SENTENCING REFORM ACT OF 1983'.


SECTION 202(A)(2) REPEALS THE PROVISIONS OF CURRENT CHAPTERS 227, 229, AND 231 OF TITLE 18 THAT ARE NOT REDESIGNATED BY SECTION 202(A)(1) AND REPLACES THEM WITH NEW CHAPTERS 227 AND 229 OF TITLE 18. THE REPEALED PROVISIONS ARE DISCUSSED BELOW WHERE PERTINENT.

**CHAPTER 227-- SENTENCES

PROPOSED CHAPTER 227 OF TITLE 18, U.S.C. DESCRIBES THE TYPES OF SENTENCES THAT CAN BE IMPOSED ON FEDERAL CRIMINAL OFFENDERS. SUBCHAPTER A CONTAINS GENERAL PROVISIONS RELATING TO SENTENCES FOR FEDERAL OFFENSES. SUBCHAPTERS B, C, AND D DESCRIBE THE SENTENCES TO A TERM OF PROBATION, TO PAY A FINE, AND TO A TERM OF IMPRISONMENT, RESPECTIVELY.

**SUBCHAPTER A-- GENERAL PROVISIONS

**(PROPOSED 18 U.S.C. 3551-3559)**

THIS SUBCHAPTER CONTAINS GENERAL PROVISIONS RELATING TO THE TYPES OF
SENTENCES THAT CAN BE IMPOSED ON INDIVIDUALS AND ON ORGANIZATIONS, AND TO THE CONSIDERATIONS THAT SHOULD GO INTO THE DETERMINATION OF AN APPROPRIATE SENTENCE. SECTION 3551 LISTS THE TYPES OF SENTENCES THAT MAY BE IMPOSED UPON A DEFENDANT WHO HAS BEEN FOUND GUILTY OF AN OFFENSE. SECTION 3552 CONTAINS THE REQUIREMENTS FOR PRESENTENCE INVESTIGATIONS AND REPORTS. SECTION 3553 LISTS THE FACTORS TO BE CONSIDERED BY A SENTENCING JUDGE IN IMPOSING SENTENCE AND SETS FORTH THE REQUIREMENT THAT THE JUDGE STATE REASONS FOR A PARTICULAR SENTENCE. SECTIONS 3554 THROUGH 3556 DESCRIBE THE COLLATERAL SENTENCES OF AN ORDER OF CRIMINAL FORFEITURE, AN ORDER OF NOTICE TO VICTIMS OF A FRAUDULENT OFFENSE, AND AN ORDER OF RESTITUTION. SECTIONS 3557 AND 3558 CONTAIN CROSS-REFERENCES TO OTHER PROVISIONS OF TITLE 18 AND THE FEDERAL RULES OF APPELLATE PROCEDURE RELATING TO APPELLATE REVIEW AND IMPLEMENTATION OF SENTENCES. SECTION 3559 SPECIFIES HOW THE CLASSIFICATION SYSTEM CREATED IN SECTION 3581(B) APPLIES TO OFFENSES THAT ARE NOT SPECIFICALLY GRADED BY LETTER GRADE.

SECTION 3551. AUTHORIZED SENTENCES

1. IN GENERAL

SECTION 3551 OUTLINES THE AUTHORIZED SENTENCES FOR DEFENDANTS FOUND GUILTY OF FEDERAL OFFENSES. IT REQUIRES THAT EACH FEDERAL OFFENDER BE SENTENCED IN ACCORD WITH THE PROVISIONS OF THE SUBCHAPTER IN ORDER TO ACHIEVE THE GENERAL PURPOSES OF SENTENCING. IT LISTS SEPARATELY THE KINDS OF SENTENCES THAT MAY BE IMPOSED ON INDIVIDUALS AND ON ORGANIZATIONS AND THE COMBINATIONS OF KINDS OF SENTENCES THAT MAY BE IMPOSED.

2. PRESENT FEDERAL LAW

SECTION 3551 HAS NO DIRECT COUNTERPART IN CURRENT LAW. GENERALLY EACH STATUTE IN CURRENT LAW THAT DEFINES A CRIMINAL OFFENSE SPECIFIES THE MAXIMUM TERM OF IMPRISONMENT OR THE MAXIMUM FINE, OR BOTH, THAT MAY BE IMPOSED UPON A DEFENDANT FOUND GUILTY OF VIOLATING THE STATUTE. A FEW STATUTES ALSO SPECIFY MINIMUM SENTENCES THAT MUST BE IMPOSED. [FN251] CURRENT LAW ALSO RARELY DISTINGUISHES BETWEEN INDIVIDUALS AND ORGANIZATIONS FOR SENTENCING PURPOSES. THUS, PRESENT LAW FAILS TO RECOGNIZE THE USUAL DIFFERENCES IN THE FINANCIAL RESOURCES OF THESE TWO CATEGORIES OF DEFENDANTS AND FAILS TO TAKE INTO ACCOUNT THE GREATER FINANCIAL HARM TO VICTIMS AND THE GREATER FINANCIAL GAIN TO THE CRIMINAL THAT CHARACTERIZE OFFENSES TYPICALLY PERPETRATED BY ORGANIZATIONS.

NOR DOES CURRENT LAW ADDUCE THE TYPES OF SENTENCES THAT MAY BE IMPOSED ON A PARTICULAR TYPE OF DEFENDANT. THE PRESENT STATUTES CONTAIN ONLY GENERAL PROVISIONS FOR SUSPENDING THE IMPOSITION OR EXECUTION OF MOST SENTENCES AND FOR PLACING DEFENDANTS ON PROBATION RATHER THAN IMPOSING OR EXECUTING THEIR SENTENCES. [FN252] FINALLY, CURRENT FEDERAL LAW CONTAINS NO GENERAL STATEMENT OF THE NEED FOR A SENTENCE TO CARRY OUT A PARTICULAR PURPOSE. IT DOES, HOWEVER, CONTAIN SEVERAL VERY SPECIALIZED SENTENCING STATUTES THAT APPLY ONLY TO CERTAIN CATEGORIES OF OFFENDERS-- YOUTH OFFENDERS, [FN253] YOUNG ADULT OFFENDERS, [FN254] CERTAIN DRUG USERS AND ADDICTS, [FN255] DANGEROUS
SPECIAL OFFENDERS, [FN256] AND DANGEROUS SPECIAL DRUG OFFENDERS--
[FN257] AND THAT TIE THEIR PROVISIONS TO CONGRESSIONAL STATEMENTS THAT
THE PURPOSE OF THE SENTENCE IS TREATMENT, [FN258] TREATMENT AND
SUPERVISION, [FN259] OR INCAPACITATION. [FN260]

3. PROVISIONS OF THE BILL, AS REPORTED

SUBSECTION (A) PROVIDES THAT A DEFENDANT FOUND GUILTY OF ANY FEDERAL
OFFENSE SHALL BE SENTENCED IN ACCORDANCE WITH THE PROVISIONS OF THE
CHAPTER 'SO AS TO ACHIEVE THE PURPOSES SET FORTH IN SUBPARAGRAPHS (A)
THROUGH (D) OF SECTION 3553(A)(2) TO THE EXTENT THAT THEY ARE APPLICABLE
IN LIGHT OF ALL THE CIRCUMSTANCES OF THE CASE.' THE PARAGRAPHS REFERRED
TO SET FORTH THE BASIC PURPOSES OF SENTENCING-- DETERRENCE, [FN261]
INCAPACITATION, JUST PUNISHMENT, AND REHABILITATION. THIS PART OF SECTION
3551 IS DESIGNED TO FOCUS THE SENTENCING PROCESS UPON THE OBJECTIVES TO
BE ACHIEVED BY THE FEDERAL CRIMINAL JUSTICE SYSTEM AND TO ENCOURAGE THE
EMPLOYMENT OF SENTENCING OPTIONS, SUCH AS PROBATION, FINES,
IMPRISONMENT, OR COMBINATIONS THEREOF, IN A FASHION TAILORED TO ACHIEVE
THOSE MULTIPLE OBJECTIVES.

WHILE THE BILL, AS REPORTED, CONTAINS A CONGRESSIONAL STATEMENT OF FOUR
PURPOSES OF SENTENCING, THE COMMITTEE HAS NOT FAVORED ONE PURPOSE OF
SENTENCING OVER ANOTHER EXCEPT WHERE THE SENTENCE INVOLVES A TERM OF
IMPRISONMENT. [FN262] WHILE SOME OF THOSE WHO HAVE COMMENTED ON THE
BILL PREFER THAT ONE PURPOSE OR ANOTHER BE FAVORED OVER THE OTHERS OR,
INDEED, THAT SOME OF THE LISTED PURPOSES HC71 *68 **3251 BE DELETED
FROM THE BILL ALTOGETHER, [FN263] THE COMMITTEE BELIEVES THAT EACH OF THE
FOUR STATED PURPOSES SHOULD BE CONSIDERED IN IMPOSING SENTENCE IN A
PARTICULAR CASE. THE COMMITTEE ALSO RECOGNIZES THAT ONE PURPOSE MAY
HAVE MORE BEARING ON THE IMPOSITION OF SENTENCE IN A PARTICULAR CASE
THAN ANOTHER PURPOSE HAS. FOR EXAMPLE, THE PURPOSE OF REHABILITATION
MAY PLAY AN IMPORTANT ROLE IN SENTENCING AN OFFENDER TO A TERM OF
PROBATION WITH THE CONDITION THAT HE PARTICIPATE IN A PARTICULAR COURSE
OF STUDY, WHILE THE PURPOSES OF JUST PUNISHMENT AND INCAPACITATION MAY
BE IMPORTANT CONSIDERATIONS IN SENTENCING A REPEATED OR VIOLENT
OFFENDER TO A RELATIVELY LONG TERM OF IMPRISONMENT.

SUBSECTION (B) OF SECTION 3551 SPECIFIES THAT AN INDIVIDUAL OFFENDER
MUST EITHER BE PLACED ON PROBATION, FINED, OR IMPRISONED AS PROVIDED IN
THE SUBCHAPTERS GOVERNING THE IMPOSITION OF SUCH SENTENCES. IT REQUIRES
THE IMPOSITION OF AT LEAST ONE OF SUCH SENTENCES. [FN264] IT FURTHER
STATES THAT A FINE OR ANY OF THE SANCTIONS AUTHORIZED BY SECTION 3554,
3555, OR 3556 MAY BE IMPOSED IN ADDITION TO ANY OTHER SENTENCE.

SUBSECTION (B) TREATS A TERM OF PROBATION AS A TYPE OF SENTENCE, RATHER
THAN AS AN ALTERNATIVE TO IMPOSITION OR EXECUTION OF A SENTENCE AS IN
CURRENT LAW. [FN265] SUBSECTION (B) ALSO ELIMINATES THE SPLIT SENTENCE IN
WHICH A TERM OF IMPRISONMENT IS FOLLOWED BY A TERM OF PROBATION. [FN266]
SUBSECTION (C) REQUIRES THAT AN ORGANIZATION THAT IS CONVICTED OF A
FEDERAL OFFENSE BE SENTENCED TO A TERM OF PROBATION [FN267] OR TO PAY A
FINE, OR BOTH. AT LEAST ONE OF SUCH SENTENCES MUST BE IMPOSED. IN
ADDITION, AN ORGANIZATION MAY, IN AN APPROPRIATE CASE, BE MADE SUBJECT
TO AN ORDER OF CRIMINAL FORFEITURE, AN ORDER OF NOTICE TO VICTIMS, OR AN
ORDER OF RESTITUTION.

S. 1, AS INTRODUCED IN THE 93RD CONGRESS, PROVIDED, AS AN EQUIVALENT TO A
TERM OF IMPRISONMENT FOR AN INDIVIDUAL OFFENDER, THAT AN ORGANIZATION
COULD BE BARRED FROM ITS 'RIGHT TO AFFECT INTERSTATE OR FOREIGN
COMMERC' FOR A PERIOD UP TO THE MAXIMUM LENGTH OF TIME THAT AN
INDIVIDUAL CONVICTED OF AN OFFENSE OF THE SAME SERIOUSNESS COULD BE SENTENCED TO PRISON. [FN268] BECAUSE THE COMMITTEE WAS CONCERNED THAT SUCH A PROVISION MIGHT TOO READILY BE USED IN AN INAPPROPRIATE CASE, THIS PROVISION WAS DELETED IN THE REPORTED VERSION OF S. 1437 IN THE 95TH CONGRESS. [FN269] INSTEAD, S. 1437 TOOK THE APPROACH THAT, IN AN APPROPRIATE CASE, AN ORGANIZATION COULD BE BARRED, AS A CONDITION OF PROBATION, FROM ENGAGING IN A PARTICULAR BUSINESS OR COULD BE ORDERED TO ENGAGE IN SUCH A BUSINESS ONLY UNDER STATED CIRCUMSTANCES. [FN270]**3252** SUCH A CONDITION OF PROBATION WOULD, OF COURSE, APPLY ONLY FOR THE DURATION OF THE TERM OF PROBATION.

BUSINESS GROUPS, HOWEVER, CONTINUED TO EXPRESS CONCERN THAT THE PROBATION CONDITION PROHIBITING AN ORGANIZATION FROM ENGAGING IN A PARTICULAR BUSINESS MIGHT ENCOURAGE MISAPPLICATION TO A BUSINESS THAT HAD COMMITTED A REGULATORY OFFENSE BUT THAT WAS OTHERWISE A LEGITIMATE BUSINESS. WHILE THE INTENT OF THE COMMITTEE HAD BEEN THAT THE CONDITION BARRING THE CONDUCTING OF A PARTICULAR BUSINESS SHALL BE USED ONLY FOR AN ORGANIZATION THAT CONDUCTED BUSINESS IN A FLAGRANTLY ILLEGAL MANNER, THE COMMITTEE UNDERSTANDS THE CONCERNS OF BUSINESS THAT THE CONDITION MIGHT ENCOURAGE MISAPPLICATION TO THE ECONOMIC DETRIMENT OF A LEGITIMATE ENTERPRISE. THE COMMITTEE ALSO BELIEVES THAT THE SITUATION IN WHICH AN ORGANIZATION OPERATES IN A TOTALLY ILLEGAL MANNER IS RELATIVELY UNUSUAL, OCCURRING MOST FREQUENTLY IN CASES WHERE A BUSINESS EXISTS ONLY AS A FRONT FOR THOSE INDIVIDUALS WHO USE IT FOR THEIR OWN FRAUDULENT PURPOSES. ACCORDINGLY, THIS CONDITION OF PROBATION HAS BEEN FURTHER MODIFIED BY THE COMMITTEE. THE BILL NOW PROVIDES THAT THE CONDITION PROHIBITING A DEFENDANT FROM ENGAGING IN A PARTICULAR BUSINESS SHALL APPLY ONLY TO AN INDIVIDUAL OFFENDER. IN THE RARE CASE IN WHICH AN ORGANIZATION OPERATES IN A GENERAL ILLEGAL MANNER, THE SENTENCING JUDGE CAN RELY ON SECTION 3563(B)(20), THE GENERAL AUTHORITY TO SET APPROPRIATE CONDITIONS OF PROBATION FOR THE ORGANIZATION, AND UNDER SECTION 3563(B)(6) CAN ALSO BAR AN INDIVIDUAL OFFENDER, SUCH AS AN OFFICER OR EVEN SOLE PROPRIETOR OF A FRAUDULENT BUSINESS, FROM ENGAGING IN A PARTICULAR BUSINESS.


SECTION 3552. PRESENTENCE REPORTS

1. IN GENERAL

SECTION 3552 REQUIRES THE PREPARATION OF A PRESENTENCE REPORT BY A PROBATION OFFICER IN ACCORD WITH THE PROVISIONS OF RULE 32(C) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, PERMITS THE COURT TO REQUEST A PRESENTENCE REPORT BY THE BUREAU OF PRISONS OR BY PSYCHIATRIC EXAMINERS IN APPROPRIATE CASES, AND requiring the court to assure that these
PRESENTENCE REPORTS ARE MADE AVAILABLE IN A TIMELY MANNER TO THE DEFENDANT AND HIS COUNSEL AND TO THE ATTORNEY FOR THE GOVERNMENT IN ACCORD WITH, AND TO THE EXTENT PERMITTED BY, THE PROVISIONS OF RULE 32(C).

*70 **3253 2. PRESENT FEDERAL LAW


*71 **3254 3. PROVISIONS OF THE BILL, AS REPORTED

SECTION 3552 AMENDS CURRENT LAW TO ASSURE THAT PRESENTENCE REPORTS CONTAIN THE INFORMATION NECESSARY TO MAKE AN APPROPRIATE SENTENCING DECISION IN THE NEW SENTENCING GUIDELINES SYSTEM. UNDER SUBSECTION (A),
PRESENTENCE REPORTS ARE REQUIRED TO BE PREPARED BY PROBATION OFFICERS PURSUANT TO THE PROVISIONS OF RULE 32. RULE 32(C) IS AMENDED BY THE BILL TO REQUIRE THE PREPARATION OF A PRESENTENCE REPORT UNLESS THE JUDGE FINDS THAT HE HAS SUFFICIENT INFORMATION 'TO ENABLE THE MEANINGFUL EXERCISE OF SENTENCING AUTHORITY PURSUANT TO 18 U.S.C. 3553'. THE DEFENDANT WOULD NOT BE ABLE TO WAIVE THE PRESENTENCE REPORT, AS HE CAN UNDER CURRENT LAW, SINCE IT IS IMPORTANT THAT THE SENTENCING JUDGE ASSURE HIMSELF THAT HE HAS SUFFICIENT INFORMATION FROM WHICH TO DETERMINE THE APPLICABLE SENTENCING GUIDELINE.


IN ITS TESTIMONY IN THE 97TH CONGRESS, THE JUDICIAL CONFERENCE EXPRESSED CONCERN THAT THE PROVISIONS OF SUBSECTION (A) AS INTRODUCED COULD BE CONSTRUED TO REQUIRE THAT THE PROBATION OFFICER WHO PREPARES THE PRESENTENCE INVESTIGATION AND REPORT MUST BE AN OFFICER OF THE PARTICULAR COURT SENTENCING THE DEFENDANT. [FN277] IN ACCORDANCE WITH A SUGGESTION BY THE CONFERENCE, SUBSECTION (A) HAS BEEN AMENDED BY THE COMMITTEE TO MAKE CLEAR THAT ANY PROBATION OFFICER MAY MAKE THE PRESENTENCE INVESTIGATION AND REPORT. THIS ASSURES THAT, FOR EXAMPLE, IF A DEFENDANT HAS LIVED IN MORE THAN ONE DISTRICT IN WHICH THE INVESTIGATION SHOULD BE CONDUCTED, IT IS UNNECESSARY FOR A PROBATION OFFICER OF THE SENTENCING COURT TO TRAVEL TO A DISTANT DISTRICT TO COMPLETE THE INVESTIGATION; HE CAN INSTEAD CALL ON A PROBATION OFFICER OF THE DISTANT DISTRICT TO CONDUCT ALL OR PART OF THE INVESTIGATION.

TO ASSIST THE COURT IN DETERMINING INTO WHAT GUIDELINE CATEGORY A CASE FITS, AND WHETHER SPECIAL MITIGATING OR AGGRAVATING FACTORS WARRANT THE IMPOSITION OF A SENTENCE OUTSIDE THAT GUIDELINE, THE EXISTING PROVISIONS OF RULE 32(C)(2)(A) AND (B) HAVE BEEN INCORPORATED IN SUBDIVISION (C)(2)(A) OF THE RULE AND ARE AMENDED BY SECTION 205(A)(5) OF THE BILL, AS REPORTED, TO REFER GENERALLY TO 'THE HISTORY AND CHARACTERISTICS OF THE DEFENDANT' IN CONFORMITY WITH THE REQUIREMENT OF SECTION 3553 THAT THE JUDGE CONSIDER THESE MATTERS IN IMPOSING SENTENCE. THE RULE HAS BEEN FURTHER AMENDED TO REQUIRE THAT THERE BE INCLUDED IN A PRESENTENCE REPORT:

THE PROVISIONS OF EXISTING RULE 32(C)(2)(C) AND (D) ARE CARRIED FORWARD UNCHANGED AS RULE 32(C)(2)(D) AND (E).

SUBSECTION (B) OF SECTION 3552 PARTIALLY INCORPORATES AND REVISES THE PROVISIONS OF 18 U.S.C. 4205(C). THE BILL PROVIDES THAT IF THE COURT DESIRES MORE INFORMATION ABOUT A CONVICTED DEFENDANT, EITHER BEFORE OR AFTER RECEIVING THE PRESENTENCE REPORT AND ANY REPORT CONCERNING THE DEFENDANT'S MENTAL CONDITION, IT MAY ORDER A STUDY OF THE DEFENDANT. THE STUDY SHALL BE CONDUCTED IN THE LOCAL COMMUNITY BY QUALIFIED CONSULTANTS UNLESS THE SENTENCING JUDGE FINDS THAT THERE IS A COMPELLING REASON FOR THE STUDY TO BE DONE BY THE BUREAU OF PRISONS OR THERE ARE NO ADEQUATE PROFESSIONAL RESOURCES LOCALLY AVAILABLE TO PERFORM THE STUDY.

THE PROVISION THAT PRESENTENCE STUDIES BE CONDUCTED LOCALLY WHERE POSSIBLE WAS ADDED TO MAXIMIZE SAVINGS OF TIME AND MONEY BY REDUCING THE NEED TO TRANSPORT FEDERAL PRISONERS TO DISTANT FEDERAL INSTALLATIONS WITHIN THE SYSTEM AND TO AVOID THE PRACTICE OF GIVING CERTAIN DEFENDANTS A 'TASTE OF JAIL' UNDER THE PRETENSE OF SENDING THEM TO A PRISON FACILITY FOR THE PURPOSE OF A PRE-SENTENCE EXAMINATION. THE BILL AMENDS CURRENT LAW BY REDUCING THE MAXIMUM PERIOD FOR THE STUDY FROM SIX MONTHS TO 120 DAYS (60 DAYS PLUS A MAXIMUM 60-DAY EXTENSION) IN ORDER TO ADVANCE THE TIME FOR FINAL SENTENCING WHILE STILL ALLOWING AN ADEQUATE PERIOD FOR STUDY. THE COMMITTEE HAS AMENDED THE BILL TO SPECIFICALLY REQUIRE THAT THE COURT ORDER FOR A STUDY SPECIFY THE INFORMATION SOUGHT BY THE COURT. THIS WILL ASSURE THAT THOSE PREPARING THE REPORT WILL FOCUS THEIR ATTENTION ON THE ISSUES OF MOST INTEREST TO THE COURT. THE REQUIREMENT IS ALSO CONSISTENT WITH THE SHORTENED PERIOD FOR PREPARATION OF THE REPORT. THE PREPARERS OF THE REPORT ARE REQUIRED TO CONDUCT A COMPLETE STUDY OF MATTERS SPECIFIED BY THE COURT AND OF ANY OTHER MATTERS THEY BELIEVE ARE PERTINENT TO THE FACTORS THAT THE JUDGE MUST CONSIDER PURSUANT TO SECTION 3553(A) BEFORE IMPOSING SENTENCE. BEFORE EXPIRATION OF THE STUDY PERIOD OR ANY EXTENSION, THE STUDY MUST BE REPORTED TO THE COURT. THE REPORT MAY CONTAIN ANY INFORMATION THAT THE BUREAU BELIEVES TO BE PERTINENT TO THE SENTENCING DECISION. THE REPORT IS REQUIRED TO INCLUDE THE BUREAU'S RECOMMENDATIONS AS TO THE SENTENCING GUIDELINES AND POLICY STATEMENTS ISSUED BY THE SENTENCING COMMISSION PURSUANT TO 28 U.S.C. §3256 994(A) THAT THE PREPARERS BELIEVE TO BE APPLICABLE TO THE DEFENDANT'S CASE.

UNDER CURRENT LAW, IF A DEFENDANT IS COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS FOR STUDY PRIOR TO SENTENCING, HE IS DEEMED TO HAVE BEEN SENTENCED TO THE MAXIMUM TERM OF IMPRISONMENT FOR HIS OFFENSE. AFTER THE STUDY, THE JUDGE EITHER AFFIRMS THAT SENTENCE, REDUCES IT, OR PLACES THE DEFENDANT ON PROBATION. UNDER SUBSECTION (B), THE TEMPORARY SENTENCE IS EXPRESSLY LABELLED FOR ADMINISTRATIVE PURPOSES AS A PROVISIONAL SENTENCE, AND WHEN THE STUDY IS COMPLETED, THE JUDGE WILL IMPOSE A FINAL SENTENCE [FN279] UNDER THE VARIOUS SENTENCING ALTERNATIVES AND PROCEDURES AVAILABLE UNDER THE CHAPTER. THUS, THE JUDGE WILL BE MAKING THE SENTENCING DECISION AFTER ALL THE NECESSARY INFORMATION HAS BEEN OBTAINED RATHER THAN BEING REQUIRED TO ADJUST A SENTENCE THAT HAS ALREADY BEEN SET AT THE MAXIMUM LEVEL. EARLIER VERSIONS OF THIS PROVISION REQUIRED THE BUREAU OF PRISONS TO RETURN THE DEFENDANT TO COURT FOLLOWING THE PRESENTENCE STUDY. THE CURRENT BILL PLACES THIS RESPONSIBILITY WITH THE UNITED STATES MARSHALS, SINCE NO CHANGE IN THIS CURRENT PRACTICE WAS INTENDED.

SUBSECTION (C) ADDS A NEW PROVISION TO THE LAW THAT SPECIFICALLY PERMITS THE COURT TO ORDER A PRESENTENCE EXAMINATION BY A PSYCHIATRIC EXAMINER
CONCERNING THE CURRENT MENTAL CONDITION OF THE DEFENDANT. THE EXAMINATION WOULD BE CONDUCTED BY A LICENSED OR CERTIFIED PSYCHIATRIST OR CLINICAL PSYCHOLOGIST DESIGNATED BY THE COURT. THE COURT WOULD HAVE THE AUTHORITY TO DESIGNATE MORE THAN ONE EXAMINER IF IT FOUND THIS TO BE APPROPRIATE. THE COURT WOULD BE PROVIDED WITH A WRITTEN REPORT THAT INCLUDED THE DEFENDANT'S HISTORY AND PRESENT SYMPTOMS, A DESCRIPTION OF THE PSYCHIATRIC, PSYCHOLOGICAL, AND MEDICAL TESTS USED AND THEIR RESULTS, THE EXAMINER'S FINDINGS AND PROGNOSIS, AND ANY RECOMMENDATION THE EXAMINER MAY HAVE ON HOW THE DEFENDANT'S MENTAL HEALTH SHOULD AFFECT HIS SENTENCE. THE EXAMINATION WOULD BE CONDUCTED ON AN OUTPATIENT BASIS UNLESS THE DEFENDANT WAS INCARCERATED PENDING SENTENCING, AND THE JUDGE COULD REQUEST THE EXAMINATION WITHOUT A MOTION BY PROSECUTION OR DEFENSE. THE JUDGE COULD ORDER AN EXAMINATION UNDER THIS SECTION IF HE THOUGHT THE DEFENDANT'S MENTAL CONDITION MIGHT AFFECT THE SENTENCING DECISION. FOR EXAMPLE, A JUDGE MIGHT BELIEVE THAT A CONVICTED DEFENDANT'S EMOTIONAL PROBLEMS SHOULD BE CONSIDERED IN FASHIONING AN APPROPRIATE SENTENCE, AND WISH TO SEEK THE ADVICE OF A PSYCHIATRIC EXAMINER AS TO WHETHER IT WOULD BE MORE APPROPRIATE TO DEAL WITH THEM IN A PRISON SETTING OR ON AN OUTPATIENT BASIS FOLLOWING A BRIEF PRISON TERM.

A NEW SUBSECTION (D) WAS ADDED BY THE COMMITTEE IN THE 96TH CONGRESS [FN280] AND AMENDED IN THIS CONGRESS TO REQUIRE THAT THE JUDGE ASSURE THAT THE REPORTS PREPARED PURSUANT TO THIS SECTION ARE DISCLOSED TO THE DEFENDANT, HIS COUNSEL, AND THE ATTORNEY FOR THE GOVERNMENT AT LEAST 10 DAYS PRIOR TO THE DATE SET FOR SENTENCING. THE 10 DAY MINIMUM DISCLOSURE PERIOD MAY BE WAIVED BY THE DEFENDANT.

*74 **3257* THE 10 DAY MINIMUM FOR DISCLOSURE OF THE PRESENTENCE REPORT WAS ADDED BY SENATOR KENNEDY IN RESPONSE TO CONCERNS RAISED BY THE DEFENSE BAR THAT THE PRACTICE CONCERNING AVAILABILITY OF PRESENTENCE REPORTS VARIES SIGNIFICANTLY FROM DISTRICT TO DISTRICT, AND EVEN WITHIN DISTRICTS. UNDER A SENTENCING GUIDELINES SYSTEM, THE PRESENTENCE REPORT IS A CRITICAL FACTOR IN SENTENCING. IT IS EXTREMELY IMPORTANT THAT THE REPORT BE ACCURATE AND COMPLETE. DISCLOSURE TO BOTH THE GOVERNMENT AND DEFENSE COUNSEL WELL IN ADVANCE OF THE HEARING WILL PROVIDE AN OPPORTUNITY TO CORRECT ANY DEFICIENCIES IN THE REPORT BEFORE THE SENTENCING HEARING.

THE DISCLOSURE IS TO BE MADE PURSUANT TO THE PROVISIONS OF RULE 32 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE. THUS, DISCLOSURE MAY BE IN THE FORM OF AN ORAL OR WRITTEN SUMMARY BY THE JUDGE OF PORTIONS OF THESE REPORTS IF THE JUDGE FINDS PURSUANT TO RULE 32(C)(3) THAT THE REPORT CONTAINS 'DIAGNOSTIC OPINION WHICH MIGHT SERIOUSLY DISRUPT A PROGRAM OF REHABILITATION, SOURCES OF INFORMATION OBTAINED UPON A PROMISE OF CONFIDENTIALITY, OR ANY OTHER INFORMATION WHICH, IF DISCLOSED, MIGHT RESULT IN HARM, PHYSICAL OR OTHERWISE, TO THE DEFENDANT OR OTHER PERSONS.' THE COMMITTEE BELIEVES THAT TIMELY REPORTS TO THE PARTIES OF THE INFORMATION ON WHICH THE JUDGE WILL BASE HIS SENTENCING DECISION ARE IMPORTANT TO ASSURE THAT COUNSEL ARE PREPARED TO ADDRESS HEARING QUESTIONS RELATING TO THE APPROPRIATE APPLICATION OF THE SENTENCING GUIDELINES TO THE DEFENDANT. SECTION 205(A)(6) OF THE BILL AMENDS RULE 32(C)(3)(A) TO REQUIRE DISCLOSURE OF THE INFORMATION REQUIRED IN THE PRESENTENCE REPORT UNDER RULE 32(C)(2) BUT TO PRECLUDE DISCLOSURE OF THE ACTUAL SENTENCE RECOMMENDATION OF THE PROBATION OFFICER PREPARING THE REPORT.

THE PROVISIONS OF SECTION 3552 THUS WILL PROVIDE A COURT WITH THE RESOURCES NECESSARY TO ACQUIRE ADEQUATE INFORMATION ABOUT A CONVICTED OFFENDER, INCLUDING RECOMMENDATIONS FROM THE PROBATION
SYSTEM AND, IF THE JUDGE BELIEVES IT WOULD BE HELPFUL, FROM THE BUREAU OF PRISONS OR A PSYCHIATRIC EXAMINER, IN ORDER TO ASSURE A SOUND BASIS IN Fact FOR THE SENTENCING DECISION. THE SECTION ALSO ASSURES THAT THE DEFENDANT AND THE GOVERNMENT HAVE SUFFICIENT INFORMATION CONCERNING THE BASIS FOR A SENTENCING DECISION TO ENABLE THEM TO PREPARE FOR THE SENTENCING HEARING.

SECTION 3553. IMPOSITION OF A SENTENCE

1. IN GENERAL

SECTION 3553 lists the factors that a judge should consider in imposing sentence. It requires the court to impose sentence within the sentencing guidelines unless an aggravating or mitigating circumstance exists that was not adequately considered in the formulation of the guidelines and that should result in a different sentence. It requires that a sentencing judge state reasons for the sentence imposed. Finally, it contains special provisions concerning presentence procedures to be followed if the court is considering imposition of an order of notice pursuant to Section 3555.

2. PRESENT FEDERAL LAW

One of the most glaring defects in current sentencing law is the absence of general legislative guidance concerning the factors to be considered in imposing sentence. [FN281] This defect is aggravated by the fact that the sentencing judge is not required to state his reasons for imposing a particular sentence. [FN282] Each judge is left to formulate his own ideas about the factors to be considered in imposing sentence and the effect that each factor should have on the sentence imposed. The result is unwarranted disparities among sentences imposed by different judges. [FN283]

3. PROVISIONS OF THE BILL, AS REPORTED

Subsection (A) sets out the factors a judge is required to consider in selecting the sentence to be imposed in a particular case. This applies to both the appropriate type of sentence (e.g., fine, probation, imprisonment, or a combination thereof) and to the severity of the sentence. Subsection (A)(1) directs the judge to consider the 'nature and circumstances of the offense and the history and characteristics of the defendant.' Under this provision, the judge must consider such things as the amount of harm done by the offense, whether a weapon was carried or used, whether the defendant was a lone participant in the offense or participated with others in a major or minor way, and whether there were any particular aggravating or mitigating circumstances surrounding the offense. With respect to the history and characteristics of the defendant, the judge must consider such matters as the criminal history of the defendant, as well as the nature and effect of any previous criminal sanctions. All of these considerations and others that the judge believed to be appropriate would assist him in assessing how the sentencing guidelines and policy
ANOTHER IN THE BELIEF THAT DIFFERENT PURPOSES MAY PLAY GREATER OR LESSER ROLES IN SENTENCING FOR DIFFERENT TYPES OF OFFENSES COMMITTED BY DIFFERENT TYPES OF DEFENDANTS. [FN290] THE COMMITTEE RECOGNIZES THAT A PARTICULAR PURPOSE OF SENTENCING MAY PLAY NO ROLE IN A PARTICULAR CASE. THE INTENT OF SUBSECTION (A)(2) IS TO RECOGNIZE THE FOUR PURPOSES THAT SENTENCING IN GENERAL IS DESIGNED TO ACHIEVE, AND TO REQUIRE THAT THE JUDGE CONSIDER WHAT IMPACT, IF ANY, EACH PARTICULAR PURPOSE SHOULD HAVE ON THE SENTENCE IN EACH CASE.

SUBSECTION (A)(3) REQUIRES THE JUDGE TO CONSIDER ALL SENTENCING POSSIBILITIES. THE COMMITTEE ADDED THIS PROVISION TO THE SENTENCING PROVISIONS IN THE CRIMINAL CODE IN THE 95TH CONGRESS. THE PROVISION WAS ADDED IN RESPONSE TO TWO CONCERNS: (1) PRISON SENTENCES ARE IMPOSED IN CASES WHERE EQUALLY EFFECTIVE SENTENCES INVOLVING LESS RESTRAINT ON LIBERTY WOULD SERVE THE PURPOSES OF SENTENCING, [FN291] AND (2) SOME MAJOR OFFENDERS, PARTICULARLY WHITE COLLAR OFFENDERS AND SERIOUS VIOLENT CRIME OFFENDERS, FREQUENTLY DO NOT RECEIVE SENTENCES THAT REFLECT THE SERIOUSNESS OF THEIR OFFENSES. IN THE FORMER CASE, FOR EXAMPLE, IT MIGHT BE POSSIBLE TO FASHION A SENTENCE THAT REQUIRE A HIGH FINE AND WEEKENDS IN PRISON FOR SEVERAL MONTHS INSTEAD OF A LONGER PERIOD OF INCARCERATION. IN THE CASE OF A MAJOR WHITE COLLAR OFFENSE, THE JUDGE MIGHT IMPOSE A SENTENCE TO A TERM OF IMPRISONMENT AND A FINE PROPORTIONATE TO THE GAIN TO THE OFFENDER INSTEAD OF SIMPLY A LOW FINE THAT AMOUNTED ONLY TO A COST OF DOING BUSINESS. IN THE CASE OF A SERIOUS VIOLENT OFFENSE, THE JUDGE MIGHT IMPOSE A HIGHER PRISON TERM THAN IS SERVED TODAY IN ORDER TO PUNISH AND INCAPACITATE THE CRIMINAL.

SUBSECTIONS (A)(4) AND (A)(5) REQUIRE THAT THE SENTENCING JUDGE CONSIDER THE KINDS OF SENTENCE AND THE SENTENCING RANGE APPLICABLE TO THE CATEGORY OF OFFENSE COMMITTED BY THE CATEGORY OF OFFENDER UNDER THE SENTENCING GUIDELINES ISSUED PURSUANT TO 28 U.S.C. 994(A) AND UNDER ANY APPLICABLE POLICY STATEMENTS ISSUED BY THE SENTENCING COMMISSION. THE GUIDELINES AND POLICY STATEMENTS TO BE APPLIED ARE THOSE IN EFFECT AT THE TIME OF SENTENCING. USE OF GUIDELINES AND POLICY STATEMENTS SINCE REVISED WOULD ONLY CREATE SIGNIFICANT ADMINISTRATIVE DIFFICULTIES. MOREOVER, IT WOULD BE INCONSISTENT WITH THE PHILOSOPHY EMBODIED IN THIS LEGISLATION, THAT THE SENTENCING COMMISSION CAN AND SHOULD CONTINUALLY REVISE ITS GUIDELINES AND POLICIES TO ASSURE THAT THEY ARE THE MOST SOPHISTICATED STATEMENTS AVAILABLE AND WILL MOST APPROPRIATELY CARRY OUT THE PURPOSES OF SENTENCING. 28 U.S.C. 991(B)(1)(C) AND 995(A) CONTAIN SPECIFIC STATUTORY DIRECTION AND AUTHORITY FOR SUCH CONTINUAL REFINEMENT. TO IMPOSE A SENTENCE UNDER OUTMODED GUIDELINES WOULD FOSTER IRRATIONALITY IN SENTENCING AND WOULD BE CONTRARY TO THE GOAL OF CONSISTENCY IN SENTENCING. [FN292] THE PRACTICE OF THE PAROLE COMMISSION HAS BEEN TO USE THE GUIDELINES *78 **3261 CURRENTLY IN EFFECT, AND THIS PRACTICE HAS GENERALLY WITHSTOOD CHALLENGES THAT IT VIOLATED THE PROHIBITION AGAINST EX POST FACTO LAWS IN ARTICLE I, SECTION 9 OF THE CONSTITUTION. [FN293] THE COMMITTEE BELIEVES THAT THE REASONS GIVEN FOR UPHOLDING THE PAROLE COMMISSION PRACTICE ARE EQUALLY APPLICABLE TO THE SENTENCING GUIDELINES: THE STATUTORY MAXIMUM SENTENCE APPLICABLE FOR AN OFFENSE IS UNCHANGED BY AN ALTERATION IN THE GUIDELINES. INSTEAD, THE GUIDELINES ARE DESIGNED TO STRUCTURE THE EXERCISE OF DISCRETION IN MAKING DECISIONS, PRIMARILY TO ACCOMMODATE INCREASED KNOWLEDGE AS TO HOW DIFFERENCES AMONG OFFENSES OR OFFENDERS SHOULD AFFECT SENTENCES. THE GUIDELINES DO NOT ELIMINATE THE DISCRETION TO SET A RELEASE DATE OUTSIDE THE GUIDELINES IF THERE IS A VALID REASON FOR DOING SO.

SUBSECTION (A)(6) REQUIRES THE JUDGE TO CONSIDER "THE NEED TO AVOID UNWARRANTED DISPARITIES AMONG DEFENDANTS WITH SIMILAR RECORDS WHO
HAVE BEEN FOUND GUILTY OF SIMILAR CONDUCT.’ A SIMILAR PROVISION, PROPOSED 28 U.S.C. 991(B)(1)(B), IS DIRECTED TO THE SENTENCING COMMISSION. THESE PROVISIONS UNDERLINE THE MAJOR PREMISE OF THE SENTENCING GUIDELINES-- THE NEED TO AVOID UNWARRANTED SENTENCING DISPARITY. THE SUBSECTION REQUIRES JUDGES TO AVOID UNWARRANTED DISPARITY IN APPLYING THE GUIDELINES AND PARTICULARLY IN DECIDING WHEN IT IS DESIRABLE TO SENTENCE OUTSIDE THE GUIDELINES.

THE COMMITTEE CONSIDERED AND REJECTED A PROPOSAL BY THE AMERICAN BAR ASSOCIATION TO INCLUDE A SO-CALLED 'LOCKSTEP' PROCEDURE WHICH WOULD MANDATE CONSIDERATION BY THE SENTENCING JUDGE IN ORDERED FASHION OF A SERIES OF SEVERAL SENTENCING ALTERNATIVES PRIOR TO SENTENCING AN INDIVIDUAL.

IN THE COMMITTEE'S VIEW, THE 'LOCKSTEP' PROCEDURE IS SUPERFLUOUS AND INCOMPATIBLE WITH A SENTENCING GUIDELINES SYSTEM. THE BILL ALREADY REQUIRES THE JUDGE TO CONSIDER ALL AVAILABLE SENTENCES, AND IS NEUTRAL ON WHAT SENTENCE IS MOST APPROPRIATE FOR A GIVEN OFFENSE. THE GUIDELINES AND POLICY STATEMENTS OF THE SENTENCING COMMISSION, NOT A MECHANISTIC EXAMINATION OF ALTERNATIVE SENTENCES WHICH MAY NOT EVEN BE APPLICABLE TO A PARTICULAR CASE, SHOULD GUIDE THE SENTENCING JUDGE.

SUBSECTION (B) OF PROPOSED 18 U.S.C. 3553 WAS ADDED TO S. 1437 DURING THE SENATE DEBATE IN THE 95TH CONGRESS. [FN294] IT REQUIRES THE SENTENCING JUDGE TO IMPOSE A SENTENCE CONSISTENT WITH THE SENTENCING GUIDELINES UNLESS HE FINDS IN THE CASE AN AGGRAVATING OR MITIGATING CIRCUMSTANCE THAT WAS NOT ADEQUATELY CONSIDERED IN THE FORMULATION OF THE SENTENCING GUIDELINES AND THAT SHOULD RESULT IN A DIFFERENT SENTENCE FROM THAT RECOMMENDED IN THE GUIDELINES.


THE COMMITTEE RESISTED THIS ATTEMPT TO MAKE THE SENTENCING GUIDELINES MORE VOLUNTARY THAN MANDATORY, BECAUSE OF THE POOR RECORD OF STATES REPORTED IN THE NATIONAL ACADEMY OF SCIENCE REPORT WHICH HAVE EXPERIMENTED WITH 'VOLUNTARY ' GUIDELINES. IN HIS TESTIMONY BEFORE THE COMMITTEE ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1983 (S. 829), THE DISTRICT ATTORNEY FOR MIDDLESEX COUNTY, MASSACHUSETTS, SCOTT
HARSHBARGER, NOTED THAT THE VOLUNTARY GUIDELINES IN MASSACHUSETTS
WERE COMPLETELY INEFFECTIVE IN REDUCING SENTENCING DISPARITIES AND
IMPOSING A RATIONAL ORDER ON CRIMINAL SENTENCING IN THE STATE, BECAUSE
JUDGES GENERALLY DID NOT FOLLOW THEM.

SUBSECTION (C) CONTAINS A NEW REQUIREMENT THAT THE COURT GIVE THE
REASONS FOR THE IMPOSITION OF THE SENTENCE AT THE TIME OF SENTENCING. IT
ALSO REQUIRE, IF THE SENTENCE IS WITHIN THE GUIDELINES, THE COURT TO GIVE
THE REASON FOR IMPOSING SENTENCE AT A PARTICULAR POINT WITHIN THE
RANGE. FURTHER, IF THE SENTENCE IS NOT WITHIN THE SENTENCING GUIDELINES,
THE COURT MUST STATE THE SPECIFIC REASON FOR IMPOSING A SENTENCE THAT
DIFFERS FROM THE GUIDELINES. THIS REQUIREMENT WOULD ESSENTIALLY EXPLAIN
WHY THE COURT FELT THE GUIDELINES DID NOT ADEQUATELY TAKE INTO ACCOUNT
ALL THE PERTINENT CIRCUMSTANCES OF THE CASE AT HAND. IF THE SENTENCING
COURT BELIEVED THE CASE WAS AN ENTIRELY TYPICAL ONE FOR THE APPLICABLE
GUIDELINE CATEGORY, IT WOULD HAVE NO ADEQUATE JUSTIFICATION FOR
DEVIATING FROM THE RECOMMENDED RANGE. THE NEED FOR CONSISTENCY IN
SENTENCES FOR SIMILAR OFFENDERS COMMITTING SIMILAR OFFENSES SHOULD BE
SUFFICIENTLY IMPORTANT TO DISSUADE A JUDGE FROM DEVIATING FROM A
CLEARLY APPLICABLE GUIDELINE RANGE. AN OFFENDER SHOULD NOT RECEIVE MORE
FAVORABLE OR LESS FAVORABLE TREATMENT BECAUSE HE HAPPENS TO BE
SENTENCED BY A PARTICULAR JUDGE. A JUDGE WHO DISAGREES WITH A GUIDELINE
MAY, OF COURSE, MAKE HIS VIEWS KNOWN TO THE SENTENCING COMMISSION AND
MAY RECOMMEND SUCH CHANGES AS HE DEEMS APPROPRIATE.

THE STATEMENT OF REASONS IS MADE IN OPEN COURT. THE COMMITTEE DOES NOT
INTEND THAT THE STATEMENT OF REASONS FOR A SENTENCE WITHIN THE
GUIDELINES BECOME A LEGAL BATTLEGROUND FOR CHALLENGING THE
PROPRIETY OF A PARTICULAR SENTENCE OR THE PROBATION OR INSTITUTIONAL
PROGRAM IN WHICH THE DEFENDANT IS PLACED. IN PARTICULAR, THE COMMITTEE
DOES NOT INTEND A STATEMENT THAT ONE PURPOSE OF A PARTICULAR SENTENCE
IS TO PERMIT THE DEFENDANT TO PARTICIPATE IN A REHABILITATION PROGRAM TO
BE THE BASIS OF A DEFENDANT'S CHALLENGE TO PARTICIPATION IN THE PROGRAM
BECAUSE IT IS ALLEGEDLY INEFFECTIVE. IT IS ALSO IMPORTANT THAT THE JUDGE
STATE GENERAL REASONS FOR A SENTENCE WITHIN THE APPLICABLE GUIDELINE TO
INFORM THE DEFENDANT AND THE PUBLIC OF THE REASONS WHY THE OFFENDER IS
SUBJECT TO THAT PARTICULAR GUIDELINE AND IN ORDER TO GUIDE PROBATION
OFFICERS AND PRISON OFFICIALS TO DEVELOP A PROGRAM TO MEET HIS NEEDS.
THE STATEMENT OF REASONS FOR A SENTENCE OUTSIDE THE GUIDELINES IS
ESPECIALLY IMPORTANT. UNDER PROPOSED 18 U.S.C. 3742, A DEFENDANT MAY
APPEAL A SENTENCE ABOVE THE APPLICABLE GUIDELINES, AND THE GOVERNMENT
MAY APPEAL A SENTENCE BELOW THE GUIDELINES. IF THE APPELLATE COURT FINDS
THAT A SENTENCE OUTSIDE THE GUIDELINES IS UNREASONABLE, THE CASE MAY BE
REMANDED TO THE TRIAL COURT FOR RESENTENCING OR THE SENTENCE MAY BE
AMENDED BY THE APPELLATE COURT. THE STATEMENT OF REASONS WILL PLAY AN
IMPORTANT ROLE IN THE EVALUATION OF THE REASONABLENESS OF THE SENTENCE.
IN FACT, IF THE SENTENCING JUDGE FAILS TO GIVE SPECIFIC REASONS FOR A
SENTENCE OUTSIDE THE GUIDELINES, THE APPELLATE COURT WOULD BE JUSTIFIED
IN RETURNING THE CASE TO THE SENTENCING JUDGE FOR SUCH A STATEMENT.
SENTENCES WITHIN THE GUIDELINES ARE SUBJECT TO APPEAL UNDER PROPOSED 18
U.S.C. 3742 ON GROUNDS OF ILLEGALITY OR AN INCORRECT APPLICATION OF THE
GUIDELINES. AS WITH SENTENCES OUTSIDE THE GUIDELINES, THE STATEMENT OF
REASONS MAY PLAY A ROLE IN THE APPELLATE COURT'S DECISION ON THE LEGALITY
OF SENTENCES. THE STATEMENT OF REASONS IN CASES CLAIMING INCORRECT
APPLICATION OF THE GUIDELINES WILL PROBABLY PLAY ONLY A MINOR ROLE IN THE
APPELLATE PROCESS BECAUSE THE SENTENCING COURT WILL BE DECIDING FACTUAL
ISSUES CONCERNING OFFENSE AND OFFENDER CHARACTERISTICS WHICH MIGHT
NOT BE DISCUSSED IN THE STATEMENT OF REASONS. [FN295]
REGARDLESS OF THE GROUNDS FOR APPEAL, THE STATEMENT OF REASONS SHOULD NOT BE SUBJECTED TO SUCH LEGALISTIC ANALYSIS THAT WILL MAKE JUDGES RELUCTANT TO SENTENCE OUTSIDE THE GUIDELINES WHEN IT IS APPROPRIATE OR THAT WILL ENCOURAGE JUDGES TO GIVE REASONS IN A STANDARDIZED MANNER. THE STATEMENT OF REASONS ALSO INFORMS THE DEFENDANT AND THE PUBLIC OF THE REASONS FOR THE SENTENCE. IT PROVIDES INFORMATION TO CRIMINAL JUSTICE RESEARCHERS EVALUATING THE EFFECTIVENESS OF VARIOUS SENTENCING PRACTICES IN ACHIEVING THEIR STATED PURPOSES. FINALLY, IT ASSISTS THE SENTENCING COMMISSION IN ITS CONTINUOUS REEXAMINATION OF ITS GUIDELINES AND POLICY STATEMENTS.

THE COMMITTEE ADDED SUBSECTION (D) TO S. 1722 IN THE 96TH CONGRESS TO ALLAY CONCERNS OF THE BUSINESS COMMUNITY THAT AN ORDER OF NOTICE TO VICTIMS UNDER SECTION 3555 OR AN ORDER OF RESTITUTION UNDER SECTION 3556 MIGHT BE IMPOSED WITHOUT ADEQUATE CONSIDERATION BY THE COURT OF THE ISSUES INVOLVED. THE SUBSECTION REQUIRES THE COURT TO GIVE PRIOR NOTIFICATION TO THE DEFENDANT AND THE GOVERNMENT THAT IT IS CONSIDERING IMPOSING SUCH AN ORDER OF NOTICE AS PART OF THE SENTENCE. THE PURPOSE OF THE NOTIFICATION IS TO ENABLE THE PARTIES TO PREPARE ADEQUATELY FOR THE SENTENCING HEARING. THE SUBSECTION ALSO REQUIRES THAT THE COURT, UPON MOTION OF THE DEFENDANT OR THE GOVERNMENT OR ON ITS OWN MOTION, (1) PERMIT THE PARTIES TO SUBMIT AFFIDAVITS AND WRITTEN MEMORANDA CONCERNING MATTERS RELEVANT TO THE IMPOSITION OF AN ORDER OF NOTICE OR RESTITUTION, INCLUDING IDENTIFICATION OF INDIVIDUAL VICTIMS OR CLASSES OF VICTIMS, VALUATION ISSUES, AND DEFENSES THAT A DEFENDANT COULD ASSERT IN A CIVIL ACTION WITH RESPECT TO ANY VICTIM; (2) AFFORD COUNSEL AN OPPORTUNITY TO ADDRESS IN OPEN COURT THE ISSUE OF THE APPROPRIATENESS OF SUCH AN ORDER; AND (3) INCLUDE IN ITS STATEMENT OF REASONS FOR THE SENTENCE SPECIFIC REASONS FOR IMPOSING THE ORDER. THE COURT MAY ALSO, UPON MOTION OF EITHER PARTY OR ITS OWN MOTION, EMPLOY ADDITIONAL PROCEDURES, INCLUDING HEARING THE TESTIMONY OF WITNESSES, THAT IT CONCLUDES WILL NOT UNDULY COMPLICATE OR PROLONG THE SENTENCING PROCESS. THE COMMITTEE DOES NOT INTEND THAT THE PROCEDURE BE USED TO RESOLVE DIFFICULT ISSUES; IF THE COMPLEXITY WOULD UNDULY COMPlicate OR PROLONG THE SENTENCING PROCESS, THE COURT SHOULD NOT CONSIDER IMPOSING AN ORDER OF NOTICE THAT WOULD HAVE TO REST UPON A RESOLUTION OF SUCH COMPLEXITY, ALTHOUGH IN SOME CASES THE COURT MIGHT FIND IT POSSIBLE AND ADVISABLE TO ACCEPT SUCH FACTS AS MORE READILY CAN BE RESOLVED AND USE THEM AS THE BASIS FOR A MORE LIMITED ORDER OF NOTICE.

SECTION 3554. ORDER OF CRIMINAL FORFEITURE

1. IN GENERAL

MEMBER OF THE COMMUNITY; AMONG WHICH SOCIAL ADVANTAGES THE RIGHT OF TRANSFERRING OR TRANSMITTING PROPERTY TO OTHERS IS ONE OF THE CHIEF. SUCH FORFEITURES MOREOVER, WHEREBY HIS POSTERITY MUST SUFFER AS WELL AS HIMSELF, WILL HELP TO RESTRAIN A MAN, \*82 **3265 NOT ONLY BY THE SENSE OF HIS DUTY, AND DREAD OF PERSONAL PUNISHMENT, BUT ALSO BY HIS PASSIONS AND NATURAL AFFECTIONS.


\*83 **3266 2. PROVISIONS OF THE BILL, AS REPORTED

994(A)(2)(A), THE UNITED STATES SENTENCING COMMISSION IS REQUIRED TO ISSUE POLICY STATEMENTS CONCERNING THE APPROPRIATE USE OF AN ORDER OF CRIMINAL FORFEITURE.

SECTION 3555. ORDER OF NOTICE TO VICTIMS

1. IN GENERAL

PROPOSED 18 U.S.C. 3555 IS A NEW PROVISION WHICH ALLOWS A COURT TO REQUIRE A DEFENDANT WHO HAS BEEN FOUND GUILTY OF AN OFFENSE INVOLVING FRAUD OR OTHER INTENTIONALLY DECEPTIVE PRACTICES TO GIVE NOTICE AND EXPLANATION OF THE CONVICTION TO THE VICTIMS OF THE OFFENSE.

2. PRESENT FEDERAL LAW

THERE ARE NO PROVISIONS OF CURRENT FEDERAL LAW WHICH REQUIRE AN OFFENDER TO GIVE NOTICE OF HIS CONVICTION TO HIS VICTIMS. [FN308] THERE IS, HOWEVER, AN ANALOGOUS CONCEPT CONTAINED IN PRESENT STATUTES THAT REQUIRE MOTOR VEHICLE AND TIRE MANUFACTURERS TO NOTIFY THE SECRETARY OF TRANSPORTATION OF DEFECTS IN THEIR PRODUCTS AND THAT PERMIT THE SECRETARY TO DISCLOSE DEFECTS TO THE PUBLIC (15 U.S.C. 1402(D)). THE EXTENSION OF THE CONCEPT TO THE AREA OF CRIMINAL LAW WAS PROPOSED BY THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS. [FN309]

3. PROVISIONS OF THE BILL, AS REPORTED

THIS SECTION WILL PERMIT A COURT TO ASSURE NOTIFICATION TO THE PERSONS INJURED BY A MULTIPLE VICTIM OFFENSE INVOLVING FRAUD OR OTHER INTENTIONALLY DECEPTIVE PRACTICES THAT THE PERPETRATOR OF THE OFFENSE HAS BEEN ADJUDGED CRIMINALLY RESPONSIBLE. THE PROVISION SHOULD FACILITATE ANY PRIVATE ACTIONS THAT MAY BE WARRANTED FOR RECOVERY OF LOSSES. WITHOUT SUCH A PROVISION, MANY VICTIMS OF MAJOR FRAUD SCHEMES MAY NOT BECOME AWARE OF THE FRAUD (FOR EXAMPLE, THAT THE MINING STOCK THEY PURCHASED IS COUNTERFEIT) UNTIL IT IS TOO LATE TO SEEK LEGAL REDRESS, OR MAY NOT BE ABLE TO ASCERTAIN THE PERPETRATOR'S CURRENT WHEREABOUTS (FOR EXAMPLE, A 'FLY-BY-NIGHT' ROOFING OPERATION). THE PROVISION SHOULD ALSO SERVE TO ALERT FRAUD VICTIMS TO THE ADVISABILITY OF OTHER ACTION ON THEIR PART (FOR EXAMPLE, NEWS OF THE WORTHLESSNESS OF A PHONY 'CANCER CURE' MAY PROMPT A VICTIM VISIT A DOCTOR IN TIME FOR PROPER MEDICAL ATTENTION).

PROFITS OF HIS CRIMINAL VENTURE. IN COMBINATION WITH THE HIGHER FINES THAT MAY BE IMPOSED UNDER THE BILL, THIS PROVISION'S PROMPTING OF A SUBSTANTIALLY INCREASED LIKELIHOOD OF SUCCESSFUL CIVIL SUITS SHOULD MATERIALLY DECREASE THE INCENTIVE TO ENGAGE IN THIS KIND OF CRIMINAL OPERATION.

THE POWER OF THE COURT TO DESIGNATE THE ADVERTISING AREAS AND MEDIA IN WHICH NOTICE IS TO BE GIVEN, AND TO APPROVE THE FORM OF THE NOTICE, AVOIDS THE POSSIBILITY OF THE OFFENDER'S MAKING ONLY TOKEN EFFORTS TO GIVE NOTICE. IT IS ACTUAL NOTICE RATHER THAN CONSTRUCTIVE NOTICE THAT IS SOUGHT TO BE OBTAINED. THUS, IF THE GROUP INJURED IS READILY IDENTIFIABLE AND SMALL, NOTICE BY LETTERS TO INDIVIDUALS MAY BE SUFFICIENT. IF THERE ARE MULTIPLE UNKNOWN PERSONS INJURED, AS IN THE CASE OF A MAJOR FRAUD, SPECIFIED NEWSPAPER ADS MIGHT BE USED. THE POWER OF THE COURT TO APPROVE THE FORM OF NOTICE WILL GIVE THE COURT THE ABILITY TO ASSURE THAT THE NOTICE IS ADEQUATE TO EXPLAIN TO PERSONS WRONGED BY THE OFFENSE WHAT THE DEFENDANT HAS DONE. INCENTIVE TO ABIDE BY A COURT'S ORDER UNDER THIS SECTION IS PROVIDED NOT ONLY BY THE COURT'S CONTEMPT POWER, BUT ALSO BY PERMITTING THE FULLFILLMENT OF THE ORDER TO BE MADE AN EXPRESS CONDITION OF PROBATION IN THOSE CASES IN WHICH IMPRISONMENT IS NOT ALSO IMPOSED [FN311] OR AN EXPRESS CONDITION OF POST-RELEASE SUPERVISION IF SUCH A TERM IS IMPOSED. [FN312]

SEVERAL CHANGES IN SECTION 3553 FROM THE VERSION CONTAINED AS SECTION 2005 IN S. 1437 OF THE 95TH CONGRESS WERE MADE BY THE COMMITTEE IN THE 96TH CONGRESS. [FN313] THE CHANGES WERE IN RESPONSE TO THE CONCERN OF THE BUSINESS COMMUNITY THAT THE PROVISION MIGHT BE USED IN AN INAPPROPRIATE CASE, SUCH AS A TECHNICAL VIOLATION OF A REGULATORY REQUIREMENT, WITH RESULTING INJURY TO BUSINESS AND REPUTATION NOT JUSTIFIED BY THE NATURE OF THE OFFENSE OR THE AMOUNT OF HARM DONE BY IT. THE CHANGES ALSO REFLECT CONCERNS THAT, EVEN WHERE NOTICE MIGHT BE APPROPRIATE, COSTS OF GIVING NOTICE MIGHT EXCEED COSTS THAT SHOULD REASONABLY BE BORNE BY THE OFFENDER GIVEN THE NATURE OF THE OFFENSE AND THE AMOUNT OF HARM DONE. ACCORDINGLY, THE COMMITTEE HAS LIMITED THE NATURE OF THE OFFENSES FOR WHICH NOTICE MAY BE ORDERED TO THOSE OFFENSES THAT INVOLVE FRAUD OR OTHER INTENTIONALLY DECEPTIVE PRACTICES, REGARDLESS OF WHETHER THE OFFENSE IS COMMITTED BY AN INDIVIDUAL OR BY AN ORGANIZATION. THE COMMITTEE HAS ALSO AMENDED THE NOTICE REQUIREMENT TO PROVIDE THAT THE CONVICTED OFFENDER MAY BE ORDERED TO GIVE 'REASONABLE' NOTICE AND EXPLANATION OF THE OFFENSE AND TO REQUIRE THAT THE JUDGE SHALL CONSIDER, IN DETERMINING WHETHER TO REQUIRE NOTICE, NOT ONLY THE FACTORS SET FORTH IN SECTION 3553(A), BUT ALSO THE COST OF GIVING NOTICE AS IT RELATES TO THE LOSS CAUSED BY THE OFFENSE. IN ADDITION, THE COMMITTEE HAS LIMITED TO $20,000 THE AMOUNT OF COSTS THAT THE COURT MAY ORDER THE DEFENDANT TO PAY FOR SUCH NOTICE. [FN314]

THESE AMENDMENTS ARE INTENDED TO ASSURE THAT THE ORDER OF NOTICE REQUIRES ONLY SUCH PUBLICATION AS IS REASONABLE UNDER THE CIRCUMSTANCES OF THE CASE. IN A MAJOR FRAUD CASE INVOLVING IDENTIFIABLE CONSUMERS DEFRAUDED OF SUBSTANTIAL AMOUNTS OF MONEY, THE DEFENDANT MIGHT REASONABLY BE EXPECTED TO GIVE INDIVIDUAL NOTICE. IN A MAJOR FRAUD CASE INVOLVING HUNDREDS OR THOUSANDS OF CONSUMERS, EACH OF WHOM SUSTAINED MINOR LOSSES, NOTICE MIGHT MORE APPROPRIATELY BE GIVEN BY PUBLICATION IN NEWSPAPERS REACHING THE BULK OF THE CONSUMERS DEFRAUDED INSTEAD OF INDIVIDUAL NOTICE. THE COMMITTEE DOES NOT INTEND THAT THE SECTION BE USED TO ORDER 'CORRECTIVE ADVERTISING' OR TO SUBJECT A DEFENDANT TO PUBLIC DERISION. PUBLICATION SHOULD NOT BE REQUIRED BEYOND THAT WHICH IS NECESSARY TO NOTIFY THE VICTIMS OF THE DEFENDANT'S
CONVICTION. FURTHER, IF IDENTIFYING THE VICTIMS IS SO COMPLEX AN
UNDERTAKING THAT IT COULD UNDULY COMPLICATE OR PROLONG THE SENTENCING
PROCESS, THE COURT SHOULD NOT REQUIRE THAT SUCH NOTICE BE GIVEN OTHER
THAN TO THOSE VICTIMS WHO CAN MORE READILY BE IDENTIFIED. THE
PROCEDURES SET FORTH IN SECTION 3553(D) SHOULD ASSIST THE COURT IN
DETERMINING WHETHER NOTICE SHOULD BE ORDERED IN THOSE CASES IN WHICH
COMPLEX ISSUES ARE NOT RAISED. THE FACT THAT NOTICE WAS ORDERED OR
GIVEN IS NOT INTENDED TO CONFER ANY LEGAL RIGHT ON ANY PERSON, AND THE
NOTICE MAY INCLUDE A CAVEAT THAT IT IS MERELY INFORMATIONAL AND CREATES
NO LEGAL RIGHTS.

PROPOSED 18 U.S.C. 3742 PERMITS A DEFENDANT TO APPEAL S SENTENCE THAT
INCLUDES AN ORDER OF NOTICE. BECAUSE OF THE POTENTIAL HARM TO BUSINESS
AND REPUTATION, THE EXECUTION OF AN ORDER OF NOTICE SHOULD BE STAYED
PENDING APPEAL UNLESS THE COURT FINDS THAT THE APPEAL OR PETITION FOR
REVIEW OF SENTENCE IS FRIVOLOUS OR TAKEN FOR PURPOSES OF DELAY.

SECTION 3556. ORDER OF RESTITUTION

PROPOSED 18 U.S.C. 3556 CARRIES FORWARD BY CROSS-REFERENCE THE
RESTITUTION PROVISIONS ENACTED AS 18 U.S.C. 3579 AND 3580 BY SECTION 5(A)
OF THE VICTIM AND WITNESS PROTECTION ACT OF 1982, AND REDESIGNATED AS 18
REFERENCE HERE IN ORDER TO COMPLETE THE DESCRIPTION HC89 **86 **3269 OF
AVAILABLE CRIMINAL SENTENCES, AND TO SHOW HOW THE ORDER OF RESTITUTION
CAN BE USED IN CONJUNCTION WITH OTHER SENTENCES. THUS, PROPOSED 18
U.S.C. 3551(B) AND (C) MAKE CLEAR THAT AN ORDER OF RESTITUTION MAY BE
IMPOSED IN ADDITION TO ANY OTHER KIND OF SENTENCE. PROPOSED 28 U.S.C.
994(A)(2)(A) REQUIRES THAT THE UNITED STATES SENTENCING COMMISSION ISSUE
POLICY STATEMENTS CONCERNING THE APPROPRIATE USE OF ORDERS OF
RESTITUTION. FINALLY, PROPOSED 18 U.S.C. 3563(A)(2) REQUIRES THAT, IF A
PERSON CONVICTED OF A FELONY IS SENTENCED TO A TERM OF PROBATION, A
CONDITION OF THAT PROBATION MUST BE THAT HE PAY A FINE OR RESTITUTION, OR
PERFORM COMMUNITY SERVICE.

18 U.S.C. 3579(G), AS ENACTED BY SECTION 5(A) OF THE VICTIM AND WITNESS
PROTECTION ACT OF 1982 AND REDESIGNATED AS 18 U.S.C. 3663(G) BY THIS BILL,
REQUIRES THAT IF A DEFENDANT WHO IS ORDERED TO PAY RESTITUTION IS PLACED
ON PROBATION, THE PAYMENT OF RESTITUTION IS A CONDITION OF PROBATION.
FAILURE TO SATISFY THIS CONDITION WOULD BE A VIOLATION SUBJECT TO THE
PROVISIONS OF PROPOSED 18 U.S.C. 3565. AN ORDER OF RESTITUTION MAY ALSO
BE MADE A CONDITION OF A TERM OF SUPERVISED RELEASE IMPOSED TO FOLLOW A
TERM OF IMPRISONMENT PURSUANT TO PROPOSED 18 U.S.C. 3583(D). VIOLATIONS
OF SUCH A CONDITION OF POST-RELEASE SUPERVISION WOULD BE CONTEMPT OF
COURT.

SECTION 3557. REVIEW OF A SENTENCE

THIS SECTION, WHICH HAS NO COUNTERPART IN CURRENT LAW, REFERS TO THE
PROVISIONS IN PROPOSED 18 U.S.C. 3742, WHICH DEFINE THE CIRCUMSTANCES
AND PROCEDURES FOR REVIEW OF SENTENCES IMPOSED PURSUANT TO PROPOSED
18 U.S.C. 3551. THE SYSTEMATIZED GUIDELINE SENTENCING PROCEDURES
INTRODUCED BY THIS BILL ARE DESIGNED TO ELIMINATE FROM FEDERAL CRIMINAL
LAW THE/plainly disproportionate sentence. THE PROVISIONS FOR APPELLATE
JUDICIAL REVIEW OF SENTENCES IN SECTION 3742 ARE DESIGNED TO REDUCE
MATERIALLY ANY REMAINING UNWARRANTED DISPARITIES BY GIVING THE RIGHT TO
APPEAL A SENTENCE OUTSIDE THE GUIDELINES AND BY PROVIDING A MECHANISM
TO ASSURE THAT SENTENCES INSIDE THE GUIDELINES ARE BASED ON CORRECT APPLICATION OF THE GUIDELINES.

SECTION 3558. IMPLEMENTATION OF A SENTENCE

THIS SECTION SIMPLY CALLS ATTENTION TO THE PROVISIONS OF PROPOSED CHAPTER 229 OF TITLE 18, WHICH GOVERN THE IMPLEMENTATION OF SENTENCES IMPOSED PURSUANT TO SECTION 3551.

SECTION 3559. SENTENCING CLASSIFICATION OF OFFENSES

1. IN GENERAL

PROPOSED 18 U.S.C. 3559 DESCRIBES WHAT LETTER GRADE IN PROPOSED 18 U.S.C. 3581 WILL APPLY TO AN OFFENSE FOR WHICH NO LETTER GRADE IS OTHERWISE SPECIFIED. IT ALSO PROVIDES THAT THE MAXIMUM FINE IS THE FINE AUTHORIZED BY PROPOSED 18 U.S.C. 3571(B) OR BY THE STATUTE DESCRIPTION THE OFFENSE, WHICHEVER IS GREATER.

2. PRESENT FEDERAL LAW

THERE IS NO COUNTERPART FOR THIS PROVISION, SINCE CURRENT LAW CONTAINS NO SYSTEMATIC GRADING SCHEME FOR SENTENCES.

*87 **3270 3. PROVISIONS OF THE BILL, AS REPORTED

PROPOSED 18 U.S.C. 3559 DID NOT APPEAR IN S. 1437 AS PASSED BY THE SENATE IN THE 95TH CONGRESS. THAT BILL INSTEAD SPECIFIED THE APPLICABLE GRADE FOR EACH OFFENSE DEFINED IN TITLE 18 AND AMENDED EACH SECTION OUTSIDE TITLE 18 THAT DESCRIBED AN OFFENSE TO INDICATE THE SENTENCE GRADE THAT APPLIED TO THE OFFENSE. IN GENERAL THOSE AMENDMENTS SPECIFIED THAT AN OFFENSE OUTSIDE TITLE 18 HAD THE GRADE FOR WHICH THE PROPOSED CRIMINAL CODE SPECIFIED A MAXIMUM TERM OF IMPRISONMENT CLOSEST TO THAT FOR THE OFFENSE IN CURRENT LAW.

THE COMMITTEE HAS REEXAMINED THE DESIRABILITY OF AMENDING CURRENT LAW IN AN ATTEMPT TO CONFORM SENTENCING PROVISIONS TO THE GRADING SCHEME OF THE BILL, AND HAS DECIDED THAT A GENERAL PROVISION SUCH AS SECTION 3559 IS PREFERABLE AT THIS TIME. TO AMEND EACH INDIVIDUAL SECTION IMPLIES THAT THE COMMITTEE HAS GIVEN CAREFUL CONSIDERATION TO GRADING ALL EXISTING OFFENSES, WHEN, IN FACT, THIS HAS NOT BEEN THE CASE. INSTEAD, THE COMMITTEE HAS POSTPONED THE RESTRUCTURING OF FEDERAL OFFENSES ACCORDING TO THEIR RELATIVE SERIOUSNESS. THE SENTENCING COMMISSION WILL UNDOUBTEDLY HAVE RECOMMENDATIONS CONCERNING THE APPROPRIATE GRADES FOR OFFENSES AS IT DEVELOPS SENTENCING GUIDELINES. CURRENT MAXIMUM PENALTIES ARE SET AT VERY UNEVEN LEVELS, AND SOME ARE SO INCONSISTENT WITH THE RELATIVE SERIOUSNESS OF THE OFFENSE THAT THE SENTENCING COMMISSION WILL PROBABLY FIND IT NECESSARY TO RECOMMEND SOME AMENDMENTS BEFORE SENTENCING GUIDELINES ARE IN PLACE. THE COMMITTEE WILL WELCOME THE COMMISSION'S SUGGESTIONS.

TWO PRIMARY GOALS ARE ACHIEVED BY THIS SECTION. THE FIRST CLARIFIES THE APPLICABILITY OF THE VARIOUS SENTENCING PROVISIONS IN TITLE 18 BY INDICATING HOW THE NEW GRADING SCHEME WILL APPLY TO EXISTING OFFENSES
UNTIL THEY ARE GRADED BY LEGISLATION. THE SECOND SUBSTANTIALLY INCREASES MAXIMUM FINE LEVELS FOR MOST OFFENSES. SECTION 3559 ACHIEVES THESE GOALS IN A SIMPLE FASHION WITHOUT IMPLYING THAT SENTENCES HAVE BEEN RATIONALIZED -- A STEP WHICH THE COMMITTEE BELIEVES SHOULD BE UNDERTAKEN WITH THE ASSISTANCE OF THE DEPARTMENT OF JUSTICE, THE UNITED STATES SENTENCING COMMISSION, AND OTHER INTERESTED AGENCIES, AFTER PASSAGE OF THIS BILL. NOT ONLY ARE THERE TOO MANY CRIMINAL OFFENSES, AND LITTLE RATIONALITY IN THE SENTENCES PROVIDED FOR THOSE OFFENSES, BUT THERE IS ALSO NO CLEAR LINE BETWEEN THE USE OF CIVIL AND CRIMINAL SANCTIONS FOR ESSENTIALLY REGULATORY OFFENSES. SECTION 3559(A) GRADES OFFENSES FOR WHICH NO LETTER GRADE IS PROVIDED ACCORDING TO THE MAXIMUM TERM OF IMPRISONMENT APPLICABLE TO THE OFFENSE. SECTION 3559(B) STATES THAT THE SENTENCE FOR AN OFFENSE GRADED ACCORDING TO SUBSECTION (A) HAS THE ATTRIBUTES OF ANY OTHER SENTENCE WITH THAT GRADE UNDER THE BILL WITH ONE EXCEPTION: THE FINE MAY NOT EXCEED THE MAXIMUM FINE AUTHORIZED BY THE BILL OR THE STATUTE THAT DESCRIBES THE OFFENSE, WHICHERVER IS HIGHER. THUS, SECTION 3559 WILL OFTEN HAVE THE EFFECT OF INCREASING THE MAXIMUM FINE PROVIDED IN CURRENT LAW, BUT NEVER OF LOWERING IT.

THE COMMITTEE INTENDS THAT FUTURE LEGISLATION CREATING NEW FEDERAL OFFENSES SPECIFY THE GRADE FOR THE OFFENSE. IT ENCOURAGES THE COMMITTEES WITH OTHER SUBSTANTIVE JURISDICTION TO CONSULT WITH THIS COMMITTEE AND THE DEPARTMENT OF JUSTICE IN DETERMINING THE APPROPRIATE GRADE FOR OFFENSES. THE COMMITTEE IS AWARE, HOWEVER, THAT FUTURE LEGISLATION MAY BE PASSED THAT INADVERTENTLY FAILS TO TAKE THESE STEPS. ACCORDINGLY, SECTION 3559 WILL CLARIFY QUESTIONS THAT MIGHT OTHERWISE ARISE AS TO THE APPLICABILITY OF THE GENERAL FEDERAL SENTENCING LAW TO THE NEW OFFENSE.

SUBCHAPTER B-- PROBATION

(SECTIONS 3561-3566)

THIS SUBCHAPTER GOVERNS THE IMPOSITION, CONDITIONS, AND POSSIBLE REVOCATION OF A SENTENCE TO A TERM OF PROBATION. IN KEEPING WITH MODERN CRIMINAL JUSTICE PHILOSOPHY, PROBATION, IS DESCRIBED AS A FORM OF SENTENCE RATHER THAN, AS IN CURRENT LAW, A SUSPENSION OF THE IMPOSITION OR EXECUTION OF SENTENCE.

SECTION 3561. SENTENCE OF PROBATION

1. IN GENERAL

PROPOSED 18 U.S.C. 3561 AUTHORIZES THE IMPOSITION OF A SENTENCE TO A TERM OF PROBATION IN ALL CASES, UNLESS THE CASE INVOLVES A CLASS A OR B FELONY OR AN OFFENSE FOR WHICH PROBATION HAS BEEN EXPRESSLY PRECLUDED, OR THE DEFENDANT IS SENTENCED AT THE SAME TIME TO A TERM OF IMPRISONMENT FOR THE SAME OR A DIFFERENT OFFENSE. THE SECTION ALSO SPECIFIES THE MAXIMUM PERMISSIBLE TERMS OF PROBATION AND SPECIFIES A MINIMUM OF ONE YEAR'S PROBATION FOR A CONVICTED FELONY. SEPARATE TERMS ARE SET FORTH FOR FELONIES (NOT LESS THAN ONE NOR MORE THAN FIVE YEARS), MISDEMEANORS (NOT MORE THAN TWO YEARS), AND INFRACTIONS (NOT MORE THAN ONE YEAR).
2. PRESENT FEDERAL LAW

18 U.S.C. 3651 authorizes the court to suspend the imposition or execution of the sentence of a person convicted of an offense, other than one punishable by death or life imprisonment, and place the person on probation. [FN315] The maximum term of probation, including any extension, is five years for any offense. The section also provides that, if an offense is punishable by more than six months in prison but is not punishable by death or life imprisonment, the judge may impose a sentence split between imprisonment and probation. Such a split sentence must be for a term in excess of six months, with no more than six months spent in prison, and with the remainder suspended and the defendant placed on probation. A few statutes, such as 18 U.S.C. 924(c), provide that an offender convicted of a particular offense may not be placed on probation.

3. PROVISIONS OF THE BILL, AS REPORTED

Proposed 18 U.S.C. 3561, unlike current law, states that probation is a type of sentence rather than a suspension of the imposition or execution of a sentence. Section 3561(A) specifies that a term of probation may be imposed except in three instances.

First, subsection (A)(1) excludes class A and class B felony offenders from receiving a sentence of probation, thus excluding, as does present law, those offenders subject to a penalty of life imprisonment or death. The section goes beyond current law by also precluding a sentence of probation for those convicted of an offense with a maximum authorized prison term, pursuant to Sec. 3581(B)(2), of not more than 25 years. Second, under subsection (A)(2), probation is unavailable to an offender who is convicted of an offense for which the imposition of a sentence of probation is specifically precluded.

Third, subsection (A)(3) differs from the provision of 18 U.S.C. 3651 that permits a sentence to be split between a term of imprisonment and a suspended sentence with probation [FN317] by specifically barring a sentence to probation in a case in which a defendant has been sentenced at the same time to a term of imprisonment either for the same offense or for a different offense. The same result may be achieved by a more direct and logically consistent route—under sections 3581 and 3583, the court may provide that the convicted defendant serve a term of imprisonment followed by a term of supervised release. The provision will permit latitude in the specification of the time to be spent in the custody of the Bureau of Prisons and in the nature of the facility. It will also be more flexible than current law in permitting a sentence to imprisonment of any permissible length to be followed by a term during which the defendant receives street supervision. The committee is of the opinion that this flexibility will permit the court to formulate a sentence best suited to the individual needs of the defendant. For example, a convicted defendant could in an appropriate case be required to spend the first three months in prison, followed by two years of street supervision, or could be sentenced to spend two years in prison followed by six months' street supervision. If, instead, the judge believes that full-time incarceration of a convicted defendant is not appropriate but is concerned that the defendant needs more supervision than is generally available to a person on street supervision, he can
SENTENCE HIM TO PROBATION ON THE CONDITION THAT HE SPEND EVENINGS OR WEEKENDS IN PRISON AS A CONDITION OF PROBATION (SECTION 3563(B)(11)) OR LIVE IN A COMMUNITY CORRECTIONS FACILITY DURING PART OF HIS TERM OF PROBATION (SECTION 3563(B)(2)). SUCH PROVISION WOULD PERMIT THE DEFENDANT TO CONTINUE EMPLOYMENT AND HIS CONTACTS WITH HIS FAMILY AND COMMUNITY.

A MAJOR DISTINCTION BETWEEN THE PROPOSED SECTION AND EXISTING LAW IS THE MAXIMUM TERM OF PROBATION AUTHORIZED FOR AN OFFENSE. 18 U.S.C. 3651 PROVIDES A TERM OF PROBATION OF UP TO FIVE YEARS WITHOUT REGARD TO THE SERIOUSNESS OF THE OFFENSE. SECTION 3561(B), ON THE OTHER HAND, PROVIDES FOR DIFFERING TERMS DEPENDING ON THE SERIOUSNESS OF THE VIOLATION. WHEN THE OFFENSE IS A FELONY THERE IS A MINIMUM TERM OF ONE YEAR AND A MAXIMUM OF FIVE YEARS. A MISDEMEANOR CONVICTION MAY LEAD TO A TERM OF PROBATION OF UP TO FIVE YEARS WITH NO REQUIRED MINIMUM. AN INFRACTION MAY RESULT IN UP TO ONE YEAR'S PROBATION, AGAIN WITH NO MINIMUM. [FN318]

WHILE THE COMMITTEE IS GENERALLY OPPOSED TO STATUTORY MINIMUM SENTENCES, IT BELIEVES THAT A CONVICTED FELON WHO IS SENTENCED TO PROBATION RATHER THAN TO A TERM OF IMPRISONMENT SHOULD BE SUBJECT TO THE JURISDICTION OF THE COURT FOR A PERIOD OF AT LEAST A YEAR. REQUIRING THIS MINIMUM PROBATIONARY PERIOD WILL ASSURE THAT HE IS ABLE TO COMPLY WITH THE LAW FOR THAT PERIOD AND THAT HE WILL BE SUBJECT TO AT LEAST ONE OTHER CONDITION SET FORTH IN SECTION 3563(A)(2).

THE SECTION, LIKE CURRENT LAW, CREATES NO PRESUMPTION FOR OR AGAINST PROBATION. THE COMMITTEE BELIEVES THAT THE SENTENCING GUIDELINES CAN MORE ADEQUATELY DELINEATE THOSE CASES IN WHICH A TERM OF PROBATION IS PREFERABLE TO A TERM OF IMPRISONMENT, OR VICE VERSA, AS A MEANS OF ACHIEVING THE PURPOSES OF SENTENCING SET FORTH IN SECTION 3553(A)(2).

SECTION 3562. IMPOSITION OF A SENTENCE OF PROBATION

1. IN GENERAL

SECTION 3562 SETS FORTH THE CRITERIA TO BE CONSIDERED BY THE COURT IN DETERMINING WHETHER TO IMPOSE A SENTENCE OF PROBATION AND IN DETERMINING THE LENGTH OF THE TERM AND THE CONDITIONS OF PROBATION. IT ALSO MAKES CLEAR THAT, DESPITE THE SUSCEPTIBILITY OF A TERM OF PROBATION TO MODIFICATION, REVOCATION, OR APPEAL, A JUDGMENT OF CRIMINAL CONVICTION THAT INCLUDES SUCH A SENTENCE CONSTITUTES A FINAL JUDGMENT FOR ALL OTHER PURPOSES.

2. PRESENT FEDERAL LAW


WHILE THE STATUTORY LAW IS SILENT ON THE SUBJECT OF THE FINALITY OF A JUDGMENT THAT INCLUDES PROBATION, THE COURTS HAVE HELD THAT SUCH A JUDGMENT, WHETHER IT SUSPENDS EXECUTION OF THE SENTENCE OR SUSPENDS
IMPOSITION OF SENTENCE, CONSTITUTES A FINAL JUDGMENT FOR PURPOSES OF
APPEAL FROM CONVICTION. [FN322] THEY HAVE ALSO HELD THAT THE COURTS MAY
NOT SUSPEND IMPOSITION OR EXECUTION OF SENTENCE UNLESS THEY PLACE THE
CONVICTED OFFENDER ON PROBATION. [FN323]

*91 **3274 3. PROVISIONS OF THE BILL, AS REPORTED

PROPOSED 18 U.S.C. 3562 REQUIRES THAT THE JUDGE, IN DETERMINING WHETHER
TO IMPOSE A SENTENCE TO A TERM OF PROBATION UPON AN ORGANIZATION OR AN
INDIVIDUAL, AND IN SETTING THE TERM AND CONDITIONS OF ANY SENTENCE TO
PROBATION THAT IS IMPOSED, CONSIDER THE FACTORS SET FORTH IN SECTION
3553(A) TO THE EXTENT THAT THEY ARE APPLICABLE. IN THE ABSTRACT, THE
FACTORS REQUIRED TO BE CONSIDERED CREATE NO PRESUMPTION EITHER FOR OR
AGAINST PROBATION. THEY ARE SET OUT MERELY TO MAKE MORE SPECIFIC THE
CONSIDERATIONS TRADITIONALLY TAKEN INTO ACCOUNT BY THE COURTS UNDER
THE BROAD LANGUAGE OF 18 U.S.C. 3651 AND TO ASSURE THEIR BEING GIVEN
APPROPRIATE WEIGHT IN ALL CASES. THEY ARE DESIGNED TO ASSIST THE COURT IN
EXERCISING ITS DISCRETION REASONABLY.
THE EFFECT OF THESE CONSIDERATIONS IS TO REQUIRE THE COURT TO FOCUS
CAREFULLY UPON THE NEEDS OF THE DEFENDANT AND THE NEEDS OF SOCIETY.
THOSE WHO EMPHASIZE THE REHABILITATIVE PURPOSE OF SENTENCING TO THE
EXCLUSION OF OTHER PURPOSES HAVE SUPPORTED THE VIEW THAT PROBATION
SHOULD BE THE SENTENCE OF PREFERENCE. [FN324] OTHERS WHO WOULD
EMPHASIZE THE NECESSITY OF PROVIDING EFFECTIVE DETERRENCE TO CRIMINAL
CONDUCT AND TO INSURE JUST PUNISHMENT OF OFFENDERS IN A TIME OF RAPIDLY
RISING CRIME RATES HAVE SUGGESTED THAT THERE SHOULD BE A PRESUMPTION
AGAINST THE UTILIZATION OF THE SENTENCE OF PROBATION FOR SOME OF THE
MOST SERIOUS OFFENSES BY CALLING FOR MANDATORY MINIMUM PRISON TERMS.
THERE IS NO DOUBT THAT IMPRISONMENT, WHEN COMPARED WITH PROBATION, IS
MORE EFFECTIVE AS PUNISHMENT, IS MORE READILY PERCEIVED BY THE PUBLIC AS
A DETERRENT, AND IS CLEARLY THE MOST EFFECTIVE MEANS OF INCAPACITATION
FOR PROTECTION OF THE PUBLIC. ON THE OTHER HAND WHEN THE PURPOSE OF
SENTENCING IS TO PROVIDE THE EDUCATIONAL OPPORTUNITY, VOCATIONAL
TRAINING, OR OTHER CORRECTIONAL TREATMENT REQUIRED FOR REHABILITATION,
GIVEN THE CURRENT STATE OF KNOWLEDGE, PROBATION IS GENERALLY
CONSIDERED TO BE PREFERABLE TO IMPRISONMENT. THIS DOES NOT MEAN,
HOWEVER, THAT IT IS NOT POSSIBLE TO FORMULATE CONDITIONS OF PROBATION
THAT WILL SERVE DETERRENT AND PUNISHMENT PURPOSES-- OR EVEN LIMITED
INCAPACITATIVE PURPOSES-- IN AN APPROPRIATE CASE. THUS, THE COMMITTEE
FEELS THAT THE BEST COURSE IS TO PROVIDE NO PRESUMPTION EITHER FOR OR
AGAINST PROBATION AS OPPOSED TO IMPRISONMENT, BUT TO ALLOW THE
SENTENCING COMMISSION AND, UNDER ITS GUIDELINES, THE COURTS, THE FULL
EXERCISE OF INFORMED DISCRETION IN TAILORING SENTENCES TO THE
CIRCUMSTANCES OF INDIVIDUAL CASES.
IN A PARTICULAR CASE, THE REQUIRED consideration OF THE PURPOSES OF
SENTENCING AND OF THE SENTENCING GUIDELINES AND POLICY STATEMENTS
ISSUED PURSUANT TO 28 U.S.C. 994(A) SHOULD SERVE TO SHARPEN THE COURT'S
FOCUS ON ALL MATTERS PERTINENT TO ITS DECISION. THE COMMITTEE IS OF THE
VIEW THAT IN THE PAST THERE HAVE BEEN MANY CASES, PARTICULARLY IN
INstances OF MAJOR WHITE COLLAR CRIME, IN WHICH PROBATION HAS BEEN
GRANTED BECAUSE THE OFFENDER REQUIRED LITTLE OR NOTHING IN THE WAY OF
INSTITUTIONALIZED REHABILITATIVE MEASURES AND BEING IN THE WAY OF
INSTITUTIONALIZED REHABILITATIVE MEASURES AND BECAUSE SOCIETY REQUIRED
NO INSULATION FROM THE OFFENDER, WITHOUT DUE CONSIDERATION BEING GIVEN
TO THE FACT THAT THE HEIGHTENED DETERRENT *92 **3275 EFFECT OF
INCARCERATION AND THE READILY PERCEIVABLE RECEIPT OF JUST PUNISHMENT ACCORDED BY INCARCERATION WERE OF CRITICAL IMPORTANCE. THE PLACING ON PROBATION OF AN EMBEZZLER, A CONFIDENCE MAN, A CORRUPT POLITICIAN, A BUSINESSMAN WHO HAS REPEATEDLY VIOLATED REGULATORY LAWS, AN OPERATOR OF A PYRAMID SALES SCHEME, OR A TAX VIOLATOR, MAY BE PERFECTLY APPROPRIATE IN CASES IN WHICH, UNDER ALL THE CIRCUMSTANCES, ONLY THE REHABILITATIVE NEEDS OF THE OFFENDER ARE PERTINENT; SUCH A SENTENCE MAY BE GROSSLY INAPPROPRIATE, HOWEVER, IN CASES IN WHICH THE CIRCUMSTANCES MANDATE THE SENTENCE'S CARRYING SUBSTANTIAL DETERRENT OR PUNITIVE IMPACT. THIS IS NOT MEANT TO IMPLY THAT THE COMMITTEE CONSIDERS A SENTENCE OF IMPRISONMENT TO BE THE ONLY FORM OF SENTENCE THAT MAY EFFECTIVELY CARRY DETERRENT OR PUNITIVE WEIGHT. IT MAY very OFTEN BE THAT RELEASE ON PROBATION UNDER CONDITIONS DESIGNED TO FIT THE PARTICULAR SITUATION WILL ADEQUATELY SATISFY ANY APPROPRIATE DETERRENT OR PUNITIVE PURPOSE. [FN325] THIS IS PARTICULARLY TRUE IN LIGHT OF THE NEW REQUIREMENT IN SECTION 3563(A) THAT A CONVICTED FELON WHO IS PLACED ON PROBATION MUST BE ORDERED TO PAY A FINE OR RESTITUTION OR TO ENGAGE IN COMMUNITY SERVICE; HE CANNOT SIMPLY BE RELEASED ON PROBATION WITH NO MEANINGFUL SANCTION. SIMILARLY, THE COMMITTEE EXPECTS THAT IN SITUATIONS IN WHICH REHABILITATION IS THE ONLY APPROPRIATE PURPOSE OF SENTENCING, THAT PURPOSE ORDINARILY MAY BE BEST SERVED BY RELEASE ON PROBATION SUBJECT TO CERTAIN CONDITIONS. IN SUM, THE PRESENCE OF THE SAME PREDOMINANT REASON FOR IMPOSING A SENTENCE IN DIFFERENT CASES WILL NOT ALWAYS LEAD LOGICALLY TO THE SAME TYPE OF SENTENCE. A CONGRESSIONAL STATEMENT OF A PREFERRED TYPE OF SENTENCE MIGHT SERVE ONLY TO UNDERMINE THE FLEXIBILITY THAT THE CRIMINAL JUSTICE SYSTEM REQUIRES IN ORDER TO DETERMINE THE APPROPRIATE SENTENCE IN A PARTICULAR CASE IN THE LIGHT OF INCREASED KNOWLEDGE OF HUMAN BEHAVIOR.

THE COMMITTEE IS ALSO MINDFUL THAT DURING A PERIOD IN WHICH THE INCIDENCE OF A PARTICULAR KIND OF CRIME IS INCREASING RAPIDLY, IT MAY BE ENTIRELY APPROPRIATE FOR THE COURT TO GIVE PARAMOUNT EMPHASIS TO THE DETERRENT PURPOSE OF SENTENCING. CONVERSELY, IN A SITUATION INVOLVING AN OFFENSE OF LITTLE NOTORIETY THAT IS NOT FREQUENTLY COMMITTED AND THAT IS COMMITTED UNDER CIRCUMSTANCES INDICATING LITTLE LIKELIHOOD OF RECIDIVISM, THE SINGULAR SIGNIFICANCE OF THE REHABILITATIVE PURPOSE OF SENTENCING MAY WELL ALMOST MANDATE A SENTENCE TO PROBATION. IN ALL CASES, THE SECTION'S CONCENTRATION OF ATTENTION UPON THE AIMS OF THE CRIMINAL JUSTICE SYSTEM IS DESIGNED TO ENCOURAGE THE INTELLIGENT BALANCING OF OFTEN COMPETING CONSIDERATIONS.


*93 **3276* THE LANGUAGE OF SECTION 3562(B) IS INTENDED TO CODIFY CURRENT JUDICIAL DECISIONS WHICH HOLD THAT JUDGMENTS IMPOSING PROBATION ARE FINAL JUDGMENTS FOR ALL PURPOSES, PARTICULARLY FOR PURPOSES OF APPEAL, EVEN THOUGH THE SENTENCE IS SUBJECT TO COMPLIANCE WITH SPECIFIED CONDITIONS, IS REVOCABLE FOR NONCOMPLIANCE WITH THOSE CONDITIONS, [FN326] AND IS SUBJECT TO MODIFICATION, EXTENSION, OR EARLY TERMINATION IN CERTAIN SITUATIONS. [FN327] THE LANGUAGE OF SECTION 3562(B)(3) IS INTENDED TO MAKE CLEAR THAT A SENTENCE THAT MAY BE APPEALED
SECTION 3563. CONDITIONS OF PROBATION

1. IN GENERAL

PROPOSED 18 U.S.C. 3563(A) SETS FORTH MANDATORY CONDITIONS OF PROBATION. IT SPECIFIES THAT THE COURT MUST PROVIDE-- AS A CONDITION OF PROBATION FOR A DEFENDANT CONVICTED OF ANY FEDERAL OFFENSE-- THAT THE DEFENDANT NOT COMMIT ANOTHER FEDERAL, STATE, OR LOCAL CRIME DURING THE TERM OF PROBATION, AND-- AS A CONDITION OF PROBATION FOR A DEFENDANT CONVICTED OF A FELONY-- THAT THE DEFENDANT PAY A FINE OR RESTITUTION, OR ENGAGE IN COMMUNITY SERVICE.

PROPOSED 18 U.S.C. 3563(B) SETS OUT OPTIONAL CONDITIONS WHICH MAY BE IMPOSED, THE LAST OF WHICH MAKES CLEAR THAT THE ENUMERATION IS SUGGESTIVE ONLY, AND NOT INTENDED AS A LIMITATION ON THE COURT'S AUTHORITY TO CONSIDER AND IMPOSE ANY OTHER APPROPRIATE CONDITIONS. PROPOSED 18 U.S.C. 3563(C) PERMITS THE COURT, AFTER A HEARING, TO MODIFY OR ENLARGE THE CONDITIONS DURING THE TERM OF PROBATION, PURSUANT TO THE PROVISIONS APPLICABLE TO THE INITIAL SETTING OF THE CONDITIONS OF PROBATION.

PROPOSED 18 U.S.C. 3563(D) REQUIRES THAT THE DEFENDANT BE PROVIDED WITH A WRITTEN STATEMENT CLEARLY SETTING OUT ALL THE CONDITIONS OF THE SENTENCE OF PROBATION.

2. PRESENT FEDERAL LAW


3. PROVISIONS OF THE BILL, AS REPORTED

PROPOSED 18 U.S.C. 3563(A) GOES BEYOND THE PROVISIONS OF CURRENT LAW IN REQUIRING THAT THE COURT IMPOSE ONE MANDATORY CONDITION OF PROBATION ON AN OFFENDER CONVICTED OF A MISDEMEANOR OR AN INFRACTION, AND TWO MANDATORY CONDITIONS ON AN OFFENDER CONVICTED OF A FELONY.

UNDER SUBSECTION (A)(1), THE COURT IS REQUIRED TO PROVIDE AS A CONDITION
OF PROBATION FOR ANY OFFENSE THAT THE DEFENDANT NOT COMMIT ANOTHER CRIME DURING THE TERM OF PROBATION. [FN330] IT SHOULD BE EMPHASIZED, HOWEVER, THAT THIS IS THE ONLY MANDATORY CONDITION OF PROBATION FOR AN OFFENDER CONVICTED OF A MISDEMEANOR OR AN INFRACTION. THE COURT IS NOT REQUIRED, FOR EXAMPLE, TO SPECIFY AS A CONDITION OF PROBATION EVEN THAT THE OFFENDER REPORT REGULARLY TO A PROBATION OFFICER SINCE IS SOME CASES THE COURT MAY CONCLUDE THAT UNSUPERVISED PROBATION IS APPROPRIATE. [FN331]

UNDER SUBSECTION (A)(2), THE COURT IS ALSO REQUIRED TO IMPOSE ON A CONVICTED FELON WHO IS SENTENCED TO A TERM OF PROBATION A CONDITION THAT HE PAY A FINE OR RESTITUTION, [FN332] OR THAT HE ENGAGE IN COMMUNITY SERVICE. THIS REQUIREMENT ASSURES THAT A CONVICTED FELON WILL RECEIVE A PUBLICLY DISCERNIBLE PENALTY EVEN IF THE CIRCUMSTANCES OF THE OFFENSE DO NOT JUSTIFY A TERM OF IMPRISONMENT. IT ALSO ASSURES THAT THE SENTENCE WILL BE FASHIONED TO SERVE DETERRENT OR PUNISHMENT PURPOSES AS WELL AS REHABILITATIVE PURPOSES IN APPROPRIATE CASES. (THE COURT MAY IN APPROPRIATE CASES IMPOSE A COMBINATION OF THE CONDITIONS DESCRIBED IN SUBSECTION (A)(2).)


IN ADDITION, UNDER SECTION 3562(A), THE POLICY STATEMENTS AND SENTENCING GUIDELINES PROMULGATED BY THE SENTENCING COMMISSION WOULD BE CONSIDERED IN DETERMINING THE CONDITIONS OF PROBATION. MOST OF THE CONDITIONS SET FORTH IN SECTION 3563(B) HAVE BEEN USED AND SANCTIONED IN APPROPRIATE CASES UNDER *95 **3278 THE CURRENT STATUTE. [FN333] THE LIST IS NOT EXHAUSTIVE, AND IT IS NOT INTENDED AT ALL TO LIMIT THE COURT'S OPTIONS-- CONDITIONS OF A NATURE VERY SIMILAR TO, OR VERY DIFFERENT FROM, THOSE SET FORTH MAY ALSO BE IMPOSED. ON THE OTHER HAND, EXCEPT AS PROVIDED IN SUBSECTION (A), NONE OF THE CONDITIONS LISTED IN THE SUBSECTION IS REQUIRED TO BE IMPOSED. THE CONDITIONS, MANY OF WHICH CLOSELY FOLLOW THE PROPOSALS OF THE NATIONAL COMMISSION, [FN334] ARE SIMPLY DESIGNED TO PROVIDE THE TRIAL COURT WITH A SUGGESTED LISTING OF SOME OF THE AVAILABLE ALTERNATIVES WHICH MIGHT BE DESIRABLE IN THE SENTENCING OF A PARTICULAR OFFENDER. [FN335] IT IS ANTICIPATED THAT, IN DETERMINING THE CONDITIONS UPON WHICH A DEFENDANT'S PROBATION IS TO BE DEPENDENT, THE COURT WILL REVIEW THE LISTED EXAMPLES IN LIGHT OF THE SENTENCING COMMISSION'S GUIDELINES AND POLICY STATEMENTS, WEIGH OTHER POSSIBILITIES SUGGESTED BY THE CASE, AND, AFTER EVALUATION, IMPOSE THOSE THAT APPEAR TO BE APPROPRIATE UNDER ALL THE CIRCUMSTANCES. IT IS CERTAINLY NOT INTENDED THAT ALL THE CONDITIONS SUGGESTED IN SUBSECTION (B) BE USED FOR EVERY DEFENDANT, BUT RATHER THAT CONDITIONS BE TAILED TO EACH DEFENDANT TO CARRY OUT THE PURPOSES OF PROBATION IN HIS CASE. IN ADDITION, THE COURT MAY NOT IMPOSE A CONDITION OF PROBATION WHICH RESULTS IN A DEPRIVATION OF LIBERTY FOR THE DEFENDANT UNLESS THAT DEPRIVATION IS 'REASONABLY NECESSARY' TO CARRY OUT THE PURPOSES OF THE SENTENCE.

PARAGRAPH (1) CARRIES FORWARD THE DISCRETIONARY PROBATION CONDITION IN CURRENT LAW THAT REQUIRES THE DEFENDANT TO SUPPORT HIS DEPENDENTS AND EXPANDS THE CONDITION TO PERMIT THE COURT TO ORDER IN APPROPRIATE CASES THAT THE DEFENDANT MEET OTHER FAMILY RESPONSIBILITIES.

PARAGRAPH (2) CARRIES FORWARD CURRENT LAW IN PERMITTING THE IMPOSITION
OF A CONDITION OF PROBATION REQUIRING PAYMENT OF A FINE, THUS MAKING THE
RECALCITRANT OFFENDER FACE THE POSSIBILITY OF A SUMMARY INCREASE IN
PUNISHMENT FOR SUCH A PROBATION VIOLATION, AS OPPOSED TO LEAVING HIM TO
FACE ONLY THE NORMAL FINE COLLECTION PROCEDURES. OF COURSE, AS PROVIDED
BY SECTION 3572(A), THE FINE MAY BE NOT SET SO HIGH THAT THE DEFENDANT,
ACTING IN GOOD FAITH, IS UNABLE TO PAY IT. A FINE MAY BE IMPOSED BOTH AS A
SEPARATE SENTENCE AND AS A CONDITION OF PROBATION. IT ALSO MAY BE
IMPOSED PURSUANT TO SUBSECTION (A)(2) AS A MANDATORY CONDITION OF
PROBATION ON A CONVICTED FELON INSTEAD OF OR IN ADDITION TO A CONDITION
ORDERING PAYMENT OF RESTITUTION OR COMMUNITY SERVICE.
PARAGRAPH (3) CARRIES FORWARD THE CURRENT LAW PROVISION PERMITTING
IMPOSITION OF A CONDITION THAT THE DEFENDANT BE REQUIRED TO MAKE
RESTITUTION TO A VICTIM. IF A PERSON PLACED ON PROBATION IS ORDERED TO
MAKE RESTITUTION, THAT ORDER AUTOMATICALLY BECOMES A CONDITION OF
PROBATION. [FN336] THE COURT COULD IN AN APPROPRIATE CASE ORDER *96
**3279 RESTITUTION NOT COVERED BY PARAGRAPH (B)(3) (AND SECTION 3556)
UNDER THE GENERAL PROVISIONS OF SUBSECTION (B)(20). IN A CASE INVOLVING
BODILY INJURY, FOR EXAMPLE, RESTITUTION AS A CONDITION OF PROBATION NEED
NOT NECESSARILY BE LIMITED TO MEDICAL EXPENSES. THE DEFENDANT IN A
PARTICULAR CASE MAY HAVE AN INTEREST IN SATISFYING SUCH A CONDITION IF IT
WILL CAUSE THE COURT TO FOREGO SENTENCING HIM TO A TERM OF
IMPRISONMENT. THE COURT MAY ALSO CHOOSE TO IMPOSE A REQUIREMENT OF
PAYMENT OF RESTITUTION AS THE MANDATORY CONDITION OF PROBATION HE MUST
IMPOSE PURSUANT TO SUBSECTION (A)(2).
PARAGRAPH (4) PERMITS THE JUDGE TO REQUIRE THAT THE DEFENDANT GIVE
NOTICE OF HIS CONVICTION TO VICTIMS OF THE OFFENSE IN ACCORD WITH THE
PROVISIONS OF SECTION 3555. AN ORDER OF NOTICE MAY BE BOTH A SEPARATE
SENTENCE AND A CONDITION OF PROBATION. MAKING AN ORDER OF NOTICE A
CONDITION OF PROBATION GIVES THE COURT THE POSSIBILITY OR REVOCATION OF
PROBATION AS AN ENFORCEMENT TOOL FOR VIOLATION OF THE CONDITION.
PARAGRAPH (5) PERMITS THE JUDGE TO ORDER AS A CONDITION OF PROBATION
THAT THE DEFENDANT WORK CONSCIENTIOUSLY AT SUITABLE EMPLOYMENT OR
CONSCIENTIOUSLY PURSUE A COURSE OF STUDY OR VOCATIONAL TRAINING THAT
WILL EQUIP HIM FOR SUITABLE EMPLOYMENT. WHEN COMBINED WITH OTHER
APPROPRIATE CONDITIONS, THIS CONDITION MIGHT ENABLE THE COURT TO AVOID
SENDING TO PRISON SOME DEFENDANTS WHO MIGHT OTHERWISE BE
INCARCERATED. FOR EXAMPLE, A JUDGE MIGHT DEVISE A PROBATION PROGRAM FOR
A NON-DANGEROUS DEFENDANT WHEREBY HE SPEND EVENINGS OR WEEKENDS IN
PRISON OR LIVE IN A COMMUNITY CORRECTIONS FACILITY, AND WORK OR GO TO
SCHOOL DURING THE DAY. PARAGRAPH (6) SUGGESTS THE CONDITION THAT AN
INDIVIDUAL DEFENDANT REFRAIN FROM ENGAGING IN A SPECIFIC OCCUPATION,
BUSINESS, OR PROFESSION, OR THAT EITHER AN INDIVIDUAL OR ORGANIZATION
OFFENDER ENGAGE IN A SPECIFIED OCCUPATION, BUSINESS, OR PROFESSION ONLY
TO A STATED DEGREE OR UNDER SPECIFIED CIRCUMSTANCES. THE CONDITION MAY
BE IMPOSED ONLY IF THE OCCUPATION, BUSINESS, OR PROFESSION BEARS A
REASONABLY DIRECT RELATIONSHIP TO THE NATURE OF THE OFFENSE. THUS A
BANK TELLER WHO EMBEZZLES BANK FUNDS MIGHT BE REQUIRED NOT TO ENGAGE
IN AN OCCUPATION INVOLVING THE HANDLING OF FUNDS IN A FIDUCIARY
CAPACITY. [FN337] SIMILARLY, AN ORGANIZATION CONVICTED OF EXECUTING A
FRAUDULENT SCHEME MIGHT BE DIRECTED TO OPERATE THAT PART OF THE
BUSINESS IN A MANNER THAT WAS NOT FRAUDULENT. THE COMMITTEE RECOGNIZES
THE HARDSHIP THAT CAN FLOW FROM PREVENTING A PERSON FROM ENGAGING IN A
SPECIFIC OCCUPATION, BUSINESS, OR PROFESSION, PARTICULARLY FOR THOSE
ACTIVITIES REQUIRING MANY YEARS OF EDUCATION AND EXPERIENCE. THIS
PARTicular CONDITION OF PROBATION SHOULD ONLY BE USED AS REASONABLY
NECESSARY TO PROTECT THE PUBLIC. IT SHOULD NOT BE USED AS REASONABLY
NECESSARY TO PROTECT THE PUBLIC. IT SHOULD NOT BE USED AS A MEANS OF
PUNISHING THE CONVICTED PERSON. INsofar as this paragraph might be used
to disqualify a person from holding a management position in an
organization, the committee emphasizes that, absent some other
relationship between the position held and the nature of the offense,
such a disqualification must bear a reasonable relationship to an abuse
of the management position for a criminal purpose. Paragraph (6) is
intended to be used to preclude the continuation or repetition of
illegal activities while avoiding a *97 **3280 bar from employment that
exceeds that needed to achieve that result. The committee has modified
paragraph (6) from the language in S. 1437 as passed by the Senate in the
95th Congress. The provision had originally been cast in terms of
ordering an organization, as well as an individual, to refrain from
engaging in a particular occupation, business, or profession. Because
of business concerns that the listing of the conditions might
encourage inappropriate use to put a legitimate enterprise out of
business, that part of the provision has been modified to relate only to
individual offenders. This deletion should not be construed to
preclude the imposition of appropriate conditions designed to stop the
continuation of a fraudulent business in the unusual case in which a
business enterprise consistently operates outside the law.
Paragraph (7) allows the court to require the offender to refrain from
frequenting specified kinds of places or from associating
unnecessarily with specified persons. [FN338] As in the case with the
other discretionary conditions of probation listed in section 3563, the
conditions suggested by this paragraph would have to be tailored to
the particular circumstances of the defendant. For example, if the
defendant were a convicted drug trafficker, it might ordinarily make
sense to condition his probation upon his avoidance of other known
drug traffickers, but if he were to be employed during the period of his
probation by a business that makes a practice of hiring former
offenders, the application of such a condition would have to be
designed to avoid any suggestion that the defendant could not engage
in necessary occupational associations with his coworkers.
Paragraph (8) permits the court to require as a condition of probation
that the defendant refrain from the excessive use of alcohol and from
any use of narcotic drugs or other controlled substances without a
prescription from a licensed medical practitioner. It is not intended
that this condition of probation be imposed on a person with no history
of excessive use of alcohol or any illegal use of a narcotic drug or
controlled substance. To do so would be an unwarranted departure
from the principle that conditions of probation should be reasonably
related to the general sentencing considerations set forth in section
3553(A)(1) and (A)(2).
Paragraph (9) permits the imposition of a condition of probation
prohibiting the defendant from possessing a firearm, destructive
device, or other dangerous weapon. While this condition may only be
imposed if it is reasonably related to the purposes of sentencing, there
are, of course, other federal, state, and local restrictions on firearms
and explosives which may apply to the defendant as well.
Paragraph (10) notes the availability of the condition that the
defendant undergo medical or psychiatric treatment as specified by the
court and remain in a specified institution if required for medical or
psychiatric purposes. Under this paragraph a court may require a
defendant to participate in the program of a narcotic or alcohol
treatment facility, regularly visit a psychiatrist, participate *98
IN A RECOGNIZED GROUP THERAPY PROGRAM, OR UNDERGO SOME OTHER FORM OF TREATMENT FOR PHYSICAL OR EMOTIONAL PROBLEMS. BECAUSE RECEIPT OF TREATMENT IN AN INSTITUTION RATHER THAN ON AN OUTPATIENT BASIS WOULD INVOLVE A DEPRIVATION OF LIBERTY, THE JUDGE WOULD HAVE TO ASSURE HIMSELF THAT IT WAS REASONABLY NECESSARY TO A PURPOSE OF SENTENCING SET FORTH IN SECTION 3553(A)(2) TO REQUIRE RESIDENCE AT AN INSTITUTION.

PARAGRAPH (11) AUTHORIZES AS A CONDITION THAT THE PROBATIONER REMAIN IN THE CUSTODY OF THE BUREAU OF PRISONS DURING NIGHTS, WEEKENDS, OR OTHER INTERVALS OF TIME NOT TO EXCEED IN THE AGGREGATE ONE YEAR, DURING THE FIRST YEAR OF PROBATION. THIS PROVISION PERMITS SHORT PERIODS OF COMMITMENT TO A TRAINING CENTER OR INSTITUTION AS A PART OF A REHABILITATIVE PROGRAM. FLEXIBILITY IS PROVIDED BY PERMITTING CONFINEMENT IN SPLIT INTERVALS, THUS AUTHORIZING, FOR EXAMPLE, WEEKEND IMPRISONMENT WITH RELEASE ON PROBATION DURING THE WEEK FOR EDUCATIONAL OR EMPLOYMENT PURPOSES, OR NIGHTTIME IMPRISONMENT WITH RELEASE FOR SUCH PURPOSES DURING WORKING HOURS. THIS CONDITION COULD BE USED ONLY TO DEPRIVE THE DEFENDANT OF HIS LIBERTY TO THE EXTENT 'REASONABLY NECESSARY' FOR THE PURPOSES SET FORTH IN SECTION 3553(A)(2). IT COULD ALSO BE USED, FOR EXAMPLE, TO PROVIDE A BRIEF PERIOD OF CONFINEMENT, E.G., FOR A WEEK OR TWO, DURING A WORK OR SCHOOL VACATION. IT IS NOT INTENDED TO CARRY FORWARD THE SPLIT SENTENCE PROVIDED IN 18 U.S.C. 3651, BY WHICH THE JUDGE IMPOSES A SENTENCE OF A FEW MONTHS IN PRISON FOLLOWED BY PROBATION. IF SUCH A SENTENCE IS BELIEVED APPROPRIATE IN A PARTICULAR CASE, THE JUDGE CAN IMPOSE A TERM OF IMPRISONMENT FOLLOWED BY A TERM OF SUPERVISED RELEASE UNDER SECTION 3583, WHICH SECTION WAS AMENDED BY THE COMMITTEE IN THE 97TH CONGRESS TO PERMIT SUCH APPLICATION.

PARAGRAPH (12) PROVIDES THAT THE JUDGE MAY IMPOSE AS A CONDITION OF PROBATION THAT THE DEFENDANT RESIDE AT, OR PARTICIPATE IN THE PROGRAM OF, A COMMUNITY CORRECTIONS FACILITY FOR ALL OR PART OF THE TERM OF PROBATION.

PARAGRAPH (13) PROVIDES THAT THE JUDGE MAY REQUIRE AS A CONDITION OF PROBATION THAT THE DEFENDANT WORK IN COMMUNITY SERVICE AS DIRECTED BY THE COURT. THIS PROVISION IS INTENDED BY THE COMMITTEE TO ENCOURAGE CONTINUED EXPERIMENTATION WITH COMMUNITY SERVICE AS AN APPROPRIATE CONDITION IN SOME CASES. THIS CONDITION IS ALSO ONE OF THE THREE CHOICES FROM WHICH THE JUDGE MUST SELECT A MANDATORY CONDITION TO BE IMPOSED ON A CONVICTED FELON WHO IS SENTENCED TO PROBATION. THIS CONDITION MIGHT PROVE ESPECIALLY USEFUL IN A CASE IN WHICH THE IMPOSITION OF A FINE OR RESTITUTION IS NOT APPROPRIATE, EITHER BECAUSE OF THE DEFENDANT'S INABILITY TO PAY OR BECAUSE THE VICTIMS CANNOT BE READILY IDENTIFIED OR THE ACTUAL AMOUNT OF INJURY IS SLIGHT. PARAGRAPH (14) NOTES THAT THE PROBATIONER MAY BE REQUIRED TO RESIDE IN A CERTAIN PLACE OR REFRAIN FROM RESIDING IN A PARTICULAR PLACE, THUS PERMITTING THE COURT TO REMOVE THE DEFENDANT FROM A DETRIMENTAL ENVIRONMENT WHICH APPARENTLY CONTRIBUTED TO HIS PRIOR ANTI-SOCIAL BEHAVIOR (E.G., A CRIMINOGENIC ENVIRONMENT) AND TO RESIDE DURING THE TERM OF PROBATION IN AN AREA--PERHAPS IN A DISTANT DISTRICT [FN339] MORE CONDUCIVE TO REHABILITATION.

PARAGRAPHS (15) THROUGH (19) CONTAIN COMMONLY EMPLOYED CONDITIONS RELATING TO DAY-TO-DAY SUPERVISION OF A PROBATIONER. PARAGRAPH (15) PERMITS THE COURT TO ORDER THAT THE DEFENDANT REMAIN IN THE JURISDICTION OF THE COURT UNLESS HE RECEIVES PERMISSION FROM THE COURT TO LEAVE. IN APPROPRIATE CASES, OF COURSE, JURISDICTION OVER THE PROBATIONER MAY BE TRANSFERRED FROM ONE DISTRICT TO ANOTHER, EVEN ON A SHORT-TERM BASIS, IN ORDER TO ASSURE CONTINUING SUPERVISION OVER THE PROBATIONER. PARAGRAPH (16) PERMITS THE COURT TO ORDER THAT THE DEFENDANT REPORT TO A PROBATION OFFICER AS DIRECTED BY THE COURT OR THE
PROBATION OFFICER. THIS CONDITION IN NOT MANDATORY-- A DEFENDANT MAY BE
PLACED ON UNSUPERVISED PROBATION WITH ONLY THE CONDITION THAT HE NOT
COMMIT A CRIME OR WITH ANOTHER CONDITION THAT DOES NOT REQUIRE DAY-TO-
DAY SUPERVISION, SUCH AS AN ORDER TO PAY A FINE OR TO MAKE RESTITUTION.
PARAGRAPH (17) PERMITS THE JUDGE TO ORDER AS A PROBATION CONDITION THAT
A PROBATION OFFICER BE PERMITTED TO VISIT THE DEFENDANT AT HOME OR AT
ANOTHER PLACE SPECIFIED BY THE COURT (BUT NOT BY THE PROBATION OFFICER).
PARAGRAPH (18) RELATES TO ANSWERING INQUIRIES OF THE PROBATION OFFICER
AND NOTIFYING HIM OF ANY CHANGE OF ADDRESS OR EMPLOYMENT. PARAGRAPH
(19) PERMITS THE COURT TO REQUIRE THAT THE DEFENDANT NOTIFY THE
PROBATION OFFICER PROMPTLY IF HE IS ARRESTED OR QUESTIONED BY A LAW
ENFORCEMENT OFFICER.
FINALLY, PARAGRAPH (20), LIKE CURRENT LAW, PERMITS THE JUDGE TO FASHION
OTHER CONDITIONS OF PROBATION. THESE WOULD INCLUDE, INTER ALIA,
CONDITIONS TO ACHIEVE THE ASSISTANCE OF THE DEFENDANT IN EFFECTUATING
THE GOALS OF OTHER LISTED CONDITIONS.
UNLIKE CURRENT LAW, SUBSECTION (B) SPECIFICALLY STATES THAT THE
CONDITIONS MUST BE REASONABLY RELATED TO THE FACTORS SET FORTH IN
SECTION 3553(A)(1) AND (A)(2), AND THAT ANY CONDITION THAT INVOLVES A
RESTRICTION OF LIBERTY MUST BE REASONABLY NECESSARY TO THE PURPOSES OF
SENTENCING SET FORTH IN SECTION 3553(A)(2). THIS LANGUAGE IS DESIGNED TO
ALLOW THE FEARS OF SUCH DISPARATE GROUPS AS THE ACLU AND THE BUSINESS
ROUNDTABLE THAT PROBATION CONDITIONS MIGHT BE TOO RESTRICTIVE IN A
PARTICULAR CASE OR MIGHT INVOLVE MORE SUPERVISION THAN IS JUSTIFIED BY
THE CASE. THE JUDGE IS LIMITED IN IMPOSING CONDITIONS OF PROBATION TO
IMPOSING ONLY THOSE THAT CARRY OUT THE PURPOSES OF SENTENCING IN A
PARTICULAR CASE. HE CANNOT RESTRAIN THE LIBERTY OF A DEFENDANT WHO DOES
NOT NEED THAT LEVEL OF PUNISHMENT OR INCAPACITATION, NOR CAN HE PLACE
BUSINESS CONDITIONS ON AN ORGANIZATION THAT ARE UNRELATED TO THE
PURPOSES OF SENTENCING FOR THE OFFENSE OF WHICH THE ORGANIZATION IS
CONVICTED. IT IS NOT THE INTENT OF THE COMMITTEE THAT THE COURTS MANAGE
ORGANIZATIONS AS A PART OF PROBATION SUPERVISION, BUT IT IS THE INTENT OF
THE COMMITTEE THAT ALL NECESSARY CONDITIONS THAT ARE RELATED TO THE
CHARACTERISTICS OF THE OFFENSE AND THE OFFENDER AND THAT ARE DIRECTED
TO THE PURPOSES OF SENTENCING BE IMPOSED.
PROPOSED 18 U.S.C. 3563(C) PROVIDES THAT THE COURT, AFTER A HEARING,
[FN340] MAY, PURSUANT TO THE PROVISIONS APPLICABLE TO THE INITIAL SETTING
OF CONDITIONS OF PROBATION, MODIFY, REDUCE OR ENLARGE THE CONDITIONS OF
A SENTENCE OF PROBATION AT ANY TIME PRIOR TO THE EXPIRATION OR
TERMINATION OF THE TERM OF PROBATION. THIS PROVISION BRINGS FORWARD THE
SUBSTANCE OF CURRENT LAW (18 U.S.C. 3651) AND RULE 32.1(B) *100 **3283 OF
THE FEDERAL RULES OF CRIMINAL PROCEDURE. IT ENABLES THE COURT TO ADJUST
THE CONDITIONS OF PROBATION TO THE CHANGED CIRCUMSTANCES OF THE
DEFENDANT.
THE REQUIREMENT IN PROPOSED 18 U.S.C. 3563(D) THAT THE COURT DIRECT THE
PROBATION OFFICER TO PROVIDE TO A DEFENDANT A WRITTEN STATEMENT THAT
SETS FORTH THE CONDITIONS OF A SENTENCE OF PROBATION WITH SUFFICIENT
CLARITY AND SPECIFICITY THAT IT CAN SERVE AS A GUIDE FOR THE DEFENDANT'S
CONDUCT AND FOR SUCH SUPERVISION AS IS REQUIRED, IS NEW TO FEDERAL LAW.
[FN341] THE COMMITTEE BELIEVES, HOWEVER, THAT SUCH A STATEMENT SHOULD
BE REQUIRED BOTH AS A MATTER OF FAIRNESS AND AS A MATTER OF EFFICIENT
PROGRAM ADMINISTRATION. [FN342]

SECTION 3564. RUNNING A TERM OF PROBATION
1. IN GENERAL

THIS SECTION GOVERS THE COMMENCEMENT OF A TERM OF PROBATION, THE
EFFECT OF OTHER SENTENCES UPON THE RUNNING OF THE TERM, AND THE COURT'S
POWER TO TERMINATE OR EXTEND A TERM OF PROBATION.

2. PRESENT FEDERAL LAW

WHILE THE PROBATION PROVISIONS OF CURRENT TITLE 18 ARE SILENT AS TO WHEN
A TERM OF PROBATION COMMENCES, THE COURTS HAVE HELD THAT, UNLESS
ANOTHER TIME IS SPECIFIED IN THE ORDER, IT BEGINS WHEN THE JUDGE IMPOSES
SENTENCE. [FN343] RULE 38(A)(4) OF THE FEDERAL RULES OF CRIMINAL
PROCEDURE PROVIDES THAT IF THE ORDER PLACING THE DEFENDANT ON
PROBATION IS NOT STAYED, THE COURT SHALL SPECIFY WHEN THE TERM OF
PROBATION SHALL COMMENCE.

THE PROVISIONS OF THE CURRENT STATUTES ARE ALSO SILENT WITH REGARD TO
THE RUNNING OF MULTIPLE TERMS OF PROBATION. WHERE THE QUESTION HAS
ARISEN, THE COURTS HAVE HELD THAT SUCH TERMS MAY BE CONSECUTIVE BUT MAY
[FN344] IF, HOWEVER, THE COURT HAS NOT SPECIFIED WHETHER TWO TERMS OF
PROBATION ARE TO RUN CONSECUTIVELY OR CONCURRENTLY, IT HAS BEEN HELD
THAT THE PRESUMPTION IS THAT THEY RUN CONCURRENTLY. [FN345]

THE CURRENT STATUTES DO NOT SPECIFY WHETHER A TERM OF PROBATION CAN
RUN CONCURRENTLY WITH A SENTENCE OF IMPRISONMENT. WHILE MOST COURTS
HAVE HELD THAT PROBATION IS TOLLED BY A SENTENCE OF IMPRISONMENT,
[FN346] AT LEAST ONE COURT HAS HELD THAT INCARCERATION FOR AN OFFENSE
*101 **3284 COMMITTED PRIOR TO THE IMPOSITION OF PROBATION DOES NOT
TOLL THE TERM OF PROBATION. [FN347]

18 U.S.C. 3653 GRANTS DISCRETION TO A COURT, UPON REVIEW OF A
PROBATIONER'S CONDUCT, TO DISCHARGE THE PROBATIONER FROM SUPERVISION
AND TERMINATE THE PROCEEDINGS AGAINST HIM, OR TO EXTEND THE TERM OF
PROBATION. HOWEVER, THE AUTHORITY TO EXTEND THE TERM OF PROBATION IS
SUBJECT TO THE FIVE-YEAR LIMITATION CONTAINED IN 18 U.S.C. 3651. [FN348]

3. PROVISIONS OF THE BILL, AS REPORTED

SUBSECTION (A) OF PROPOSED 18 U.S.C. 3564 PROVIDES THAT THE TERM OF
PROBATION COMMENCES ON THE DAY THE SENTENCE OF PROBATION IS IMPOSED,
UNLESS OTHERWISE ORDERED BY THE COURT.

SUBSECTION (B) PROVIDES THAT MULTIPLE TERMS OF PROBATION ARE TO RUN
CONCURRENTLY, REGARDLESS OF WHEN OR FOR WHAT OFFENSES OR BY WHAT
JURISDICTION THEY ARE IMPOSED, AND THAT A TERM OF PROBATION IS TO RUN
CONCURRENTLY WITH A TERM OF SUPERVISED RELEASE. CONSEQUENTIALY, UNLIKE
THE SITUATION UNDER CURRENT LAW, CONSECUTIVE TERMS OF PROBATION MAY
NOT BE IMPOSED. OF COURSE, IF A DEFENDANT IS SENTENCED TO TERMS OF
PROBATION FOR OFFENSES OF VARYING SERIOUSNESS, THE MAXIMUM TERM OF
PROBATION WOULD BE MEASURED ACCORDING TO THE TERM FOR THE MOST
SERIOUS OFFENSE. THIS SUBSECTION ALSO MAKES IT CLEAR THAT PROBATION
DOES NOT RUN DURING ANY PERIOD IN WHICH THE DEFENDANT IS INCARCERATED
FOR A PERIOD OF AT LEAST 30 CONSECUTIVE DAYS IN CONNECTION WITH A
FEDERAL, STATE OR LOCAL CRIMINAL CONVICTION.

SUBSECTION (C) AUTHORIZES THE COURT, AFTER CONSIDERING THE FACTORS SET
FORTH IN SECTION 3553(A), TO TERMINATE A TERM OF PROBATION AND TO
DISCHARGE THE DEFENDANT PRIOR TO ITS EXPIRATION AT ANY TIME IN THE CASE
OF A MISDEMEANOR OR AN INFRACTION OR AT ANY TIME AFTER ONE YEAR IN THE CASE OF A FELONY, IF THE CONDUCT OF THE DEFENDANT AND THE INTEREST OF JUSTICE WARRANT SUCH ACTION. WHILE CURRENT LAW [FN349] PERMITS SUCH EARLY TERMINATION AT ANY TIME WITHOUT REGARD TO THE DEGREE OF THE OFFENSE, IT APPEARS APPROPRIATE TO RETAIN THE COURT'S JURISDICTION OVER AN OFFENDER CONVICTED OF A FELONY FOR AT LEAST A ONE-YEAR PERIOD. IF THE COURT DETERMINES THAT AN OFFENDER DOES NOT NEED ACTIVE SUPERVISION, IT MAY IMPOSE ONLY THE LEAST ONEROUS DISCRETIONARY CONDITIONS OF PROBATION THAT IT DECIDES TO BE ADVISABLE, OR MAY PERMIT THE PROBATIONER TO REMAIN AT LIBERTY SUBJECT ONLY TO THE CONDITIONS THAT HE NOT COMMIT ANOTHER OFFENSE AND, IF HE IS CONVICTED OF A FELONY, THAT HE PAY A FINE OR RESTITUTION, OR ENGAGE IN COMMUNITY SERVICE. [FN350]

SUBSECTION (D) AUTHORIZES THE COURT, AFTER A HEARING AND PURSUANT TO THE PROVISIONS APPLICABLE TO THE INITIAL SETTING OF THE TERM OF PROBATION, TO EXTEND A TERM OF PROBATION, AT ANY TIME PRIOR TO ITS EXPIRATION OR TERMINATION, UNLESS THE MAXIMUM TERM WAS PREVIOUSLY IMPOSED. THIS PROVISION IS NECESSARY, THE COMMITTEE BELIEVES, TO ENCOURAGE JUDGES TO INITIALLY IMPOSE WHAT APPEARS TO BE THE MOST APPROPRIATE LENGTH FOR THE TERM OF PROBATION. IF JUDGES FEARED THAT A *102 **3285 TERM WOULD LATER BE FOUND TO BE TOO SHORT AND THAT THE COURT WOULD BE POWERLESS TO EXTEND IT, THEY MIGHT WELL FEEL CONSTRAINED TO IMPOSE THE MAXIMUM TERM IN ALL CASES.

SUBSECTION (E) PROVIDES THAT A TERM OF PROBATION REMAINS SUBJECT TO REVOCATION DURING ITS CONTINUANCE.

SECTION 3565. REVOCATION OF PROBATION

1. IN GENERAL

THIS SECTION PROVIDES THAT PROBATION MAY BE REVOKED IF THE DEFENDANT VIOLATES A CONDITION OF PROBATION, AND SPECIFIES THE PERIOD DURING WHICH SUCH REVOCATION MAY TAKE PLACE.

2. PRESENT FEDERAL LAW

3. PROVISIONS OF THE BILL, AS REPORTED

SECTION 3565(A) PROVIDES THAT IF A DEFENDANT VIOLATES A CONDITION OF PROBATION THE COURT MAY, AFTER A HEARING PURSUANT TO RULE 32.1 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, EITHER CONTINUE THE DEFENDANT ON THE SENTENCE OF PROBATION, SUBJECT TO SUCH MODIFICATIONS OF THE TERM OF CONDITIONS OF PROBATION AS IT DEEMS APPROPRIATE, OR MAY REVOKE PROBATION AND IMPOSE ANY OTHER SENTENCE WHICH COULD HAVE BEEN IMPOSED AT THE TIME OF THE INITIAL SENTENCING. PROVISIONS GOVERNING THE ARREST OF A PROBATIONER ARE CONTAINED IN PROPOSED 18 U.S.C. 3606; PROVISIONS GOVERNING THE HEARING TO BE ACCORDED THE PROBATIONER ARE CONTAINED IN RULE 32.1. [FN352] THE COMMITTEE FELT IT APPROPRIATE TO LEAVE PROCEDURAL PROVISIONS CONCERNING PROBATION REVOCATION RIGHTS IN RULE 32.1 WHERE THEY WILL REMAIN SUBJECT TO PERIODIC REVISION BY THE JUDICIAL CONFERENCE OF THE UNITED STATES, IF NECESSARY.


SECTION 3566. IMPLEMENTATION OF A SENTENCE OF PROBATION

THIS SECTION, WHICH HAS NO COUNTERPART IN CURRENT LAW, MERELY DIRECTS ATTENTION TO THE FACT THAT PROVISIONS GOVERNING THE IMPLEMENTATION OF PROBATION ARE CONTAINED IN SUBCHAPTER A OF CHAPTER 229.

SUBCHAPTER C-- FINES

(SECTIONS 3571-3574)

AN EARLIER ERA WHEN THE AVERAGE WAGE EARNER ACHIEVED A YEARLY INCOME CONSIDERABLY LOWER THAN THAT COMMON TODAY, AND WHEN INFLATION HAD NOT YET REDUCED THE VALUE OF CURRENCY TO ITS PRESENT LEVEL. THERE EXISTS TODAY THE ANOMALOUS SITUATION IN WHICH A TYPICAL FELONY MAY BE PUNISHABLE ON THE ONE HAND BY A MAXIMUM OF FIVE YEARS' IMPRISONMENT, AND ON THE OTHER HAND BY A MAXIMUM FINE OF ONLY $5,000 OR $10,000. [FN354] BEFORE THE TWO FACETS OF THE STATED PENALTY MAY BE SERIOUSLY CONSIDERED AS ALTERNATIVES TO ONE ANOTHER, THEY MUST BE OF ROUGHLY EQUIVALENT SEVERITY. YET TODAY, FIVE YEARS OF A PERSON'S FREEDOM, EVEN WHEN MEASURED ACCORDING TO THE AVERAGE INDIVIDUAL'S EARNING POWER ALONE, CARRIES A VALUE IN EXCESS OF $50,000. *104 **3287* IN A CASE IN WHICH A SERIOUS VIOLATION HAS OCCURRED, BUT IN WHICH THE COURT HAS FOUND REASON TO EXPLORE ALTERNATIVES TO INCARCERATION, THE CURRENT STATE OF THE LAW NEEDLESSLY HAMPERS THE COURT IN ITS FASHIONING OF AN APPROPRIATE SENTENCE. IT IS WITH THE INTENT OF ENHANCING THE ABILITY OF THE COURTS TO FASHION REMEDIES APPROPRIATE TO OFFENSES BY PROVIDING MAXIMUM FINES AT LEVELS THAT ARE SUITABLE TO OUR TIMES-- AND AT LEVELS THAT WILL HELP TO ELIMINATE THE POPULAR VIEW THAT CERTAIN OFFENSES WILL LEAD ONLY TO A NOMINAL FINE EQUIVALENT TO A MINOR COST OF DOING BUSINESS-- THAT THE COMMITTEE HAS DRAFTED THE PROVISIONS OF THE SUBCHAPTER.

SECTION 3571. SENTENCE OF FINE

1. IN GENERAL

PROPOSED 18 U.S.C. 3571 ESTABLISHES THE GENERAL STATUTORY AUTHORITY FOR THE IMPOSITION OF A FINE AS A PENAL SANCTION. THE MAXIMUM AMOUNT OF THE FINE THAT MAY BE IMPOSED IN A PARTICULAR CASE DEPENDS ON WHETHER THE OFFENSE IS CLASSIFIED AS A FELONY, MISDEMEANOR, OR INFRACTION; WHETHER THE OFFENDER IS AN INDIVIDUAL OR AN ORGANIZATION; AND, IN THE CASE OF A MISDEMEANOR, WHETHER THE OFFENSE RESULTED IN LOSS OF HUMAN LIFE.

2. PRESENT FEDERAL LAW

UNDER THE PRESENT FEDERAL LAW, FINES ARE SPECIFIED AS AN AUTHORIZED FORM OF SENTENCE FOR VIRTUALLY ALL OFFENSES. IT IS RECOGNIZED THAT FINES OFTEN REPRESENT THE ONLY USEFUL SANCTION AGAINST CORPORATIONS AND OTHER ORGANIZATIONS, AS WELL AS BEING, IN THE VIEW OF MANY JUDGES, THE MAJOR ACCEPTABLE PENALTY AGAINST SIGNIFICANT NUMBERS OF INDIVIDUAL FEDERAL OFFENDERS. THE AUTHORIZED MAXIMUM LIMITS, HOWEVER, ARE GENERALLY VERY LOW. COMPLAINTS THAT CURRENT FINE LEVELS ARE INSUFFICIENT TO ACCOMPLISH THE PURPOSES OF SENTENCING ARE BEING VOICED BY FEDERAL JUDGES WITH INCREASING REGULARITY. [FN355] PRESENT FEDERAL LAW ALSO INCLUDES LARGE AND LOGICALLY INEXPLICABLE DISPARITIES IN THE LEVELS OF FINE PERMITTED AS CRIMINAL SANCTIONS FOR OFFENSES OF ESSENTIALLY SIMILAR NATURES. THE FOLLOWING ARE EXAMPLES. A. CONSPIRACY TO DEFRAUD THE UNITED STATES OR TO COMMIT ANY OFFENSE AGAINST THE UNITED STATES IS PUNISHABLE BY A MAXIMUM PRISON TERM OF FIVE YEARS AND BY A FINE OF UP TO $10,000 [FN356] ON THE OTHER HAND, A CONSPIRACY TO PREVENT A PERSON FROM ACCEPTING FEDERAL OFFICE OR TO PREVENT A FEDERAL OFFICIAL FROM DISCHARGING HIS DUTIES, WHILE GRADED MORE SERIOUSLY IN TERMS OF THE AUTHORIZED MAXIMUM PRISON TERM, WHICH
IS SIX YEARS, CARRIES A LESSER MAXIMUM FINE-- $5,000. [FN357]

*105 **3288 B. FORGERY OF NATURALIZATION OR CITIZENSHIP PAPERS CARRIES
THE SAME MAXIMUM FIVE-YEAR PRISON TERM AS DOES FORGERY OF AN ENTRY VISA,
YET THE FORMER OFFENSE CARRIES A MAXIMUM FINE OF $5,000 AND THE LATTER A
MAXIMUM FINE OF ONLY $2,000. [FN358] MOREOVER, ANOTHER OFFENSE OF THIS
KIND, FALSIFICATION OF AN INVOICE BY A CONSULAR OFFICIAL, CARRIES A
MAXIMUM PRISON TERM OF THREE YEARS AND THIS, PRESUMABLY, IS CONCEIVED
TO BE A LESS SERIOUS OFFENSE THAN THE TWO CITED FORGERY OFFENSES, YET IT
PROVIDES FOR A $10,000 FINE. [FN359]

C. ROBBERY OF A FEDERALLY ISSUED BANK IS PUNISHABLE BY A FINE OF UP TO
$5,000, AS WELL AS BY A SENTENCE TO IMPRISONMENT. [FN360] ROBBERY OF A
POST OFFICE MUST RESULT IN A TERM OF IMPRISONMENT BUT CANNOT RESULT IN A
FINE. [FN361]

D. A POSTMASTER WHO DEMANDS MORE THAN THE AUTHORIZED POSTAGE FOR MAIL
MATTER AND A VESSEL INSPECTOR WHO COLLECTS MORE THAN THE AUTHORIZED
FEE BOTH ARE SUBJECT TO A MAXIMUM PRISON TERM OF SIX MONTHS. THE VESSEL
INSPECTOR CAN BE FINED UP TO $500, WHILE THE POSTMASTER IS SUBJECT TO A
MAXIMUM FINE OF ONLY $100. [FN362]

E. ONE WHO INJURES PROPERTY OF THE UNITED STATES IS SUBJECT TO A FINE OF
UP TO $10,000 IF THE DAMAGE EXCEEDS $100, AND A FINE UP TO $1,000 IF THE
DAMAGE IS LESS THAN $100. [FN363] ONE WHO INJURES PROPERTY OF THE UNITED
STATES ON A WILDLIFE REFUGE, NO MATTER HOW MUCH THE DAMAGE, IS SUBJECT
TO A MAXIMUM FINE OF ONLY $500. [FN364]

F. A CLERK OF COURT WHO CONVERTS FUNDS WHICH HAVE COME INTO HIS HANDS
BY VIRTUE OF HIS OFFICIAL POSITION MAY BE PUNISHED BY UP TO TEN YEARS'
IMPRISONMENT IF THE AMOUNT EXCEEDS $100. [FN365] CONVERSION BY A CLERK
OF COURT OF FUNDS WHICH BELONG IN THE REGISTRY OF THE COURT ALSO
CARRIES A MAXIMUM SENTENCE OF TEN YEARS IN PRISON IF THE AMOUNT EXCEEDS
$100. [FN366] BUT IN THE FORMER CASE A FINE CAN EQUAL DOUBLE THE AMOUNT
CONVERTED, WHILE IN THE LATTER A FINE CANNOT EXCEED THE AMOUNT
CONVERTED.

3. PROVISIONS OF THE BILL, AS REPORTED

SUBSECTION (A) AUTHORIZES THE USE OF FINES IN CRIMINAL SENTENCING. THERE
ARE NO OFFENSES FOR WHICH A FINE MAY NOT BE IMPOSED. AS PROVIDED IN
SECTION 3551(B) AND (C), A FINE MAY BE IMPOSED ALONE OR IN ADDITION TO ANY
OTHER SENTENCE. PAYMENT OF A FINE MAY ALSO BE MADE A CONDITION OF
PROBATION PURSUANT TO SECTION 3562(B)(2), OR A MANDATORY CONDITION OF
PROBATION PURSUANT TO SECTION 3562(A)(2), SO THAT REVOCATION OF
PROBATION IS AVAILABLE AS A MEANS OF ENFORCING THE FINE. A FINE MAY ALSO
BE MADE A CONDITION OF POST-RELEASE SUPERVISION, PERMITTING THE COURT
TO HOLD A DEFENDANT IN CONTEMPT IF HE FAILS TO PAY IT.

SUBSECTION (B) ESTABLISHES THE MAXIMUM LIMITS OF FINES FOR FELONIES,
MISDEMEANORS, AND INFRACTIONS, EXCEPT TO THE EXTENT THAT A HIGHER LIMIT
MAY OTHERWISE BE AUTHORIZED IN THIS CHAPTER FOR THE OFFENSE. THE FINE
LEVELS SET FORTH IN THE SUBSECTION ARE CONSIDERABLY *106 **3289 HIGHER
THAN THOSE GENERALLY AUTHORIZED BY CURRENT LAW, [FN367] AND ARE
DESIGNED TO ESTABLISH AN EFFECTIVE SCALE FOR PECUNIARY PUNISHMENT AND
DETERRENCE THAT WILL REFLECT CURRENT ECONOMIC REALITIES. [FN368]

PENALTIES FOR ORGANIZATIONS ARE SET AT HIGHER LEVELS THAN THOSE FOR
INDIVIDUALS, FOLLOWING THE NEW YORK MODEL, [FN369] IN ORDER TO TAKE
COGNIZANCE OF THE FACT THAT A SUM OF MONEY THAT IS SUFFICIENT TO
PENALIZE OR DETER AN INDIVIDUAL MAY NOT BE SUFFICIENT TO PENALIZE OR
DETER AN ORGANIZATION, BOTH BECAUSE THE ORGANIZATION IS LIKELY TO HAVE
MORE MONEY AVAILABLE TO IT AND BECAUSE THE SENTENCE FOR AN ORGANIZATION OBVIOUSLY CANNOT INCLUDE A TERM OF IMPRISONMENT. THE FINE LEVELS IN SUBSECTION (B) FOR FELONIES AND MISDEMEANORS COMMITTED BY INDIVIDUALS AND FOR FELONIES COMMITTED BY ORGANIZATIONS, ARE CONSIDERABLY HIGHER THAN THE LEVELS PROVIDED IN S. 1437 AS PASSED BY THE SENATE IN THE 95TH CONGRESS. IN ADDITION, SUBSECTIONS (B)(1)(A) AND (B)(2)(A) WERE AMENDED IN THE 96TH CONGRESS TO PROVIDE THE SAME MAXIMUM FINE FOR A MISDEMEANOR THAT RESULTS IN THE LOSS OF LIFE AS FOR A FELONY. THESE AMENDMENTS ARE DESIGNED TO OFFSET THE DELETION IN THE 96TH CONGRESS OF SECTION 2201(C) IN S. 1437, WHICH PROVIDED THAT, AS AN ALTERNATIVE TO THE MAXIMUM FINES SET FORTH IN SUBSECTION (B), 'A DEFENDANT WHO HAS BEEN FOUND GUILTY OF AN OFFENSE THROUGH WHICH PECUNIARY GAIN WAS DIRECTLY OR INDIRECTLY DERIVED, OR BY WHICH BODILY INJURY OR PROPERTY DAMAGE OR OTHER LOSS WAS CAUSED, MAY BE SENTENCED TO PAY A FINE THAT DOES NOT EXCEED TWICE THE GROSS GAIN DERIVED OR TWICE THE GROSS LOSS CAUSED, WHICHEREVER IS THE GREATER.' THE BUSINESS COMMUNITY EXPRESSED CONCERNS THAT THE STANDARD FOR DETERMINING THE AMOUNT OF A FINE UNDER THAT PROVISION COULD RESULT IN AN UNWIELDY SENTENCING PROCEEDING THAT WOULD BE VIRTUALLY EQUIVALENT TO A TRIAL ON THE QUESTION OF DAMAGES. THE COMMITTEE CONCLUDED THAT AN INCREASE IN THE MAXIMUM FINE LEVELS FOR SERIOUS OFFENSES COULD ASSURE THAT A FINE COULD BE IMPOSED THAT WOULD USUALLY REACH THE DEFENDANT'S ILLGOTTEN GAINS WHILE AVOIDING UNDUE COMPLEXITY IN THE SENTENCING HEARING. OF COURSE, IN A SITUATION IN WHICH, FOR EXAMPLE, THE DEFENDANT OBTAINED MILLIONS OF DOLLARS IN THE COURSE OF COMMITTING AN OFFENSE, THE PROVISIONS FOR AN ORDER OF RESTITUTION OR AN ORDER OF NOTICE TO VICTIMS MAY BE USED, DEPENDING ON THE CIRCUMSTANCES, IN CONJUNCTION WITH A FINE TO ASSURE THAT A CONVICTED DEFENDANT CANNOT KEEP WHAT HE OBTAINED. IT IS INTENDED BY THE COMMITTEE THAT THE INCREASED FINES PERMITTED BY THIS SECTION WILL HELP MATERIALLY TO PENALIZE AND DETER WHITE COLLAR CRIME AND OTHER HIGHLY PROFITABLE CRIME. CERTAINLY NO CORRECTIONAL AIMS CAN BE ACHIEVED WHERE THE MAXIMUM SENTENCE IMPOSABLE IS SET AT SUCH A LOW LEVEL THAT IT CAN BE REGARDED MERELY AS A COST OF DOING BUSINESS--A COST THAT MAY IN FACT BE MORE THAN OFFSET BY THE GAIN FROM THE ILLEGAL METHOD OF DOING BUSINESS. THE NEED FOR SUCH INCREASED PENALTIES IS PARTICULARLY APPARENT WITH REGARD TO A CORPORATE DEFENDANT WHICH TODAY CAN OFTEN DIVIDE THE MINOR BURDEN OF PAYMENT AMONG ITS MANY STOCKHOLDERS, OR PASS IT ON TO CONSUMERS AS A COST OF DOING BUSINESS, WITH THE RESULT THAT LESSER PENALTIES MAY NOT BE FELT EITHER BY THE CORPORATIONS OR BY ITS MULTIPLE OWNERS.

*107 **3290 WHILE THE COMMITTEE BELIEVES THAT THE INCREASE FINE LEVELS WILL BE OF PARTICULAR IMPORTANCE IN THE WHITE COLLAR CRIME AREA, IT DOES NOT MEAN TO IMPLY THAT FINES ARE NOT AN IMPORTANT ASPECT OF SENTENCING IN OTHER AREAS AS WELL. IT IS HOPED THAT THE SENTENCING PROVISIONS WILL LEAD TO MORE CREATIVE USE OF SENTENCING OPTIONS SUCH AS, FOR EXAMPLE, THE USE OF A SENTENCE TO PAY A FINE IN INSTALLMENTS OVER A PERIOD THE ASSETS OF THE ORGANIZATION, UNLESS EXPRESSLY PERMISSIBLE OF TIME FOR MINOR OFFENDERS WHO MAY NOT BE ABLE TO PAY A FINE IN A LUMP SUM. SUCH A SENTENCE WOULD BE APPROPRIATE, FOR EXAMPLE, IN THE CASE OF A DEFENDANT WITHOUT CURRENT ASSETS WHO IS CONVICTED OF A MINOR OFFENSE THAT DOES NOT WARRANT IMPRISONMENT BUT
THAT NEVERTHELESS MUST BE MET BY SOME CLEAR FORM OF PUNISHMENT AND DETERRENCE.

SECTION 3572. IMPOSITION OF A SENTENCE OF FINE

SECTION 3572 SETS OUT FACTORS THAT THE COURT MUST CONSIDER IN IMPOSING A FINE, SPECIFIES THE DEGREE TO WHICH A SENTENCE TO PAY A FINE IS FINAL, PLACES A LIMIT ON THE AGGREGATION OF MULTIPLE FINES, PROVIDES THAT THE COURT MAY SPECIFY THE TIME AND METHOD OF PAYMENT OF THE FINE, PRECLUDES THE IMPOSITION OF AND ALTERNATIVE SENTENCE TO BE SERVED IF AN IMPOSED FINE IS NOT PAID, PROVIDES NOTICE THAT AGENTS OF AN ORGANIZATION WHO ARE AUTHORIZED TO DISBURSE ITS ASSETS ARE INDIVIDUALLY RESPONSIBLE FOR PAYMENT FROM THE FUNDS OF THE ORGANIZATION OF THE ASSESSED AGAINST IT, AND PROVIDES THAT A FINE IMPOSED ON AN AGENT OR SHAREHOLDER OF AN ORGANIZATION MAY NOT BE PAID FROM THE ASSETS OF THE ORGANIZATION, UNLESS EXPRESSLY PERMISSIBLE UNDER APPLICABLE STATE LAW.

2. PRESENT FEDERAL LAW

THE PROVISIONS OF THIS SECTION GENERALLY ARE NOT THE SUBJECT OF ANY CURRENT FEDERAL STATUTES, ALTHOUGH IMPRISONMENT IN LIEU OF THE PAYMENT OF A FINE IS INFERENTIALLY AUTHORIZED. [FN370]

3. PROVISIONS OF THE BILL, AS REPORTED

SUBSECTION (A), BY CROSS-REFERENCE TO SECTION 3553(A), SPECIFIES THE FACTORS TO BE CONSIDERED BY THE COURT IN DETERMINING WHETHER TO IMPOSE A FINE, AND IN DETERMINING ITS AMOUNT, THE TIME FOR PAYMENT, AND THE METHOD OF PAYMENT. AS IS THE CASE WITH REGARD TO OTHER POTENTIAL SANCTIONS, THE COURT IS REQUIRED TO CONSIDER THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY AND CHARACTERISTICS OF THE DEFENDANT, THE PURPOSES OF SENTENCING WITH REGARD TO WHICH A FINE MAY BE AN APPROPRIATE RESPONSE, AND THE GUIDELINES AND ANY POLICY STATEMENTS WHICH MAY BE APPLICABLE. USE OF THE QUALIFIER 'TO THE EXTENT THAT THEY ARE APPLICABLE' IN REFERRING TO THE FOUR STATED PURPOSES OF SENTENCING IS INTENDED AS RECOGNITION THAT A FINE MAY OFTEN BE A HIGHLY USEFUL MEANS OF PROVIDING JUST PUNISHMENT AND OF DETERRING OTHERS FROM ENGAGING IN LIKE OFFENSES-- PARTICULARLY OFFENSES AFFORDING THE OPPORTUNITY FOR MONETARY GAIN-- WHILE THE OTHER PURPOSES OF SENTENCING WOULD LESS COMMONLY BE SERVED BY A SENTENCE TO PAY A FINE.

FLEXIBILITY IN TAILORING THE FINE LEVEL TO THE SITUATION IN A PARTICULAR CASE. WHILE IT IS NOT INTENDED THAT A FINE FOR A SOLVENT INDIVIDUAL BE SO HIGH AS TO FORCE HIM INTO A LIFETIME OF POVERTY, IF A DEFENDANT IS WEALTHY AND THE COURT FINDS THAT A HIGH FINE IS NECESSARY TO SERVE THE PURPOSES OF SENTENCING, IT SHOULD NOT BE RELUCTANT TO SENTENCE THE DEFENDANT TO PAY A HIGH FINE. ON THE OTHER HAND, THE COURT NEED NOT AVOID THE USE OF A SENTENCE TO PAY A FINE AGAINST AN INDIVIDUAL WHO IS NOT WEALTHY SINCE THE BILL WOULD PERMIT INSTALLMENT PAYMENTS OF A FINE. IN SOME CASES, THE MOST APPROPRIATE SENTENCE MIGHT BE, FOR EXAMPLE, THE PAYMENT OF A FAIRLY SUBSTANTIAL FINE IN INSTALLMENTS OF A SPECIFIED AMOUNT OUT OF EACH PAY CHECK OVER A PERIOD OF TIME.

THE REQUIREMENT THAT THE COURT, IN ASSESSING THE ABILITY OF A DEFENDANT TO PAY A FINE, CONSIDER ANY PAYMENT OF RESTITUTION BY THE DEFENDANT OR ANY REQUIREMENT THAT THE DEFENDANT MAKE RESTITUTION TO THE VICTIMS OF THE OFFENSE IS NOT INTENDED NECESSARILY TO RESULT IN THE COURT'S AVOIDING IMPOSITION OF A FINE THAT MIGHT OTHERWISE BE IMPOSED OR REDUCING A FINE BY THE AMOUNT OF RESTITUTION TO BE PAID. EITHER OF THESE RESULTS MIGHT, HOWEVER, BE APPROPRIATE IN A PARTICULAR CASE, DEPENDING UPON THE EFFECT OF PAYMENT OF RESTITUTION UPON THE DEFENDANT'S ABILITY TO PAY A FINE AND UPON THE PURPOSES OF SENTENCING TO BE SERVED BY REQUIRING PAYMENT OF A PARTICULAR FINE. OF COURSE, IF THE DEFENDANT HAS, PRIOR TO SENTENCING MADE REPARATION OR MADE ARRANGEMENTS TO MAKE REPARATION TO THE VICTIMS OF HIS OFFENSE, THIS WILL HAVE AN EFFECT ON HIS FINANCIAL RESOURCES WHICH SHOULD BE TAKEN INTO ACCOUNT IN ASSESSING THE ABILITY OF THE DEFENDANT TO PAY A FINE, AND MAY ALSO ALLEVIATE SOMEWHAT THE NEED TO IMPOSE A HIGH FINE FOR PURPOSES OF PUNISHMENT AND DETERRENCE.

THE CONSIDERATIONS IN SETTING FINE LEVELS CAN OBVIOUSLY BE QUITE COMPLEX, AND THEY WARRANT CAREFUL ATTENTION BY THE SENTENCING COMMISSION IN FORMULATING SENTENCING GUIDELINES AND POLICY STATEMENTS TO AID IN IMPOSING SENTENCE.

SUBSECTION (B) WAS INCLUDED FOR THE FIRST TIME IN S. 1630 IN THE 97TH CONGRESS. IT PROVIDES THAT, UNLESS OTHERWISE EXPRESSLY PERMITTED, THE AGGREGATE OF FINES THAT MAY BE IMPOSED ON A DEFENDANT AT THE SAME TIME FOR OFFENSES THAT ARISE FROM A COMMON SCHEME OR PLAN AND THAT DO NOT CAUSE SEPARABLE OR DISTINGUISHABLE KINDS OF HARM OR DAMAGE, IS TWICE THE AMOUNT IMPOSABLE FOR THE MOST SERIOUS OFFENSE. THE PROVISION WAS ADDED IN RESPONSE TO CONCERNS THAT THERE MIGHT BE SOME OFFENSES, PARTICULARLY REGULATORY OFFENSES, WHERE AN ONGOING PATTERN OF CONDUCT CONSTITUTED NUMEROUS MINOR OFFENSES, WITH THE RESULT THAT THE DEFENDANT MIGHT BE SUBJECT TO AN UNJUSTIFIABLY HIGH MAXIMUM FINE.

SUBSECTION (C) MAKES CLEAR THAT, EVEN THOUGH A FINE IMPOSED BY THE SENTENCING JUDGE MAY BE MODIFIED OR REMITTED PURSUANT TO SECTION 3573, CORRECTED PURSUANT TO SECTION 3742, OR APPEALED AND MODIFIED PURSUANT TO SECTION 3742 IF IT IS OUTSIDE THE GUIDELINES, THE JUDGMENT OF CONVICTION THAT INCLUDES A FINE IS FINAL FOR ALL OTHER PURPOSES. THIS NOTES THE PROVISIONAL NATURE OF THE SENTENCE PENDING ANY LATER MODIFICATIONS AUTHORIZED BY THE BILL WHILE MAKING CLEAR THAT THE CONVICTION IS OTHERWISE FINAL.

SUBSECTION (D) PERMITS THE COURT TO AUTHORIZE PAYMENT WITHIN A SPECIFIED PERIOD OF TIME OR IN INSTALLMENTS. SUCH FLEXIBLE PAYMENT SCHEDULES ARE NOW SPECIFICALLY AUTHORIZED IN THE FEDERAL SYSTEM FOR A FINE IMPOSED AS A CONDITION OF PROBATION, [FN371] AND ARE AUTHORIZED IN MANY STATES. [FN372] CLEARLY, IF THE DEFENDANT CAN EARN THE MONEY TO PAY A CERTAIN FINE OVER A PERIOD OF TIME, THERE SEEMS LITTLE JUSTIFICATION FOR CHOOSING
IMPRISONMENT OR A LESSER FINE IF THE HIGHER FINE WOULD OTHERWISE BE CLEARLY THE MOST APPROPRIATE SENTENCE. SUBSECTION (E) PROHIBITS IMPOSITION, AT THE TIME THE SENTENCE TO PAY A FINE IS IMPOSED, OF AN ALTERNATIVE SENTENCE TO BE SERVED IF THE FINE IS NOT PAID. IF THE DEFENDANT FAILS TO PAY HIS FINE, THE COURT MAY DETERMINE THE REMEDY AFTER THE NONPAYMENT AND AFTER AN INQUIRY INTO THE REASONS FOR IT. [FN373] IF, FOR EXAMPLE, NONPAYMENT HAS OCCURRED BECAUSE CHANGES IN THE DEFENDANT'S FINANCIAL CIRCUMSTANCES HAVE MADE PAYMENT AN UNDUE FINANCIAL BURDEN, IT MAY BE NECESSARY TO ADJUST THE AMOUNT OF THE FINE PURSUANT TO THE PROVISIONS OF SECTION 3573. IF, ON THE OTHER HAND, THE DEFENDANT IS ABLE TO PAY THE FINE BUT Chooses TO IGNORE HIS LEGAL OBLIGATION TO PAY IT, THE PROVISIONS OF PROPOSED SUBCHAPTER B OF CHAPTER 229 REGARDING COLLECTION OF FINES MAY BE UTILIZED TO COLLECT THE FINE. SUBSECTION (F) SPECIFIES THAT, IF AN ORGANIZATION IS FINED, IT IS THE DUTY OF EACH OF THE ORGANIZATION'S EMPLOYEES OR AGENTS WHO IS AUTHORIZED TO MAKE DISBURSEMENT OF THE ORGANIZATION'S ASSETS TO PAY THE FINE FROM ORGANIZATION ASSETS. THIS PROVISION IS DESIGNED TO ASSURE THAT A CORPORATION WILL NOT BE ABLE TO ESCAPE OR DELAY LIABILITY BY MEANS OF OBFUSCATING THE NATURE OF ITS STRUCTURE. [FN374] THE SUBSECTION ALSO PRECLUDES THE PAYMENT OF A FINE IMPOSED ON AN AGENT OR SHAREHOLDER OF AN ORGANIZATION FROM ASSETS OF THE ORGANIZATION UNLESS SUCH PAYMENT IS EXPRESSLY PERMISSIBLE UNDER APPLICABLE STATE LAW. THE PURPOSE OF THE EXCEPTION IS SIMPLY TO RECOGNIZE THAT THE GOVERNING OF INTERNAL CORPORATE OPERATIONS IS APPROPRIATELY A MATTER FOR THE LAW OF THE STATE OF INCORPORATION. MOST STATES, THE COMMITTEE UNDERSTANDS, CAREFULLY CIRCUMSCRIBE INDEMNIFICATION FOR FINES. THE TERM 'EXPRESSLY PERMISSIBLE' IS INTENDED TO DISTINGUISH BETWEEN SITUATIONS IN WHICH STATE STATUTES OR COURT DECISIONS AUTHORIZE INDEMNIFICATION AND THOSE IN WHICH STATE LAW PROHIBITS IT OR IS SILENT. THE COURT'S FINDING IS TO EXTEND ONLY TO THAT ISSUE. IF INDEMNIFICATION IS AUTHORIZED, STATE LAW GOVERS THE MANNER OF DETERMINING WHETHER IT IS PROPER IN A PARTICULAR CASE.

SECTION 3573. MODIFICATION OR REMISSION OF FINE

1. IN GENERAL

SECTION 3573 PROVIDES THE FLEXIBILITY NECESSARY TO ACCOMMODATE CHANGES IN THE FINANCIAL CONDITION OF A DEFENDANT. SINCE SECTION 3572 SPECIFIES THAT THE ABILITY OF A DEFENDANT TO PAY IS RELEVANT TO THE AMOUNT OF A FINE, A MODIFICATION OR REMISSION OF THE FINE SHOULD BE AVAILABLE WHEN THAT ABILITY CHANGES. THE COURT IS THUS EQUIPPED TO ADJUST THE FINE OF THE WELL-INTENTIONED DEFENDANT IN ORDER TO AVOID CREATING UNJUSTIFIABLE IMPOVERISHMENT. AN UNEXCUSED FAILURE TO PAY A FINE, HOWEVER, MAY BE PROSECUTED AS ANY OTHER CRIMINAL CONTEMPT. [FN375]

2. PRESENT FEDERAL LAW

THERE IS NO COUNTERPART TO THIS SECTION IN EXISTING FEDERAL LAW; AS PREVIOUSLY NOTED, THE CURRENT STATUTE PERMITS A JUDGMENT IN A CRIMINAL CASE TO REQUIRE IMPRISONMENT UNTIL THE FINE IS PAID. [FN376]

3. PROVISIONS OF THE BILL, AS REPORTED
SUBSECTION (A) PERMITS A DEFENDANT WHO HAS BEEN SENTENCED TO PAY A FINE TO PETITION THE COURT FOR CHANGES IN THE TERMS OF PAYMENT OR REMISSION OF ALL OR PART OF THE FINE IN SPECIFIED CIRCUMSTANCES. UNDER PARAGRAPH (1), IF A DEFENDANT HAS PAID PART OF A FINE AND IF THE CIRCUMSTANCES THAT JUSTIFIED IMPOSITION OF THE FINE IN A PARTICULAR AMOUNT OR PAYMENT BY A PARTICULAR TIME OR METHOD HAVE CHANGED, THE DEFENDANT MAY PETITION THE COURT FOR MODIFICATION OF THE METHOD OF PAYMENT, REMISSION OF ALL OR PART OF THE UNPAID PORTION OF THE FINE, OR A CHANGE IN THE TIME OR METHOD OF PAYMENT. THE PROVISION RECOGNIZES THAT THE DEFENDANT'S CIRCUMSTANCES MAY CHANGE IN A WAY THAT CAUSES THE AMOUNT OR METHOD OF PAYMENT OF A FINE TO BECOME TOO HARSH TO SERVE THE PURPOSES OF SENTENCING FAIRLY. PARAGRAPH (2) PERMITS A DEFENDANT WHO HAS VOLUNTARILY MADE RESTITUTION TO THE VICTIM OF HIS OFFENSE AFTER A FINE WAS IMPOSED TO PETITION THE COURT FOR A REDUCTION OF THE FINE IN AN AMOUNT NOT EXCEEDING THE AMOUNT OF RESTITUTION. THIS PROVISION PLACES THE DEFENDANT WHO VOLUNTARILY MAKES RESTITUTION AFTER A FINE IS IMPOSED ON THE SAME FINANCIAL FOOTING AS THE DEFENDANT WHO VOLUNTARILY MAKES RESTITUTION BEFORE SENTENCING OR WHO IS ORDERED TO MAKE RESTITUTION AS PART OF HIS SENTENCE. [FN377]

*111 **3294 SUBSECTION (B) PERMITS THE JUDGE TO ENTER AN APPROPRIATE ORDER IF THE CIRCUMSTANCES WARRANT RELIEF. OF COURSE, THE CONSIDERATIONS SET FORTH IN SECTION 3572(A) FOR THE SETTING OF THE INITIAL FINE AND ITS TIME AND METHOD OF PAYMENT ARE EQUALLY APPLICABLE TO A DETERMINATION WHETHER A REMISSION OF THE FINE OR A CHANGE IN THE TIME OR METHOD OF PAYMENT IS WARRANTED.


SECTION 3574. IMPLEMENTATION OF A SENTENCE OF FINE

SECTION 3574 NOTES THAT IMPLEMENTATION OF A SENTENCE TO PAY A FINE IS GOVERNED BY THE PROCEDURES OUTLINED IN SUBCHAPTER B OF CHAPTER 229 OF TITLE 18. FULL DISCUSSION OF THESE PROCEDURES IS CONTAINED IN THE REPORT ON THAT SUBCHAPTER.

SUBCHAPTER D-- IMPRISONMENT

(SECTIONS 3581-3586)

PROPOSED SUBCHAPTER D OF CHAPTER 227 OF TITLE 18, U.S.C. SETS FORTH THE BASIC CONSIDERATIONS GOVERNING THE IMPOSITION OF SENTENCES OF IMPRISONMENT. IT CREATES THE FRAME OF REFERENCE USED THROUGHOUT THE SENTENCING PROVISIONS TO DETERMINE THE MAXIMUM SENTENCE THAT MAY BE IMPOSED FOR EACH OFFENSE. IT DEALS SPECIFICALLY WITH THE TERMS OF IMPRISONMENT AND SUPERVISED RELEASE AUTHORIZED FOR THE VARIOUS GRADES OF OFFENSES; CRITERIA FOR IMPOSING SUCH SENTENCES; COLLATERAL ASPECTS OF SENTENCES OF IMPRISONMENT, OPERATION OF MULTIPLE SENTENCES; AND CALCULATION OF TERMS OF IMPRISONMENT.

SECTION 3581. SENTENCE OF IMPRISONMENT
1. IN GENERAL

SECTION 3581 PROVIDES THAT A DEFENDANT CONVICTED OF AN OFFENSE MAY GENERALLY BE SENTENCED TO A TERM OF IMPRISONMENT, ESTABLISHES THE CLASSES OF OFFENSES, AND SPECIFIES THE MAXIMUM AUTHORIZED TERM OF IMPRISONMENT FOR EACH CLASS.

2. PRESENT FEDERAL LAW

PRESENT FEDERAL CRIMINAL LAW, WHICH HAS GROWN BY SPORADIC ADDITION AND DELETION, HAS RESULTED IN THERE BEING AUTHORIZED IN CURRENT TITLE 18 AT LEAST SEVENTEEN LEVELS OF CONFINEMENT, RANGING FROM LIFE IMPRISONMENT TO THIRTY DAYS. BY COMBINING IMPRISONMENT AND FINE VARIATIONS, SOME SEVENTY-FIVE DIFFERENT PUNISHMENT LEVELS MAY BE ISOLATED. COMPARISON OF PUNISHMENT PROVISIONS FOR PARTICULAR OFFENSES LEADS TO THE EXPOSURE OF NUMEROUS APPARENT INCONSISTENCIES.

IN ADDITION TO THE SENTENCING PROVISIONS FOUND IN THE TEXT OF EACH INDIVIDUAL CRIMINAL STATUTE THERE ARE TWO GENERALLY APPLICABLE SPECIAL OFFENDER SENTENCING PROVISIONS IN CURRENT LAW. [FN380] THESE TWO **3295 PROVISIONS ALLOW A TERM OF IMPRISONMENT 'FOR AN APPROPRIATE TERM NOT TO EXCEED TWENTY-FIVE YEARS AND NOT DISPROPORTIONATE IN SEVERITY TO THE MAXIMUM TERM OTHERWISE AUTHORIZED BY LAW' FOR A SPECIAL OFFENDER IN CERTAIN CLEARLY DEFINED INSTANCES. BOTH REQUIRE NOTICE AND A HEARING WITH RIGHTS OF COUNSEL, CONFRONTATION, AND COMPULSORY PROCESS IF APPLICATION OF THE SPECIAL OFFENDER SENTENCE IS SOUGHT BY THE PROSECUTOR, AND A SENTENCE PURSUANT TO THE PROVISIONS MAY BE APPEALED BY THE DEFENDANT OR THE GOVERNMENT. [FN381]

SENTENCE THAT HE IMPOSES. IF, FOR EXAMPLE, A JUDGE BELIEVES THAT A DEFENDANT SHOULD SPEND 20 MONTHS IN PRISON, LESS GOOD TIME, FOR A ROBBERY OFFENSE THAT CARRIES A MAXIMUM TERM OF IMPRISONMENT OF 15 YEARS, [FN384] COMMITTED UNDER MITIGATING CIRCUMSTANCES, HE COULD ACHIEVE THAT RESULT UNDER CURRENT LAW BY SENTENCING HIM TO EXACTLY 20 MONTHS IMPRISONMENT, BUT COULD ACHIEVE THE RESULT ONLY BECAUSE THE EXISTING PAROLE GUIDELINES DO NOT RECOMMEND PAROLE DURING SUCH A SHORT PERIOD. IF, INSTEAD, HE TRIED TO ACHIEVE THAT RESULT BY SENTENCING THE DEFENDANT TO 60 MONTHS IN PRISON, WITH ELIGIBILITY FOR PAROLE IN ONE-THIRD THAT TIME PURSUANT TO 18 U.S.C. 4205(A), IN THE BELIEF THAT MOST PRISONERS ARE RELEASED ON PAROLE AT THEIR PAROLE ELIGIBILITY DATE, THE RESULT WOULD PROBABLY BE THAT THE DEFENDANT WOULD SPEND AT LEAST 24 MONTHS IN PRISON, THE LOWEST PERIOD PROVIDED FOR ROBBERY IN THE PAROLE GUIDELINES. ONLY IF THE PAROLE COMMISSION AGREED WITH THE JUDGE THAT THERE WERE PARTICULAR MITIGATING CIRCUMSTANCES NOT TAKEN INTO ACCOUNT IN THE GUIDELINES WOULD THE DEFENDANT SERVE THE LENGTH OF TIME THAT THE JUDGE INTENDED. [FN385] ON THE OTHER HAND, IF THE JUDGE THOUGHT THE DEFENDANT SHOULD SPEND FIVE YEARS IN PRISON, HE WOULD HAVE TO SENTENCE THE DEFENDANT TO A 15-YEAR TERM WITHOUT EARLY PAROLE ELIGIBILITY IN ORDER TO ASSURE THAT OPERATION OF THE PAROLE GUIDELINES WOULD NOT RESULT IN AN EARLIER RELEASE FROM PRISON THAN THE JUDGE INTENDED. [FN386] IF THE JUDGE THOUGHT THE DEFENDANT SHOULD SERVE SEVEN YEARS IN PRISON, HE COULD NOT CONTROL THAT RESULT AT ALL; SUCH A SENTENCE EXCEEDS ANY PERIOD RECOMMENDED IN THE PAROLE GUIDELINES FOR THE OFFENSE OF ROBBERY (EXCEPT FOR MULTIPLE OFFENSES) AND EXCEEDS ANY PERIOD FOR WHICH THE JUDGE COULD MAKE THE DEFENDANT INELIGIBLE FOR PAROLE.

THUS, SENTENCING JUDGES AND THE PAROLE COMMISSION SECOND-GUESS EACH OTHER, OFTEN WORKING AT CROSS-PURPOSES. THE ARGUMENT THAT EARLY RELEASE ON PAROLE SHOULD BE RETAINED TO HELP ALLEVIATE JUDICIAL SENTENCING DISPARITY FAILS TO TAKE INTO ACCOUNT THE FACT THAT IT IS THE VERY AVAILABILITY OF SUCH RELEASE THAT HELPS TO CREATE THAT DISPARITY. THE JUDGES ARE ATTEMPTING TO APPLY THEIR INDIVIDUAL SENTENCING PHILOSOPHY TO CONTROL THE TRUE SENTENCE OF THE DEFENDANT, WHILE THE PAROLE COMMISSION IS ATTEMPTING TO ALLEVIATE THE RESULTING DISPARITY. OBVIOUSLY NEITHER IS SUCCESSFUL UNDER CURRENT LAW. THE PROBLEM IS COMPOUNDED BY THE FACT THAT THE JUDGES DO NOT GENERALLY STATE REASONS FOR THEIR SENTENCES OR THE LENGTHS OF TIME THEY BELIEVE DEFENDANTS SHOULD ACTUALLY SPEND IN PRISON, EFFECTIVELY PRECLUDING THE PAROLE COMMISSION FROM EVALUATING THE JUDGES' VIEWS, TO THE EXTENT IT MIGHT FIND THEM PERTINENT, AS TO THE INFLUENCING FACTORS IN PARTICULAR CASES.

3. PROVISIONS OF THE BILL, AS REPORTED

PROPOSED 18 U.S.C. 3581(A) STATES THE GENERAL RULE THAT ALL INDIVIDUAL OFFENDERS, REGARDLESS OF THE TYPE OF OFFENSE COMMITTED, MAY BE SENTENCED TO A TERM OF IMPRISONMENT. [FN387] THIS DIFFERS SLIGHTLY FROM THE APPROACH TAKEN BY THE NATIONAL COMMISSION IN THAT THE COMMISSION'S SENTENCING PROVISIONS DID NOT PROVIDE FOR IMPRISONING PERSONS COMMITTING THE LOWEST CLASS OF OFFENSES. [FN388] THE COMMITTEE IS OF THE BELIEF THAT A VERY SHORT TERM (FIVE DAYS) OF IMPRISONMENT IS APPROPRIATE FOR SOME OFFENDERS WHO ARE FOUND TO HAVE COMMITTED INFRACTIONS SINCE, INTER ALIA, THE SHOCK VALUE OF A BRIEF PERIOD IN PRISON MAY HAVE SIGNIFICANT SPECIAL DETERRENT EFFECT. SUBSECTION (B) SETS FORTH NINE CLASSES OF OFFENSES. [FN389] THERE ARE FIVE
FELONY CLASSES WITH AUTHORIZED TERMS OF IMPRISONMENT RANGING FROM LIFE IMPRISONMENT TO THREE YEARS; THREE MISDEMEANOR CLASSES WITH MAXIMUM TERMS RANGING FROM ONE YEAR TO THIRTY DAYS; AND THE AFOREMENTIONED INFRACTION CATEGORY CARRYING A MAXIMUM OF FIVE DAYS. THIS CATEGORIZATION OF OFFENSES ACCORDS FAIRLY CLOSELY WITH THE RANGE AND NUMBER OF CATEGORIES ADOPTED IN SEVERAL RECENT STATE CODIFICATIONS, AND, EXCEPT FOR THE ADDITION OF A THREE-YEAR FELONY AND A SIX-MONTH MISDEMEANOR, ACCORDS CLOSELY WITH THE RECOMMENDATION OF THE NATIONAL COMMISSION. [FN390]

IT MUST BE REMEMBERED THAT THE TERMS SET FORTH ARE THE MAXIMUM PERIODS FOR WHICH A JUDGE IS AUTHORIZED TO SENTENCE AN OFFENDER IN EACH SUCH CATEGORY; THEY REPRESENT THE COMMITTEE'S JUDGMENT AS TO THE GREATEST PERIOD THE CONGRESS SHOULD ALLOW A JUDGE TO IMPOSE FOR AN OFFENSE COMMITTED UNDER THE MOST AGRIOUS OF CIRCUMSTANCES. IT SHOULD ALSO BE REMEMBERED THAT THE SENTENCING COMMISSION WILL BE PROMULGATING GUIDELINES THAT WILL RECOMMEND AND APPROPRIATE SENTENCE FOR A PARTICULAR CATEGORY OF OFFENDER WHO IS CONVICTED OF A PARTICULAR CATEGORY OF OFFENSE AND THAT THE GUIDELINES WOULD RESERVE THE UPPER RANGE OF THE MAXIMUM SENTENCE FOR OFFENDERS WHO REPEATEDLY COMMIT OFFENSES OR THOSE WHO COMMIT AN OFFENSE UNDER PARTICULARLY AGRIOUS CIRCUMSTANCES. [FN391] IT IS EXPECTED, FOR EXAMPLE, THAT THE ORDINARY SENTENCE IMPOSED FOR A CLASS C FELONY WILL BE CONSIDERABLY LESS THAN THE TWELVE-YEAR MAXIMUM AUTHORIZED. THIS SUBSECTION IS DESIGNED SIMPLY TO PROVIDE A MAXIMUM LIMIT ON THE BROAD RANGE WITHIN WHICH THE SENTENCING COMMISSION AND THE JUDGES ARE TO OPERATE. THE SUBSECTION IS NO MORE INTENDED TO INDICATE THE ACTUAL SENTENCE A JUDGE IS EXPECTED TO IMPOSE IN EACH CASE THAN ARE THE ANALOGOUS PROVISIONS OF CURRENT FEDERAL STATUTES THAT ALSO CUSTOMARILY SET FORTH ONLY THE MAXIMUM LIMIT ON THE JUDGE'S DISCRETION. FURTHER, FOR THE FIRST TIME IN FEDERAL CRIMINAL LAW, THE SENTENCING JUDGE WILL BE SENTENCING WITHIN THE MAXIMUM PERMISSIBLE TERM OF IMPRISONMENT AFTER CONSIDERATION OF SENTENCING GUIDELINES THAT WILL RECOMMEND THE TOP OF THE POSSIBLE SENTENCING **115** **3298** RANGE ONLY FOR THE MOST AGRIOUS CASES, AND THE DEFENDANT WILL BE ABLE TO OBTAIN APPELLATE REVIEW OF THE SENTENCE IF IT EXCEEDS THE GUIDELINE RANGE APPLICABLE TO HIM. [FN392]

A SENTENCE IMPOSED BY A JUDGE PURSUANT TO SECTION 3581 WILL REPRESENT THE ACTUAL PERIOD OF TIME THAT THE DEFENDANT WILL SPEND IN PRISON, EXCEPT THAT A PRISONER, AFTER SERVING ONE YEAR OF HIS TERM OF IMPRISONMENT, MAY RECEIVE CREDIT AT THE END OF EACH YEAR OF UP TO 36 DAYS PER YEAR TOWARD SERVICE OF HIS SENTENCE IF HE SATISFACTORILY COMPLIES WITH THE INSTITUTION'S RULES. [FN393] THE USE OF SUCH 'DETERMINATE' SENTENCES, AS NOTED EARLIER, REPRESENTS A SUBSTANTIAL DEPARTURE FROM THE SENTENCING PHILOSOPHY ON WHICH CURRENT LAW IS BASED. AT THE TIME THE ORIGINAL PAROLE STATUTES WERE DRAFTED A JUDICIAL SENTENCE WAS TO REPRESENT ONLY THE MAXIMUM TERM THAT A DEFENDANT WAS TO REMAIN INCARCERATED, AND THE ROLE OF THE PAROLE COMMISSION WAS TO DETERMINE WHEN IN THE COURSE OF THAT INCARCERATION THE DEFENDANT HAD BECOME SUFFICIENTLY REHABILITATED TO BE SAFELY RETURNED TO SOCIETY. WHILE-- FOR THE REASONS STATED PREVIOUSLY-- THE REHABILITATION MODEL IS NO LONGER THE BASIS OF THE PAROLE RELEASE DECISION, THE THEORY ON WHICH IT IS BASED STILL PERVADES THE EXISTING FEDERAL SENTENCING STATUTES. UNDER CURRENT LAW, IF A JUDGE SENTENCES A DEFENDANT TO A TERM OF IMPRISONMENT THAT EXCEEDS ONE YEAR IN LENGTH, THAT SENTENCE WILL ALWAYS RESULT IN THE PRISONER'S BEING ELIGIBLE FOR PAROLE AFTER SERVING ONE-THIRD OF THE TERM, OR LESS IF THE JUDGE SO SPECIFIES. IN NO CASE CAN THE JUDGE SPECIFY THAT, FOR EXAMPLE, A DEFENDANT SHOULD SERVE TWO YEARS IN PRISON AND THEN BE RELEASED FOR A
TRANSITIONAL PERIOD OF SUPERVISION. THIS IS TRUE EVEN THOUGH LOGICALLY
THE ATTRIBUTES OF THE ENTIRE SENTENCE COULD BE SET AT THE TIME OF
SENTENCING-- THE FACTORS ROUTINELY CONSIDERED TODAY BY THE PAROLE
COMMISSION IN SETTING RELEASE DATES [FN394] RELATE ENTIRELY TO
INFORMATION KNOWN AT THE TIME OF SENTENCING. [FN395]
THE COMMITTEE IS OF THE VIEW, IN LIGHT OF THE REASONS THAT HAVE BEEN
REVIEWS PREVIOUSLY, THAT THE INDETERMINATE SENTENCE NO LONGER HAS A
ROLE TO PLAY IN THE CONTEXT OF A GUIDELINE SENTENCING SYSTEM. THE
GUIDELINE SENTENCING SYSTEM MUST TOTALLY SUPPLANT THE INDETERMINATE
SENTENCING SYSTEM IN ORDER TO BE SUCCESSFUL. ACCORDINGLY, ALL SENTENCES
TO IMPRISONMENT UNDER THE NEW SYSTEM ARE DETERMINATE.
**3299 +116 IT IS THE EXPECTATION OF THE COMMITTEE THAT DETERMINATE
SENTENCES IMPOSED UNDER THIS NEW SENTENCING SYSTEM WILL NOT, ON THE
AVERAGE, BE MATERIALLY DIFFERENT FROM THE ACTUAL TIMES NOW SPENT IN
PRISON BY SIMILAR OFFENDERS WHO HAVE COMMITTED SIMILAR OFFENSES. LOGIC
AND REASON ON THE PART OF THE SENTENCING COMMISSION, AS REVIEWED AND
ACCEPTED BY THE CONGRESS, WILL CONTROL THE LENGTH OF THE RECOMMENDED
TERMS, BUT HISTORICAL AVERAGES WILL BE EXAMINED DURING THEIR
DEVELOPMENT. [FN396] THERE WILL BE SOME LOGICAL CHANGES FROM HISTORICAL
PATTERNS, OF COURSE, AS IN THE CASE OF SERIOUS VIOLENT CRIMES OR WHITE
COLLAR OFFENSES FOR WHICH PLAINLY INADEQUATE SENTENCES HAVE BEEN
IMPOSED IN THE PAST, AND IN THE CASE OF MINOR OFFENSES FOR WHICH
GENERALLY INAPPROPRIATE TERMS OF IMPRISONMENT HAVE BEEN IMPOSED IN THE
PAST, BUT FOR THE MOST PART THE AVERAGE TIME SERVED SHOULD BE SIMILAR TO
THAT SERVED TODAY IN LIKE CASES. CERTAINLY, THE GUIDELINES WILL REMOVE
FROM THE CRIMINAL JUSTICE SYSTEM THE ARTIFICIALLY HIGH TERMS OF
IMPRISONMENT THAT ARE IMPOSED TODAY TO TAKE INTO ACCOUNT THE EFFECTS OF
THE PAROLE LAWS ON THE TIME THE DEFENDANT WILL SERVE. BOTH THE OFFENDER
AND SOCIETY WILL BENEFIT. [FN397]

SECTION 3582. IMPOSITION OF A SENTENCE OF IMPRISONMENT

1. IN GENERAL

THIS SECTION SPECIFIES THE FACTORS TO BE CONSIDERED BY A SENTENCING
JUDGE IN DETERMINING WHETHER TO IMPOSE A TERM OF IMPRISONMENT AND, IF A
TERM IS TO BE IMPOSED, THE LENGTH OF THE TERM. THE SECTION ALSO PROVIDES
THAT, IF A TERM OF IMPRISONMENT IS IMPOSED, THE JUDGE MAY RECOMMEND A
TYPE OF PRISON FACILITY SUITABLE FOR THE DEFENDANT. THE SECTION ALSO
MAKES CLEAR THAT A JUDGMENT OF CONVICTION IS FINAL EVEN THOUGH THE
SENTENCE IS PROVISIONAL IN THAT IT MAY BE MODIFIED, CORRECTED, OR
APPEALED, AND DESCRIBES THE CIRCUMSTANCES UNDER WHICH THE TERM OF
IMPRISONMENT MAY BE MODIFIED.

2. PRESENT FEDERAL LAW

AT PRESENT THERE ARE NO GENERAL FEDERAL STATUTES PRESCRIBING FACTORS
THAT A JUDGE MUST CONSIDER IN DECIDING WHETHER TO SENTENCE A DEFENDANT
TO A TERM OF IMPRISONMENT AND, IF SO, HOW LONG THAT TERM OF
IMPRISONMENT SHOULD BE.
IN ADDITION, AS NOTED BEFORE, THE SENTENCING JUDGE HAS VERY LIMITED
CONTROL UNDER CURRENT LAW OVER THE QUESTION OF HOW LONG A DEFENDANT
WILL ACTUALLY SPEND IN PRISON. THE DEFENDANT WHOSE SENTENCE IS MORE
THAN A YEAR LONG IS ELIGIBLE FOR RELEASE ON PAROLE BY OPERATION OF LAW AFTER SERVING ONE-THIRD OF THE TERM OF IMPRISONMENT OR TEN YEARS, WHICHEVER IS LESS, [FN398] UNLESS THE JUDGE HAS SPECIFICALLY MADE HIM ELIGIBLE FOR PAROLE AT AN EARLIER TIME [FN399] OR IMMEDIATELY UPON COMMENCEMENT OF SERVICE OF SENTENCE. [FN400] THE LAW *117 **3300 CONTAINS NO STATEMENT CONCERNING WHEN THE JUDGE SHOULD SPECIFY EARLY OR IMMEDIATE ELIGIBILITY FOR PAROLE. IT ALSO DOES NOT PERMIT THE JUDGE IN ANY CASE IN WHICH THE TERM OF IMPRISONMENT EXCEEDS ONE YEAR TO MAKE THE DEFENDANT INELIGIBLE FOR PAROLE FOR A LONGER PERIOD THAN ONE-THIRD OF HIS TERM OF IMPRISONMENT.

THERE ARE SEVERAL SPECIALIZED SENTENCING STATUTES THAT PROVIDE SOME STATUTORY GUIDANCE CONCERNING THE FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE UNDER THEIR PROVISIONS. THESE STATUTES RELATE TO DANGEROUS SPECIAL OFFENDERS, DANGEROUS SPECIAL DRUG OFFENDERS, YOUTH AND YOUNG ADULT OFFENDERS, AND DRUG ADDICTS.

DETAILED CRITERIA FOR A SENTENCE TO A TERM OF IMPRISONMENT LONGER THAN THAT WHICH WOULD ORDINARILY BE PROVIDED FOR MANY FELONIES ARE PROVIDED IN 18 U.S.C. 3575 FOR 'DANGEROUS SPECIAL OFFENDERS' AND IN 21 U.S.C. 849 FOR 'DANGEROUS SPECIAL DRUG OFFENDERS.' THE CRITERIA FOR THE TWO CLASSES OF OFFENDERS ARE PARALLEL, EXCEPT THAT THE DANGEROUS SPECIAL OFFENDER PROVISIONS MAY APPLY TO ANY FELONY IF THE CRITERIA ARE MET, WHILE THE DANGEROUS SPECIAL DRUG OFFENDER PROVISIONS APPLY ONLY TO FELONIES INVOLVING CONTROLLED SUBSTANCES. IN ORDER FOR THE DANGEROUS SPECIAL OFFENDER OR DANGEROUS SPECIAL DRUG OFFENDER SENTENCING PROVISIONS TO APPLY TO A DEFENDANT, HE MUST BE FOUND TO BE BOTH 'DANGEROUS' AND A 'SPECIAL' OFFENDER BECAUSE HE FITS ONE OF THREE CLASSIFICATIONS SET FORTH IN THE STATUTE. A DEFENDANT IS CONSIDERED 'DANGEROUS' IF A PERIOD OF CONFINEMENT FOR A FELONY THAT IS LONGER THAN THE MAXIMUM PROVIDED IN THE STATUTE DEFINING THE FELONY 'IS REQUIRED FOR THE PROTECTION OF THE PUBLIC FROM FURTHER CRIMINAL CONDUCT BY THE DEFENDANT.' [FN400A] THE DANGEROUS SPECIAL OFFENDER PROVISIONS APPLY TO AN OFFENDER WHO (1) WAS PREVIOUSLY CONVICTED OF TWO OR MORE SEPARATE FELONIES, AND HAS EITHER BEEN CONVICTED OF THE LAST ONE WITHIN FIVE YEARS OF THE CURRENT OFFENSE OR BEEN RELEASED FROM PRISON, ON PAROLE OR OTHERWISE, ON ONE OF THE OFFENSES WITHIN THE PAST FIVE YEARS; (2) COMMITTED THE CHARGED FELONY AS PART OF A PATTERN OF CRIMINAL CONDUCT WHICH GENERATED A SUBSTANTIAL SOURCE OF HIS INCOME AND IN WHICH HE MANIFESTED SPECIAL SKILLS OR EXPERTISE; OR (3) COMMITTED THE FELONY AS PART OF, OR IN FURTHERANCE OF, A CONSPIRACY WITH THREE OR MORE OTHER PERSONS IN WHICH THE OFFENDER PLAYED OR HAD AGREED TO PLAY A LEADERSHIP ROLE, OR IN WHICH HE USED, OR HAD AGREED TO USE, BRIBERY OR FORCE. THE CLASSIFICATIONS OF DANGEROUS SPECIAL DRUG OFFENDERS ARE SUBSTANTIALLY THE SAME, EXCEPT THAT THEY RELATE ONLY TO PERSONS CHARGED WITH CONTROLLED SUBSTANCES FELONIES, AND WHERE THE CHARACTERIZATION OF THE OFFENSE IS DEPENDENT ON PREVIOUS CONVICTIONS, THESE CONVICTIONS ARE FOR FELONIES INVOLVING CONTROLLED SUBSTANCES. UNDER EITHER STATUTE, THE APPLICABILITY TO THE DEFENDANT OF THE SPECIAL OFFENDER CLASSIFICATION MUST BE ESTABLISHED BY A PREPONDERANCE OF THE INFORMATION, INCLUDING INFORMATION FROM THE TRIAL, THE SENTENCING HEARING, AND THE PRESENTENCE REPORT.

THE FEDERAL YOUTH CORRECTIONS ACT [FN401] PROVIDES THAT A PERSON WHO IS UNDER 22 YEARS OF AGE AT THE TIME OF CONVICTION MAY BE SENTENCED UNDER THE ACT UNDER SPECIFIED CIRCUMSTANCES. SECTION 5010(D) OF TITLE 18 PROVIDES THAT A YOUTH OFFENDER MAY BE SENTENCED TO A REGULAR ADULT SENTENCE IF THE COURT FINDS THAT HE 'WILL NOT DERIVE *118 **3301 BENEFIT FROM TREATMENT' UNDER THE ACT. THIS PROVISION HAS BEEN INTERPRETED BY THE SUPREME COURT TO REQUIRE THAT THE SENTENCING COURT CONSIDER
WHETHER TO SENTENCE A YOUTH OFFENDER PURSUANT TO THE ACT BUT NOT TO REQUIRE THAT THE COURT STATE REASONS FOR DECIDING THAT IT WILL OR WILL NOT IMPOSE SENTENCE UNDER THE ACT. [FN402] IF THE COURT DOES SENTENCE A YOUTH OFFENDER UNDER THE ACT, IT MAY EITHER SENTENCE HIM TO AN INDETERMINATE SENTENCE FOR PURPOSES OF 'TREATMENT AND SUPERVISION' [FN403] OR, IF IT FINDS 'THAT THE YOUTH OFFENDER MAY NOT BE ABLE TO DRIVE MAXIMUM BENEFIT FROM TREATMENT * * * PRIOR TO THE EXPIRATION OF SIX YEARS,' MAY SENTENCE HIM TO THE CUSTODY OF THE ATTORNEY GENERAL 'FOR TREATMENT AND SUPERVISION' PURSUANT TO THE PROVISIONS OF THE FEDERAL YOUTH CORRECTIONS ACT TO ANY 'FURTHER PERIOD THAT MAY BE AUTHORIZED BY LAW FOR THE OFFENSE OR OFFENSES.' [FN404]


FINALLY, TITLE II OF THE NARCOTIC ADDICT REHABILITATION ACT [FN410] PROVIDES THAT, IF THE COURT FINDS THAT AN 'ELIGIBLE OFFENDER' [FN411] IS AN ADDICT AND 'IS LIKELY TO BE REHABILITATED THROUGH TREATMENT,' THE COURT MUST SENTENCE THE DEFENDANT TO THE CUSTODY OF THE ATTORNEY GENERAL FOR TREATMENT UNLESS THE ATTORNEY GENERAL CERTIFIES THAT *119 **3302 ADEQUATE FACILITIES AND PERSONNEL FOR SUCH TREATMENT ARE NOT AVAILABLE. [FN412] SUCH A COMMITMENT IS FOR AN INDETERMINATE PERIOD OF UP TO TEN YEARS, BUT NOT 'TO EXCEED THE MAXIMUM TERM OF IMPRISONMENT' APPLICABLE TO THE OFFENSE. THE DEFENDANT MAY BE RELEASED ON PAROLE AT ANY TIME AFTER SIX MONTHS OF TREATMENT IF THE ATTORNEY GENERAL RECOMMENDS SUCH RELEASE TO THE BOARD OF PAROLE AND THE SURGEON GENERAL CERTIFIES 'THAT THE OFFENDER HAS MADE SUFFICIENT PROGRESS TO WARRANT HIS CONDITIONAL RELEASE UNDER SUPERVISION.' [FN413]

3. PROVISIONS OF THE BILL, AS REPORTED

PROVIDE JUST PUNISHMENT, A DETERRENT EFFECT, INCAPACITATION, AND AN OPPORTUNITY FOR REHABILITATION; AND THE GUIDELINES AND ANY POLICY STATEMENTS OF THE SENTENCING COMMISSION THAT ARE APPLICABLE. WHILE JUDGES GENERALLY CONSIDER OFFENSE AND OFFENDER CHARACTERISTICS IN DETERMINING THE TYPE AND LENGTH OF SENTENCE TO BE IMPOSED UNDER CURRENT LAW, THE LISTING OF THE FACTORS TO BE CONSIDERED SERVES TO FOCUS ATTENTION ON THE SPECIFIC PURPOSES OF THE SENTENCING PROCESS AND TO ASSURE THAT ADEQUATE EMPHASIS IS GIVEN TO EACH. AGAIN, IT SHOULD BE NOTED THAT THERE WILL BE CASES IN WHICH INCARCERATION WOULD BE APPROPRIATE TO SERVE ONLY ONE OR TWO OF THE LISTED PURPOSES OF SENTENCING; NEVERTHELESS, IF IMPRISONMENT IS FOUND TO BE JUSTIFIED FOR ANY ONE OF THE PURPOSES, EXCEPT AS NOTED BELOW, ITS IMPOSITION IS AUTHORIZED UNDER THIS SECTION. IN SUCH A CASE, WHETHER IT SHOULD BE IMPOSED WHEN AUTHORIZED IS A QUESTION TO BE RESOLVED AFTER BALANCING ALL THE RELEVANT CONSIDERATIONS.

SUBSECTION (A) SPECIFIES, IN LIGHT OF CURRENT KNOWLEDGE, THAT THE JUDGE SHOULD RECOGNIZE, IN DETERMINING WHETHER TO IMPOSE A TERM OF IMPRISONMENT, 'THAT IMPRISONMENT IS NOT AN APPROPRIATE MEANS OF PROMOTING CORRECTION AND REHABILITATION.' THIS CAUTION CONCERNING THE USE OF REHABILITATION AS A FACTOR TO BE CONSIDERED IN IMPOSING SENTENCE IS TO DISCOURAGE THE EMPLOYMENT OF A TERM OF IMPRISONMENT ON THE SOLE GROUND THAT A PRISON HAS A PROGRAM THAT MIGHT BE OF BENEFIT TO THE PRISONER. THIS DOES NOT MEAN, OF COURSE, THAT IF A DEFENDANT IS TO BE SENTENCED TO IMPRISONMENT FOR OTHER PURPOSES, THE AVAILABILITY OF REHABILITATIVE PROGRAMS SHOULD NOT BE AN APPROPRIATE CONSIDERATION, FOR EXAMPLE, IN RECOMMENDING A PARTICULAR FACILITY.

*120 **3303 THE COMMITTEE BELIEVES THAT THE GUIDELINES PROVIDE AN APPROPRIATE MEANS FOR EMBODYING THE SAME CONSIDERATIONS WHICH ARE CONTAINED IN CURRENT DANGEROUS SPECIAL OFFENDER STATUTES. TWO PROVISIONS IN THE DIRECTIVES TO THE SENTENCING COMMISSION ARE DESIGNED TO BE USED IN THEIR PLACE. FIRST, UNDER PROPOSED 28 U.S.C. 994(I), THE SENTENCING COMMISSION IS SPECIFICALLY DIRECTED TO ASSURE THAT THE SENTENCING GUIDELINES REQUIRE A SUBSTANTIAL TERM OF IMPRISONMENT FOR CATEGORIES OF DEFENDANTS IN WHICH THE DEFENDANT HAS AN EXTENDED CRIMINAL HISTORY, IS A CAREER CRIMINAL, OR IS ENGAGED IN RACKETEERING IN A MANAGERIAL OR SUPERVISORY CAPACITY, OR COMMITTED A VIOLENT FELONY WHILE ON RELEASE PENDING TRIAL, SENTENCE, OR APPEAL FROM ANOTHER FELONY CHARGE OR CONVICTION. SECOND, PROPOSED 28 U.S.C. 994(H) REQUIRES THE SENTENCING GUIDELINES TO SPECIFY A TERM OF IMPRISONMENT AT OR NEAR THE STATUTORY MAXIMUM FOR A THIRD CONVICTION OF A FELONY THAT INVOLVES A CRIME OF VIOLENCE OR DRUG TRAFFICKING.


IN ADDITION, THE CONVERSE SITUATION IS ALSO RECOGNIZED; THE BILL PLACES IN 28 U.S.C. 994(J) A RECOGNITION THAT A YOUTH FIRST OFFENDER, WHO HAS NOT COMMITTED A SERIOUS CRIME, ORDINARILY SHOULD NOT RECEIVE A SENTENCE TO IMPRISONMENT. THE COMMITTEE BELIEVES THAT THIS APPROACH TO SUCH FACTORS AS YOUTH IS FAR PREFERABLE TO THE APPROACH IN CURRENT LAW. WHILE THE BUREAU OF PRISONS HAS FOUND THAT IT IS BETTER FROM THE STANDPOINT OF BOTH PRISONERS AND THE CRIMINAL JUSTICE SYSTEM TO HAVE PRISONERS IN
DIFFERENT AGE GROUPS IN THE SAME INSTITUTION, PROVIDING SEPARATE WINGS WITHIN AN INSTITUTION FOR YOUTHFUL OFFENDERS, SOME COURTS HAVE RECENTLY HELD THAT THE YOUTH CORRECTIONS ACT REQUIRES THAT OFFENDERS SENTENCED UNDER THE ACT MUST BE HOUSED IN A MANNER THAT SEPARATES THEM ENTIRELY FROM ADULT OFFENDERS. [FN417] THE BUREAU OF PRISONS THUS PROVIDES THREE SEPARATE INSTITUTIONS FOR THESE OFFENDERS DESPITE ITS MISGIVINGS CONCERNING THE WISDOM OF DOING SO, BOTH BECAUSE THE LIMITED NUMBER OF INSTITUTIONS FOR SUCH OFFENDERS CAUSES MOST OF THEM TO BE INCARCERATED FAR FROM HOME AND BECAUSE AN INSTITUTION CONTAINING ONLY YOUTHFUL OFFENDERS TENDS TO HAVE MORE DISCIPLINE PROBLEMS THAN ONE WITH A VARIETY OF AGE GROUPS. [FN418] THE COMMITTEE SHARES THESE CONCERNS AND BELIEVES THAT THESE PROVISIONS SHOULD BE DELETED. THE DIRECTIVE TO THE SENTENCING COMMISSION CONTAINED IN PROPOSED 28 U.S.C. 994(D) TO CONSIDER THE EFFECT THAT AGE SHOULD HAVE ON SENTENCES IS SUFFICIENT TO ASSURE SUCH SPECIALIZED TREATMENT AS IS DESIRABLE FOR THIS CATEGORY OF OFFENDERS.

*121 **3304 SUBSECTION (B) IS ADDED TO MAKE CLEAR THAT A JUDGMENT OF CONVICTION IS FINAL EVEN THOUGH IT INCLUDES A PROVISIONAL SENTENCE THAT IS SUBJECT TO MODIFICATION AS DESCRIBED IN SUBSECTION (C), SUBJECT TO CORRECTION PURSUANT TO PROPOSED 18 U.S.C. 3742, OR, IF THE SENTENCE IS OUTSIDE THE GUIDELINES, SUBJECT TO APPEAL AND MODIFICATION PURSUANT TO PROPOSED 18 U.S.C. 3742.

SUBSECTION (C) PROVIDES THAT A COURT MAY NOT MODIFY A SENTENCE EXCEPT AS DESCRIBED IN THE SUBSECTION. THE SUBSECTION PROVIDES 'SAFETY VALVES' FOR MODIFICATION OF SENTENCES IN THREE SITUATIONS. THE FIRST 'SAFETY VALVE' APPLIES, REGARDLESS OF THE LENGTH OF SENTENCE, TO THE UNUSUAL CASE IN WHICH THE DEFENDANT'S CIRCUMSTANCES ARE SO CHANGED, SUCH AS BY TERMINAL ILLNESS, THAT IT WOULD BE INEQUITABLE TO CONTINUE THE CONFINEMENT OF THE PRISONER. IN SUCH A CASE, UNDER SUBSECTION (C)(1)(A), THE DIRECTOR OF THE BUREAU OF PRISONS COULD PETITION THE COURT FOR A REDUCTION IN THE SENTENCE, AND THE COURT COULD GRANT A REDUCTION IF IT FOUND THAT THE REDUCTION WAS JUSTIFIED BY 'EXTRAORDINARY AND COMPELLING REASONS' AND WAS CONSISTENT WITH APPLICABLE POLICY STATEMENTS ISSUED BY THE SENTENCING COMMISSION. [FN419] (SUBSECTION (C)(1)(B) SIMPLY NOTES THE AUTHORITY TO MODIFY A SENTENCE IF MODIFICATION IS PERMITTED BY STATUTE OR BY RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.)

ANOTHER 'SAFETY VALVE,' SET FORTH IN SUBSECTION (C)(2), PERMITS THE COURT TO REDUCE A TERM OF IMPRISONMENT, UPON MOTION OF THE DEFENDANT OR THE DIRECTOR OF THE BUREAU OF PRISONS OR ON ITS OWN MOTION, IF THE TERM WAS BASED ON A SENTENCING RANGE IN THE APPLICABLE GUIDELINE THAT WAS LOWERED BY THE SENTENCING COMMISSION AFTER THE DEFENDANT'S SENTENCE WAS IMPOSED AND IF SUCH A REDUCTION IS CONSISTENT WITH APPLICABLE POLICY STATEMENTS OF THE SENTENCING COMMISSION.

THE VALUE OF THE FORMS OF 'SAFETY VALVES' CONTAINED IN THIS SUBSECTION LIES IN THE FACT THAT THEY ASSURE THE AVAILABILITY OF SPECIFIC REVIEW AND REDUCTION OF A TERM OF IMPRISONMENT FOR 'EXTRAORDINARY AND COMPELLING REASONS' AND TO RESPOND TO CHANGES IN THE GUIDELINES. THE APPROACH TAKEN KEEPS THE SENTENCING POWER IN THE JUDICIARY WHERE IT BELONGS, YET PERMITS LATER REVIEW OF SENTENCES IN PARTICULARLY COMPELLING SITUATIONS. SUBSECTION (D) PERMITS THE COURT TO ORDER, IN CONJUNCTION WITH A TERM OF IMPRISONMENT, THAT A DEFENDANT CONVICTED OF A FELONY VIOLATION OF THE LAWS RELATING TO ORGANIZED CRIME OR DRUG OFFENSES, NOT ASSOCIATE OR COMMUNICATE WITH A SPECIFIED PERSON IF THERE IS PROBABLE CAUSE TO BELIEVE THAT ASSOCIATION OR COMMUNICATION WITH THE PERSON IS FOR THE PURPOSE OF CONTINUING THE DEFENDANT'S PARTICIPATION IN AN ILLEGAL
ENTERPRISE. THE ORDER MAY BE ISSUED AT THE TIME OF SENTENCING OR MAY BE
ISSUED AT A LATER DATE IF THE BUREAU OF PRISONS OR THE UNITED STATES
ATTORNEY REQUESTS. THE ORDER MAY NOT EXTEND TO ASSOCIATION OR
COMMUNICATION WITH THE DEFENDANT’S COUNSEL. THE PURPOSE OF THE
PROVISION IS TO PREVENT THE DEFENDANT FROM CONTINUING HIS ILLEGAL
ACTIVITIES FROM HIS PLACE OF CONFINEMENT. THE PROVISION IS SIMILAR IN
CONCEPT TO THE PROVISION OF SECTION 3563(B)(7) THAT PERMITS THE COURT TO
ORDER AS A CONDITION OF PROBATION OR SUPERVISED *122 **3305 RELEASE
THAT A DEFENDANT NOT ASSOCIATE UNNECESSARILY WITH A SPECIFIED PERSON.
THE PROVISION IS NOT INTENDED TO LIMIT IN ANY WAY THE CURRENT AUTHORITY
OF THE BUREAU OF PRISONS TO TAKE APPROPRIATE MEASURES TO CONTROL
SIMILAR OR RELATED ACTIVITIES ON THE PART OF PRISONERS OR OTHERWISE TO
IMPOSE REASONABLE RESTRICTIONS ON ASSOCIATION OR COMMUNICATION BY
PRISONERS. THIS ASPECT OF A SENTENCE IS NOT REFERRED TO IN THE PROVISION
RELATING TO APPELLATE REVIEW OF SENTENCE SINCE THE CONCERNS WITH
LIMITATIONS ON COMMUNICATIONS ARE CONSTITUTIONAL CONCERNS TO BE
DECIDED UNDER EXISTING LAW ON CONSTITUTIONAL GROUNDS BY THE COURTS ON
A CASE-BY-CASE BASIS.
TWO OTHER POINTS SHOULD BE NOTED IN CONJUNCTION WITH SECTION 3582.
FIRST, IN ARTICULATING FOR THE FIRST TIME A GENERAL PHILOSOPHY OF
SENTENCING-- EMBODYING THE CONCEPTS OF DETERRENCE, INCAPACITATION, JUST
PUNISHMENT, AND REHABILITATION-- THE BILL AVOIDS THE HIGHLY EMOTIONAL
PAST DEBATE OVER WHETHER OR NOT THERE SHOULD BE A GENERAL SENTENCING
PRESUMPTION EITHER IN FAVOR OF INCARCERATION OR IN FAVOR OF PROBATION.
THE APPROACH TAKEN IN THE BILL IS TO AVOID ANY GENERAL REFERENCE TO
EITHER PRESUMPTION AND, INSTEAD, RELY ON THE GENERAL PURPOSES OF
SENTENCING, LEAVING TO THE SPECIFIC GUIDELINES PROMULGATED BY THE
COMMISSION THE ISSUE OF WHETHER IMPRISONMENT IN AN INDIVIDUAL CASE IS
APPROPRIATE OR NOT. SECOND, IT IS, OF COURSE, APPARENT THAT THE GENERAL
PURPOSES OF SENTENCING, IN AND OF THEMSELVES, WILL NOT SOLVE THE
PROBLEM OF DISPARITY. OBVIOUSLY, THIS SECTION MUST BE READ IN
CONJUNCTION WITH THE SPECIFIC GUIDELINES, AND OTHER PROVISIONS OF THE
BILL, WHICH ARE DESIGNED TO DEAL WITH THE IMMEDIATE PRACTICAL PROBLEM OF
DISPARITY.

SECTION 3583. INCLUSION OF A SENTENCE OF SUPERVISED RELEASE AFTER
IMPRISONMENT

1. IN GENERAL

PROPOSED 18 U.S.C. 3583 IS A NEW SECTION THAT PERMITS THE COURT, IN
IMPOSING A TERM OF IMPRISONMENT FOR A FELONY OR A MISDEMEANOR, TO
IMPOSE AS PART OF THE SENTENCE A REQUIREMENT THAT THE DEFENDANT BE
PLACED ON A TERM OF SUPERVISED RELEASE TO BE SERVED AFTER IMPRISONMENT.

2. PRESENT FEDERAL LAW

UNDER CURRENT LAW, BOTH THE LENGTH OF TIME THAT A DEFENDANT MAY BE
SUPERVISED ON PAROLE FOLLOWING A TERM OF IMPRISONMENT AND THE LENGTH
OF TIME FOR WHICH A PAROLEE MAY BE REIMPRISONED FOLLOWING PAROLE
REVOCATION ARE DEPENDENT ON THE LENGTH OF THE ORIGINAL TERM OF
IMPRISONMENT.
UNDER 18 U.S.C. 4210(A), A PAROLEE REMAINS IN THE LEGAL CUSTODY AND UNDER

UNDER PRESENT LAW, IF A PAROLEE VIOLATES A CONDITION OF PAROLE THAT RESULTS IN A DETERMINATION TO REVOKE PAROLE, THE REVOCATION HAS THE EFFECT OF REQUIRING THE PAROLEE TO SERVE THE REMAINDER OF HIS ORIGINAL TERM OF IMPRISONMENT, SUBJECT TO PERIODIC CONSIDERATION FOR RELEASE AS REQUIRED FOR ANY PRISONER WHO IS ELIGIBLE FOR PAROLE. [FN425] CURRENT LAW ALSO CONTAINS TWO PROVISIONS THAT RESULT IN STREET SUPERVISION FOLLOWING CONFINEMENT OF A PERSON SENTENCED TO A PERIOD OF CONFINEMENT OF LESS THAN A YEAR. UNDER 18 U.S.C. 3651, A DEFENDANT WHO IS CONVICTED OF AN OFFENSE FOR WHICH THE MAXIMUM TERM OF IMPRISONMENT IS MORE THAN SIX MONTHS MAY BE SENTENCED TO A SPLIT SENTENCE WITH NO MORE THAN SIX MONTHS' IMPRISONMENT FOLLOWED BY PROBATION. UNDER 18 U.S.C. 4205(F), THE SENTENCING JUDGE MAY SPECIFY THAT A DEFENDANT SENTENCED TO BETWEEN SIX MONTHS AND ONE YEAR IN PRISON WILL BE RELEASED AS IF ON PAROLE (I.E., SUBJECT TO STREET SUPERVISION) AFTER SERVING ONE-THIRD OF THE TERM.

3. PROVISIONS OF THE BILL, AS REPORTED

SUPERVISED RELEASE IS LONGER THAN *124 **3307 RECOMMENDED IN THE APPLICABLE SENTENCING GUIDELINES, THE DEFENDANT MAY APPEAL IT UNDER PROPOSED SECTION 3742; IF IT IS SHORTER, THE GOVERNMENT MAY APPEAL ON BEHALF OF THE PUBLIC.

SUBSECTION (B) SPECIFIES THE AUTHORIZED MAXIMUM TERMS OF SUPERVISED RELEASE, WITH THE TERMS RANGING FROM A MAXIMUM OF ONE YEAR FOR A DEFENDANT SENTENCED FOR A CLASS E FELONY OR FOR A MISDEMEANOR, TO A TERM OF NOT MORE THAN THREE YEARS FOR A DEFENDANT RELEASED AFTER SERVING A TERM OF IMPRISONMENT FOR A CLASS A OR B FELONY. THE LENGTH OF THE TERM OF SUPERVISED RELEASE WILL BE DEPENDENT ON THE NEEDS OF THE DEFENDANT FOR SUPERVISION RATHER THAN, AS IN CURRENT LAW, ON THE ALMOST SHEER ACCIDENT OF THE AMOUNT OF TIME THAT HAPPENS TO REMAIN OF THE TERM OF IMPRISONMENT WHEN THE DEFENDANT IS RELEASED.


SUBSECTION (E) PERMITS THE COURT, AFTER CONSIDERING THE SAME FACTORS CONSIDERED IN THE ORIGINAL IMPOSITION OF A TERM OF SUPERVISED RELEASE, TO TERMINATE A TERM OF SUPERVISED RELEASE PREVIOUSLY ORDERED AT ANY TIME AFTER ONE YEAR OF SUPERVISED RELEASE; OR, AFTER A HEARING, TO EXTEND THE TERM OF SUPERVISED RELEASE (IF LESS THAN THE maximum term was originally imposed); OR MODIFY, REDUCE, OR ENLARGE THE CONDITIONS OF SUPERVISED RELEASE; OR TO TREAT A
VIOLATION OF A CONDITION OF A TERM OF SUPERVISED RELEASE AS CONTEMPT OF COURT PURSUANT TO SECTION 401(3) OF TITLE 18. THE COURT IS ALSO EMPOWERED BY SUBSECTION (E)(3) TO TREAT A VIOLATION OF A CONDITION OF A TERM OF SUPERVISED RELEASE AS CONTEMPT OF COURT PURSUANT TO SECTION 401(E) OF THIS TITLE AND TO CARRY OUT THE APPROPRIATE CONTEMPT PROCEEDINGS AND SANCTIONS AS SPECIFIED IN 18 U.S.C. 401. IT IS INTENDED THAT CONTEMPT OF COURT PROCEEDINGS WILL ONLY BE USED AFTER REPEATED OR SERIOUS VIOLATIONS OF THE CONDITIONS OF SUPERVISED RELEASE.

IN PAST CONGRESSES, THE LEGISLATIVE HISTORY OF THE SENTENCING REFORM PROPOSAL HAS CONTEMPLATED USE OF CRIMINAL CONTEMPT AS A SANCTION FOR VIOLATION OF CONDITIONS OF POST-RELEASE SUPERVISION. THE PROBATION COMMITTEE OF THE JUDICIAL CONFERENCE URGED THE COMMITTEE TO EXPRESSLY STATE THE AVAILABILITY OF THIS SANCTION IN THE LEGISLATION TO AVOID CONFUSION, AND THE COMMITTEE HAS DONE SO.

SUBSECTION (F) REQUIRES THE COURT TO DIRECT THE PROBATION OFFICER TO PROVIDE THE DEFENDANT WITH A CLEAR AND SPECIFIC STATEMENT OF THE CONDITIONS OF SUPERVISED RELEASE. IN EFFECT, THE TERM OF SUPERVISED RELEASE PROVIDED BY THE BILL, TAKES THE PLACE OF PAROLE SUPERVISION UNDER CURRENT LAW. UNLIKE CURRENT LAW, HOWEVER, PROBATION OFFICERS WILL ONLY BE SUPERVISING THOSE RELEASEES FROM PRISON WHO ACTUALLY NEED SUPERVISION, AND EVERY RELEASEE WHO DOES NEED SUPERVISION WILL RECEIVE IT. [FN426] THE TERM OF SUPERVISED RELEASE IS VERY SIMILAR TO A TERM OF PROBATION, EXCEPT THAT IT FOLLOWS A TERM OF IMPRISONMENT AND MAY NOT BE IMPOSED FOR PURPOSES OF PUNISHMENT OR INCAPACITATION SINCE THOSE PURPOSES WILL HAVE BEEN SERVED TO THE EXTENT NECESSARY BY THE TERM OF IMPRISONMENT. UNLIKE A TERM OF PROBATION, HOWEVER, THE TERM OF SUPERVISED RELEASE IS NOT SUBJECT TO REVOCATION FOR A VIOLATION. INSTEAD, FOR THE USUAL VIOLATIONS, THE TERM OR CONDITIONS OF SUPERVISED RELEASE MAY BE AMENDED PURSUANT TO SUBSECTION (E). IF THE VIOLATION IS A NEW OFFENSE, THE DEFENDANT MAY, OF COURSE, BE PROSECUTED FOR THE OFFENSE OR HELD IN CONTEMPT OF COURT FOR VIOLATIONS OF THE COURT ORDER SETTING THE CONDITIONS OF SUPERVISED RELEASE. THE COMMITTEE DID NOT PROVIDE FOR REVOCATION PROCEEDINGS FOR VIOLATION OF A CONDITION OF SUPERVISED RELEASE BECAUSE IT DOES NOT BELIEVE THAT A MINOR VIOLATION OF A CONDITION OF SUPERVISED RELEASE SHOULD RESULT IN RESENTENCING OF THE DEFENDANT AND BECAUSE IT BELIEVES THAT A MORE SERIOUS VIOLATION OF COURSE, THE FACT THAT A DEFENDANT IS CHARGED WITH A NEW OFFENSE COMMITTED WHILE HE WAS ON RELEASE WILL BE PERTINENT TO THE QUESTIONS WHETHER THERE IS A RISK OF FLIGHT OR DANGER TO THE COMMUNITY PENDING TRIAL AND WHAT CONDITIONS MIGHT BE IMPOSED ON HIS RELEASE.

SECTION 3584. MULTIPLE SENTENCES OF IMPRISONMENT

1. IN GENERAL

THIS SECTION PROVIDES THE RULES FOR DETERMINING THE LENGTH OF A TERM OF IMPRISONMENT FOR A PERSON CONVICTED OF MORE THAN ONE OFFENSE. *126 **3309 IT SPECIFIES THE FACTORS TO BE CONSIDERED IN DETERMINING WHETHER TO IMPOSE CONCURRENT OR CONSECUTIVE SENTENCES. IT FURTHER PROVIDES THAT CONSECUTIVE SENTENCES, AND ANY PORTIONS THEREOF DURING WHICH THE DEFENDANT IS SUBJECT TO EARLY RELEASE, SHALL BE TREATED AS A SINGLE SENTENCE FOR ADMINISTRATIVE PURPOSES.

2. PRESENT FEDERAL LAW

3. PROVISIONS OF THE BILL, AS REPORTED


PROPOSED 18 U.S.C. 3584(A) ALSO CODIFIES THE RULE THAT, IF THE COURT IS SILENT AS TO WHETHER SENTENCES TO TERMS OF IMPRISONMENT IMPOSED AT THE SAME TIME ARE CONCURRENT OR CONSECUTIVE, THE TERMS RUN CONCURRENTLY UNLESS A STATUTE REQUIRES THAT THEY BE CONSECUTIVE. [FN434] IF, ON THE OTHER HAND, MULTIPLE TERMS OF IMPRISONMENT ARE IMPOSED AT DIFFERENT TIMES WITHOUT THE JUDGE SPECIFYING WHETHER THEY ARE TO RUN CONCURRENTLY OR CONSECUTIVELY, THEY WILL RUN CONSECUTIVELY UNLESS THE STATUTE SPECIFIES OTHERWISE. THIS CARRIES FORWARD CURRENT LAW WHERE BOTH SENTENCES ARE FOR FEDERAL OFFENSES, BUT CHANGES THE LAW THAT NOW APPLIES TO A PERSON SENTENCED FOR A FEDERAL OFFENSE WHO IS ALREADY SERVING A TERM OF IMPRISONMENT FOR A STATE OFFENSE. [FN435] SUBSECTION (A) IS INTENDED TO BE USED AS A RULE OF CONSTRUCTION IN THE CASES IN WHICH THE COURT IS SILENT AS TO WHETHER SENTENCES ARE

SUBSECTION (B) PROVIDES THAT IN EVALUATING WHETHER THE SENTENCES SHOULD RUN CONCURRENTLY OR CONSECUTIVELY, THE COURT MUST CONSIDER THE NATURE AND CIRCUMSTANCES OF THE OFFENSES AND THE HISTORY AND CHARACTERISTICS OF THE OFFENDER, THE NEED FOR JUST PUNISHMENT, DETERRENCE, INCAPACITATION, AND REHABILITATION, AND THE SENTENCING GUIDELINES AND ANY PERTINENT POLICY STATEMENTS OF THE SENTENCING COMMISSION. IT IS ANTICIPATED THAT IN CERTAIN SITUATIONS A PURPOSE OF INCAPACITATION ALONE MIGHT WARRANT IMPOSITION OF CONSECUTIVE TERMS OF IMPRISONMENT, WHILE IN OTHER SITUATIONS OTHER PURPOSES OF SENTENCING MIGHT MANDATE THE IMPOSITION OF CONCURRENT TERMS. CORRESPONDINGLY, ALTHOUGH SIMILAR OFFENSES COMMITTED IN THE COURSE OF A SINGLE CRIMINAL EPISODE WOULD ORDINARILY BE APPROPRIATE SUBJECTS FOR CONCURRENT SENTENCES, THERE MAY BE INSTANCES IN WHICH THE JUST PUNISHMENT PURPOSE OF SENTENCING MIGHT REQUIRE THE IMPOSITION OF DISTINCT, SEPARATELY IDENTIFIABLE SENTENCES FOR EACH OF THE PARTICULAR OFFENSES THE DEFENDANT IS FOUND TO HAVE COMMITTED. MORE FREQUENTLY, PERHAPS, MULTIPLE OFFENSES WILL RESULT IN A BASE SENTENCE FOR THE FIRST OFFENSE OR FOR THE MOST SERIOUS OFFENSE BEING ADDED TO AN INCREMENTAL SENTENCE FOR EACH SUBSEQUENT OFFENSE. THE SUBSECTION SIMPLY SERVES TO CALL ATTENTION TO THE FACT THAT IN THIS SENTENCING DETERMINATION, AS IN ANY OTHER SENTENCING DETERMINATION, THE PRINCIPAL FOCUS SHOULD BE UPON THE PURPOSES TO BE SERVED BY THE SENTENCE, AND THAT THE SENTENCE SHOULD BE STRUCTURED ACCORDINGLY. [FN437]

SUBSECTION (C) PROVIDES THAT CONSECUTIVE TERMS OF IMPRISONMENT SHALL BE TREATED AS AN AGGREGATE FOR ADMINISTRATIVE PURPOSES, Thus SIMPLIFYING ADMINISTRATION.

SECTION 3585. CALCULATION OF A TERM OF IMPRISONMENT

1. IN GENERAL
THIS SECTION PROVIDES THE METHOD OF CALCULATING THE ONSET OF A TERM OF IMPRISONMENT AND CONTAINS PROVISIONS FOR CREDITING AN OFFENDER FOR PRIOR CUSTODY.

2. PRESENT FEDERAL LAW

CURRENT FEDERAL LAW ON THESE SUBJECTS IS CONTAINED IN 18 U.S.C. 3568. THAT SECTION PROVIDES THAT A TERM OF IMPRISONMENT COMMENCES ON THE DATE THAT THE OFFENDER IS RECEIVED AT AN INSTITUTION FOR THE SERVICE OF HIS SENTENCE OR ON THE DATE HE IS TAKEN INTO CUSTODY AWAITING TRANSPORTATION TO THE PLACE HE IS TO SERVE HIS SENTENCE. IT FURTHER PROVIDES THAT THE OFFENDER WILL RECEIVE CREDIT FOR ANY TIME SPENT IN CUSTODY IN CONNECTION WITH THE OFFENSE OR ACTS FOR WHICH THE SENTENCE WAS IMPOSED.

*129 **3312 3. PROVISIONS OF THE BILL, AS REPORTED

SUBSECTION (A) OF PROPOSED 18 U.S.C. 3585 PROVIDES THAT THE SENTENCE COMMENCES ON THE DATE THAT THE DEFENDANT IS RECEIVED IN CUSTODY AWAITING TRANSPORTATION TO THE FACILITY IN WHICH HE IS TO SERVE HIS SENTENCE, OR ARRIVES VOLUNTARILY AT SUCH FACILITY. [FN438] CURRENT LAW LANGUAGE DIFFERS FROM SUBSECTION (A) BY STATING THAT A SENTENCE BEGINS FROM THE DATE OF RECEIPT AT A FACILITY OR, IF HE IS COMMITTED TO ONE FACILITY TO AWAITS TRANSPORTATION TO ANOTHER FACILITY, ON THE DATE OF RECEIPT AT THE FIRST FACILITY. THE COMMITTEE DOES NOT INTEND A DIFFERENT RESULT BY NOT SPECIFICALLY REQUIRING THAT THE DEFENDANT BE COMMITTED TO THE FACILITY FROM WHICH HE WILL BE TRANSPORTED. THE COMMITTEE ALSO DOES NOT INTEND THAT THIS PROVISION BE READ TO BAR CONCURRENT FEDERAL AND STATE SENTENCES FOR A DEFENDANT WHO IS SERVING A STATE SENTENCE AT THE TIME HE RECEIVES A FEDERAL SENTENCE. [FN439] IT SHOULD BE POSSIBLE FOR THE BUREAU OF PRISONS TO USE ITS AUTHORITY TO CONTRACT WITH STATE FACILITIES TO MAKE EQUITABLE ARRANGEMENTS FOR A DEFENDANT TO CONTINUE TO RESIDE IN THE STATE FACILITY WHILE SERVING PART OF HIS FEDERAL SENTENCE.

SUBSECTION (B) PROVIDES THAT THE DEFENDANT WILL RECEIVE CREDIT TOWARDS THE SENTENCE OF IMPRISONMENT FOR ANY TIME HE HAS SPENT IN OFFICIAL CUSTODY PRIOR TO THE DATE THE SENTENCE WAS IMPOSED WHERE THE CUSTODY WAS A RESULT OF THE SAME OFFENSE FOR WHICH THE SENTENCE WAS IMPOSED OR WAS A RESULT OF A SEPARATE CHARGE FOR WHICH HE WAS ARRESTED AFTER THE COMMISSION OF THE CURRENT OFFENSE. NO CREDIT WOULD BE GIVEN IF SUCH TIME HAD ALREADY BEEN CREDITED TOWARD THE SERVICE OF ANOTHER SENTENCE.

SECTION 3586. IMPLEMENTATION OF A SENTENCE OF IMPRISONMENT

THIS SECTION CALLS ATTENTION TO THE IMPRISONMENT PROVISIONS IN SUBCHAPTER C OF CHAPTER 229, AND TO PROVISIONS IN SUBCHAPTER A OF CHAPTER 229 RELATING TO TERMS OF SUPERVISED RELEASE, TO FACILITATE APPROPRIATE REFERENCE TO THE PORTIONS OF THE BILL THAT CONTROL THE GENERAL ADMINISTRATION OF IMPRISONMENT AND RELEASE MATTERS.

CHAPTER 229-- POST-SENTENCE ADMINISTRATION
PROPOSED CHAPTER 229 OF TITLE 18, U.S.C. CONSISTS OF THREE SUBCHAPTERS WHICH COVER THE ADMINISTRATION OF THE VARIOUS TYPES OF SENTENCES IMPOSED UNDER PROPOSED CHAPTER 227. SUBCHAPTER A PROVIDES FOR THE APPOINTMENT OF PROBATION OFFICERS AND SETS FORTH THEIR DUTIES. IN ADDITION, IT PROVIDES FOR SPECIAL PROBATION AND RECORD EXPUNGEMENT PROCEDURES FOR DRUG POSSESSION OFFENSES. SUBCHAPTER B COVERS THE PAYMENT AND COLLECTION OF FINES WHICH MAY BE IMPOSED UNDER SUBCHAPTER C OF CHAPTER 227. SUBCHAPTER C OF CHAPTER 229, SETS FORTH THE PROCEDURES FOR SENTENCES TO PRISON TERMS.

*130 **3313 SUBCHAPTER A-- PROBATION

(SECTIONS 3601-3607)

THIS SUBCHAPTER CONTAINS THE PROVISIONS FOR IMPLEMENTATION OF A SENTENCE TO PROBATION PURSUANT TO PROPOSED SUBCHAPTER B OF CHAPTER 227, THE PLACEMENT OF JUVENILE DELINQUENTS ON PROBATION PURSUANT TO EXISTING CHAPTER 403, AND THE PLACEMENT OF AN INDIVIDUAL ON SUPERVISED RELEASE PURSUANT TO PROPOSED 18 U.S.C. 3583. THE SUBCHAPTER, FOR THE MOST PART, CARRIES FORWARD CURRENT LAW CONCERNING THE APPOINTMENT OF PROBATION OFFICERS BY THE COURTS AND THE POWERS AND DUTIES OF PROBATION OFFICERS.

SECTION 3601. SUPERVISION OF PROBATION


SECTION 3602. APPOINTMENT OF PROBATION OFFICERS

PROPOSED 18 U.S.C. 3602 IS LARGELY DERIVED FROM 18 U.S.C. 3654. SUBSECTION (A) REQUIRES EACH DISTRICT COURT OF THE UNITED STATES TO APPOINT SUITABLE AND QUALIFIED PERSONS TO SERVE WITH OR WITHOUT COMPENSATION AS PROBATION OFFICERS UNDER THE DIRECTION OF THE COURT. THOSE APPOINTED WITH COMPENSATION ARE REMOVABLE BY THE COURT FOR CAUSE, RATHER THAN
REMOVABLE AT THE DISCRETION OF THE COURT. THIS IS A CHANGE FROM EXISTING LAWS, WHICH WAS MADE UPON THE RECOMMENDATION OF THE PROBATION COMMITTEE OF THE JUDICIAL CONFERENCE. VOLUNTEERS SERVING WITHOUT COMPENSATION REMAIN SUBJECT TO REMOVAL AT THE DISCRETION OF THE COURT. THE REQUIREMENT THAT PROBATION OFFICERS BE APPOINTED IS ALSO NEW. UNDER EXISTING LAW, THE COURT IS AUTHORIZED, RATHER THAN REQUIRED, TO APPOINT PROBATION OFFICERS SINCE THE ORIGINAL REASON FOR ENACTING PROBATION LEGISLATION WAS TO GRANT THE COURTS THE POWER TO SUSPEND SENTENCES AND APPOINT PROBATION OFFICERS, A PROCEDURE WHICH THE COURTS HAD SOUGHT TO EXERCISE WITHOUT SPECIFIC AUTHORITY. [FN443] EXISTING LAW PROVIDES THAT PROBATION OFFICERS BE 'SUITABLE' BUT DOES NOT INCLUDE THE REQUIREMENT THAT THEY BE 'QUALIFIED' BY TRAINING OR BACKGROUND TO BE PROBATION OFFICERS. GIVEN THE BILL'S ENCOURAGEMENT OF THE USE OF INNOVATIVE CONDITIONS OF PROBATION TO MEET THE PURPOSES OF SENTENCING, DIFFERENT SORTS OF QUALIFIED PROBATION OFFICERS SHOULD BE AVAILABLE TO THE COURTS. THE EFFECTIVE SUPERVISION OF A CONVICTED LOAN-SHARK, UNION, FORGER, OR BROKERAGE HOUSE, FOR EXAMPLE, WOULD REQUIRE QUITE DIFFERENT QUALIFICATIONS. SOME OF THESE QUALIFICATIONS MIGHT BE FOUND AMONG PROBATION OFFICER 'SPECIALISTS' (WHO MIGHT BE MADE AVAILABLE, AS THE NEED AROSE, TO ANY OF SEVERAL COURTS); OTHERS MIGHT BE NEEDED SO RARELY AS TO WARRANT ONLY OCCASIONAL SPECIAL APPOINTMENTS FROM THE REQUISITE PROFESSION TO SUPERVISE THE FEW CASES IN WHICH SUCH TALENTS WOULD BE HELPFUL. EXISTING LAW ALSO PROVIDES THAT PROBATION OFFICERS SERVE WITHOUT COMPENSATION EXCEPT WHEN IT APPEARS THAT THE 'NEEDS OF THE SERVICE' REQUIRE COMPENSATION. THIS PROVISION HAS BEEN DROPPED AS OUTMODED IN RECOGNITION OF THE IMPORTANCE OF A QUALIFIED PROFESSIONAL PROBATION SYSTEM. OF COURSE, THE COURTS MAY CONTINUE TO USE THE SERVICES OF QUALIFIED VOLUNTEERS. PROPOSED 18 U.S.C. 3602(B) CARRIES FORWARD THE EXISTING PROVISION CONCERNING THE ORDER OF APPOINTMENT OF A PROBATION OFFICER. SUBSECTION (C) CARRIES FORWARD THE EXISTING PROVISION PERMITTING DESIGNATION OF A CHIEF PROBATION OFFICER BY THE COURT TO DIRECT THE WORK OF ALL PROBATION OFFICERS SERVING WITHIN THE JUDICIAL DISTRICT. THE PROVISION HAS BEEN AMENDED FROM CURRENT LAW TO MAKE CLEAR THAT EACH JUDICIAL DISTRICT HAS ONLY ONE CHIEF PROBATION OFFICER EVEN IF THE DISTRICT HAS MORE THAN ONE DIVISION OR PLACE OF HOLDING COURT.

SECTION 3603. DUTIES OF PROBATION OFFICERS

PROPOSED 18 U.S.C. 3603 CARRIES FORWARD THE PROVISIONS OF 18 U.S.C. 3655 RELATING TO THE DUTIES OF PROBATION OFFICERS WITH RESPECT TO SUPERVISION OF PROBATIONERS AND THE KEEPING OF RECORDS AND MAKING OF REPORTS, BUT MODIFIES THE PROVISIONS TO INCLUDE PERSONS RELEASED ON SUPERVISED RELEASE FOLLOWING A TERM OF IMPRISONMENT PURSUANT TO SECTION 3583. THE SECTION ALSO ADDS A NUMBER OF SPECIFIC REQUIREMENTS NOT FOUND IN CURRENT LAW, INCLUDING THE REQUIREMENTS THAT THE PROBATION OFFICER BE RESPONSIBLE FOR SUPERVISION OF ANY PROBATIONER OR PERSON ON SUPERVISED RELEASE KNOWN TO BE WITHIN THE JUDICIAL DISTRICT (IN ORDER TO CLARIFY SUPERVISED AUTHORITY OVER PROBATIONERS AND PERSONS ON SUPERVISED RELEASE TRANSFERRED INTO HIS DISTRICT OR TEMPORARILY PRESENT IN THE DISTRICT), AND THAT, WHEN REQUESTED, HE SUPERVISE AND FURNISH INFORMATION ABOUT PERSONS ON WORK RELEASE, FURLough, OR OTHER AUTHORIZED RELEASE OR IN PRE-RELEASE CUSTODY PURSUANT TO SECTION 3642(C). THE CURRENT LAW PROVISIONS REQUIRING PROBATION OFFICERS TO KEEP
RECORDS OF MONEY RECEIVED FROM PROBATIONERS HAVE BEEN DROPPED AS UNNECESSARY SINCE IT IS NOT THE RESPONSIBILITY OF THE PROBATION OFFICER TO PERFORM SUCH FUNCTIONS AS COLLECTING FINES IMPOSED BY THE COURTS.

SECTION 3604. TRANSPORTATION OF A PROBATIONER

THIS SECTION CARRIES FORWARD THE PROVISIONS OF 18 U.S.C. 4283 PERMITTING A COURT TO ORDER A UNITED STATES MARSHAL TO FURNISH TRANSPORTATION TO A PERSON PLACED ON PROBATION TO THE PLACE WHERE HE IS REQUIRED TO GO AS A CONDITION OF PROBATION. UNDER EXISTING LAW, THE COURT ALSO MAY ORDER SUBSISTENCE EXPENSES FOR THE PROBATIONER WHILE TRAVELING TO HIS DESTINATION, NOT TO EXCEED THIRTY DOLLARS. SECTION 3604 DOES NOT SPECIFY A LIMITATION ON THE AMOUNT OF SUBSISTENCE WHICH COULD BE PAID, BUT WOULD PERMIT THE ATTORNEY GENERAL TO PRESCRIBE REASONABLE SUBSISTENCE PAYMENTS.

SECTION 3605. TRANSFER OF JURISDICTION OVER A PROBATIONER

PROPOSED 18 U.S.C. 3605, RELATING TO TRANSFER OF JURISDICTION OVER A PROBATIONER OR PERSON ON SUPERVISED RELEASE FROM ONE COURT TO ANOTHER, IS DERIVED FROM 18 U.S.C. 3653. BOTH CURRENT LAW AND SECTION 3605 REQUIRE THE CONCURRENCE OF THE COURT RECEIVING JURISDICTION OF A PROBATIONER IN THE TRANSFER OF JURISDICTION. SECTION 3605 EXPANDS CURRENT LAW TO COVER PERSONS ON SUPERVISED RELEASE AND PROVIDES THAT THE TRANSFER OF A PROBATIONER OR PERSON ON SUPERVISED RELEASE TO ANOTHER DISTRICT MAY BE MADE EITHER AS A CONDITION OF PROBATION OR SUPERVISED RELEASE OR WITH THE PERMISSION OF THE COURT, WHILE 18 U.S.C. 3653 PROVIDES FOR TRANSFER OF A PROBATIONER 'FROM THE DISTRICT IN WHICH HE IS BEING SUPERVISED.' THE ABILITY OF THE SENTENCING JUDGE TO PROVIDE THAT THE DEFENDANT MOVE OR GO TO ANOTHER DISTRICT AS A CONDITION OF PROBATION OR SUPERVISED RELEASE [FN444] COULD PROVE TO BE A VERY USEFUL ASPECT OF AN EFFECTIVE SENTENCE TO A TERM OF PROBATION. IT COULD BE USED IN CONJUNCTION WITH A CONDITION TO WORK AT PARTICULAR EMPLOYMENT OR PURSUE A PARTICULAR COURSE OF STUDY. [FN445] PERHAPS MOST IMPORTANT, IT COULD PROVIDE THE JUDGE WITH AN ALTERNATIVE TO A TERM OF IMPRISONMENT IN THE SITUATION WHERE THAT WOULD OTHERWISE BE THE ONLY ALTERNATIVE TO RETURNING THE DEFENDANT TO AN ENVIRONMENT IN WHICH THERE WOULD BE AN UNACCEPTABLE RISK THAT HE MIGHT COMMIT ANOTHER OFFENSE. SECTION 3605 WOULD ALSO PERMIT A COURT TO WHICH JURISDICTION OVER A PROBATIONER OR PERSON ON SUPERVISED RELEASE WAS TRANSFERRED TO EXERCISE ALL THE POWERS OVER THE PROBATIONER OR RELEASEE THAT ARE PERMITTED BY THIS SUBCHAPTER OR PROPOSED SUBCHAPTER B OF CHAPTER 227. UNDER 18 U.S.C. 3653, THE COURT TO WHICH JURISDICTION WAS TRANSFERRED COULD NOT CHANGE THE PERIOD OF PROBATION WITHOUT CONSENT OF THE SENTENCING COURT. THE COMMITTEE BELIEVES THAT IT IS UNNECESSARY TO RETAIN THE SENTENCING COURT'S RESTRICTION SINCE THE NEW COURT WILL BE IN A BETTER POSITION TO KNOW WHETHER A CHANGE IN THE TERM OF PROBATION IS JUSTIFIED. IN ADDITION, THE CHANGE SHOULD RESULT IN SIMPLIFYING SENTENCING ON NEW CHARGES, BY PERMITTING THE TRANSFER OF JURISDICTION OVER THE PROBATIONER OR RELEASE TO THE DISTRICT IN WHICH THE NEW CHARGES HAVE BEEN FILED SO THAT THE SENTENCING JUDGE MAY ADJUST THE TERM OF PROBATION OR SUPERVISED RELEASE AS NEEDED TO SERVE THE PURPOSE OF SENTENCING ON THE NEW CHARGE.
SECTION 3606. ARREST AND RETURN OF A PROBATIONER

PROPOSED 18 U.S.C. 3606 CONTINUES THE PROVISIONS OF 18 U.S.C. 3653 WHICH AUTHORIZE THE ARREST AND RETURN OF A PROBATIONER TO THE COURT HAVING JURISDICTION OVER HIM WHEN THERE HAS BEEN A VIOLATION OF A CONDITION OF PROBATION, AND EXPANDS THE PROVISION TO REFER TO PERSONS ON SUPERVISED RELEASE PURSUANT TO SECTION 3583. THE COMMITTEE INTENDS THAT ANY PROBATIONER ARRESTED FOR VIOLATION OF A CONDITION OF PROBATION BE RETURNED TO THE DISTRICT IN WHICH HE IS BEING SUPERVISED EVEN IF THE ARREST IS IN A DIFFERENT DISTRICT. A PROBATION OFFICER MAY MAKE THE ARREST, WITH OR WITHOUT A WARRANT, WHEREVER THE PROBATIONER OR RELEASEE IS FOUND. AN ARREST WARRANT FOR VIOLATION OF RELEASE CONDITIONS MAY BE ISSUED BY THE COURT HAVING SUPERVISION OVER THE INDIVIDUAL, OR IF NONE, BY THE COURT WHICH LAST HAD SUPERVISION OVER HIM. EITHER A PROBATION OFFICER OR A UNITED STATES MARSHAL MAY EXECUTE THIS WARRANT WHEREVER THE PROBATIONER OR RELEASEE IS FOUND. THE PROVISIONS OF 18 U.S.C. 3653 CONCERNING REVOCATION OF PROBATION AND REIMPOSITION OF SENTENCE FOR PROBATION VIOLATIONS ARE COVERED IN RULE 32.1 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND IN SECTION 3565. AS DISCUSSED IN CONNECTION WITH SECTION 3583, THE BILL CONTAINS NO SPECIFIC PROVISIONS CONCERNING REVOCATION OF A TERM OF POST-RELEASE SUPERVISION, BUT INSTEAD RELIES ON OTHER REMEDIES, INCLUDING MODIFICATION OF CONDITIONS AND THE USE OF THE COURT'S CONTEMPT POWERS, TO ENFORCE THE CONDITIONS.

SECTION 2607. SPECIAL PROBATION AND EXPUNGEMENT PROCEDURES FOR DRUG POSSESSORS


SUBCHAPTER B-- FINES

(SECTIONS 3611-3613)

THIS SUBCHAPTER IS DESIGNED TO INCREASE THE EFFICIENCY WITH WHICH THE GOVERNMENT COLLECTS FINES ASSESSED AGAINST CRIMINAL DEFENDANTS. PRESENT LAW, 18 U.S.C. 3565, PROVIDES THAT CRIMINAL FINE JUDGMENTS 'MAY BE ENFORCED BY EXECUTION AGAINST THE PROPERTY OF THE DEFENDANT IN LIKE MANNER AS JUDGMENTS IN CIVIL CASES.' THUS, THE FEDERAL GOVERNMENT IS GREATLY CONFINED BY STATE LAW AND MUST LITIGATE IN ORDER TO COLLECT A FINE FROM AN UNCOOPERATIVE DEFENDANT. THESE RELATIVELY CUMBERSOME PROCEDURES HAVE RESULTED IN COLLECTION OF ONLY 60 TO 70 PERCENT OF THE AMOUNT OF FINES IMPOSED. THE CONSEQUENTIAL AWARENESS BY CRIMINAL DEFENDANTS THAT THEY MAY BE ABLE TO AVOID PAYING FINES WITH RELATIVE IMPUNITY BODES ILL FOR
RESPECT FOR THE LAW.
This subchapter attempts to remedy this situation by treating criminal fine judgments like tax liens for collection purposes, thereby making available to the attorney general summary collection procedures similar to those used by the internal revenue service. Foremost among these is the power to administratively levy against the property of the defendant, which precludes disposition of the property to avoid payment and permits realization of the amount of the fine without litigation.

SECTION 3611. PAYMENT OF A FINE

Proposed 18 U.S.C. 3611 provides for the payment of a fine imposed under proposed subchapter C of chapter 227 to the clerk of the sentencing court to be forwarded to the United States Treasury. The section requires either immediate payment or payment by the time and method specified by the sentencing court. This latter provision is in recognition of the authorization granted the court by Proposed 18 U.S.C. 3572(D) to permit payment of a fine within a specified period of time or in specified installments.

SECTION 3612. COLLECTION OF AN UNPAID FINE

Proposed 18 U.S.C. 3612 requires the sentencing court, whenever a fine is imposed, to provide the attorney general with certain certified information. The attorney general is then made responsible for the collection of the fine should it not be paid at the time required. This retains the basic current law provision that vests the duty of collecting fines in the attorney general.

In the case of all fines imposed, subsection (a) requires the district court that imposes sentence to certify to the attorney general specified information about the defendant and the fine, most of which is identification information and information relating to the case in which the fine is imposed and to the fine itself. The court is also required to certify any subsequent remission or modification of the fine, and to notify the attorney general of any payments that the court receives with respect to previously certified fines.

This provision, placing responsibility on the clerk of the district court, should improve the notification process and thus better insure that all fine-debtors are brought to the attention of the enforcing authorities in the Department of Justice. At the present time, there is no standardized procedure for notification of the United States attorney. Rather, he receives notification of fines and payment difficulties through a number of methods, which increases the chance of administrative oversight of a failure to pay. By centralizing the responsibility for notification in the district court, section 3612 lessens this chance.

Subsection (b) places the responsibility for collecting and enforcing criminal fines with the attorney general. Since this responsibility is currently centered in the criminal division of the Department of Justice and *135 **3318 no change in existing law. Rather than shifting the burden of enforcement (e.g., to the internal revenue service), the committee has elected to expand the enforcement powers of the Justice Department in order to strengthen the government's collection effort.
SECTION 3613. LIEN PROVISIONS FOR SATISFACTION OF AN UNPAID FINE

1. IN GENERAL

PROPOSED 18 U.S.C. 3613 ESTABLISHES THE PROCEDURE BY WHICH THE ATTORNEY GENERAL IS TO MAKE COLLECTION OF UNPAID FINES. THIS SECTION SIGNIFICANTLY IMPROVES CURRENT PRACTICES BY PROVIDING A FEDERAL COLLECTION PROCEDURE INDEPENDENT OF STATE LAWS AND Patterned ON THE COLLECTION PROCEDURES UTILIZED SO SUCCESSFULLY OVER THE YEARS BY THE INTERNAL REVENUE SERVICE.

2. PRESENT FEDERAL LAW


CRIMINAL FINE JUDGMENTS ARE LIENS ON PROPERTY IN THE STATE TO THE SAME EXTENT AS A JUDGMENT OF A COURT OF GENERAL JURISDICTION IN THE STATE IS A LIEN. THEY MAY ALSO BE PERFECTED AS LIENS UNDER STATE LAW, IF THE LAW OF THE STATE IN WHICH THE DISTRICT COURT SITS PERMITS PERFECTION OF A LIEN BASED ON A FEDERAL JUDGMENT IN THE SAME MANNER AS PROVIDED FOR JUDGMENTS IN THE STATE COURTS. [FN447] BECAUSE OF STATE EXEMPTION LAWS, OTHER PERFECTED LIENS, AND UNCLEAR TITLE TO THE PROPERTY, ENFORCEMENT OF A FEDERAL LIEN (WHICH UNDER MOST STATE LAWS IS CONFINED TO REAL ESTATE) BY FORECLOSURE AND SALE IS USUALLY NOT A REALISTIC POSSIBILITY. THE COMMITTEE REGARDS THE LIEN AS A PROTECTIVE FIRST STEP, SINCE IT DOES HELP INSURE THE SATISFACTION OF THE DEBT SHOULD THE DEFENDANT-DEBTOR WISH TO TRANSFER THE PROPERTY.

THE LAWS OF SEVERAL STATES ALLOW A JUDGMENT CREDITOR (IN THE CASE OF A CRIMINAL FINE, THE UNITED STATES GOVERNMENT) TO OBTAIN AN ORDER COMPELLING THE JUDGMENT DEBTOR (THE DEFENDANT) TO MAKE SPECIFIED INSTALLMENT PAYMENTS WHERE IT IS SHOWN THAT HE IS RECEIVING OR WILL RECEIVE MONEY FROM ANY SOURCE. THIS ORDER IS CALLED AN INSTALLMENT PAYMENT ORDER AND RESULTS FROM A FEDERAL DISTRICT COURT HEARING SOUGHT BY THE UNITED STATES. NOTICE MUST BE GIVEN TO THE JUDGMENT DEBTOR SO THAT HE MAY APPEAR AND CONTEST THE MOTION.

FINALLY, RULE 69(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE STATES IN PART THAT:

IN AID OF THE JUDGMENT OR EXECUTION, THE JUDGMENT CREDITOR . . . MAY OBTAIN DISCOVERY FROM ANY PERSON, INCLUDING *136 **3319 THE JUDGMENT DEBTOR, IN THE MANNER PROVIDED IN THESE RULES OR IN THE MANNER PROVIDED BY THE PRACTICE OF THE STATE IN WHICH THE DISTRICT COURT IS HELD.

THE UNITED STATES ATTORNEY MAY USE THIS RULE TO OBTAIN FINANCIAL INFORMATION ABOUT THE DEBTOR-DEFENDANT BY ORAL OR WRITTEN DEPOSITIONS OR BY WRITTEN INTERROGATORIES. IN MOST CASES, THE ASSISTANCE OF THE DISTRICT COURT OR A UNITED STATES MAGISTRATE IS NECESSARY.
3. PROVISIONS OF THE BILL, AS REPORTED

SECTION 3613(A) ELIMINATES THE CLERICAL PROCEDURES NECESSARY TO CREATE JUDGMENT LIENS, BY PROVIDING THAT THE FINE:
* * * IS A LIEN IN FAVOR OF THE UNITED STATES UPON ALL PROPERTY BELONGING TO THE PERSON FINED. THE LIEN ARISES AT THE TIME OF THE ENTRY OF THE JUDGMENT AND CONTINUES UNTIL THE LIABILITY IS SATISFIED, REMITTED, OR SET ASIDE, OR UNTIL IT BECOMES UNENFORCEABLE PURSUANT TO THE PROVISIONS OF SUBSECTION (B).

LANGUAGE ADDED IN THE 97TH CONGRESS REQUIRES THE ATTORNEY GENERAL TO RELEASE THE LIEN UPON ACCEPTANCE OF A BOND DESCRIBED IN SECTION 6325 OF THE INTERNAL REVENUE CODE OF 1954, OR TO ISSUE A CERTIFICATE OF DISCHARGE OF ANY PART OF THE PERSON’S PROPERTY SUBJECT TO A LIEN IF THE ATTORNEY GENERAL DETERMINES THAT THE PROPERTY REMAINING IS EQUAL IN VALUE TO AT LEAST THREE TIMES THE AMOUNT OF THE FINE. THESE PROVISIONS WERE ADDED IN RESPONSE TO BUSINESS CONCERNS THAT THE ORIGINAL LIEN PROVISIONS COULD HAVE RESULTED IN TYING UP PROPERTY FAR IN EXCESS OF THAT NEEDED TO SATISFY THE LIEN, MAKING IT DIFFICULT TO CARRY ON NORMAL BUSINESS TRANSACTIONS PENDING PAYMENT OF THE FINE.

UNDER SUBSECTION (A), A LIEN SIMILAR TO A TAX LIEN ARISES AT THE TIME OF JUDGMENT, AND, AS SUBSECTION (C) PROVIDES, MAY BE ENFORCED LIKE A TAX LIEN THROUGH THE USE OF ADMINISTRATIVE LEVY PROCEDURES. FILING UNDER SUBSECTION (D) IS NECESSARY ONLY TO PERFECT THE LIEN AGAINST INNOCENT THIRD PARTIES.

THIS PROCEDURE SIGNIFICANTLY ALTERS CURRENT PRACTICES. AS STATED PREVIOUSLY, 28 U.S.C. 1962 PROVIDES THAT:
EVERY JUDGMENT RENDERED BY A DISTRICT COURT WITHIN A STATE SHALL BE A LIEN ON THE PROPERTY LOCATED IN SUCH STATE IN THE SAME MANNER, TO THE SAME EXTENT AND UNDER THE SAME CONDITIONS AS A JUDGMENT OF A COURT OF GENERAL JURISDICTION IN SUCH STATE, AND SHALL CEASE TO BE A LIEN IN THE SAME MANNER AND TIME. WHenever THE LAW OF ANY STATE REQUIRES A JUDGMENT OF A STATE COURT TO BE REGISTERED, RECORDED, DOCKETED OR INDEXED, OR ANY OTHER ACT TO BE DONE, IN A PARTICULAR MANNER, OR IN A CERTAIN OFFICE OR COUNTY OR PARISH BEFORE SUCH LIEN ATTACHES, SUCH REQUIREMENTS SHALL APPLY ONLY IF THE LAW OF SUCH STATE AUTHORIZES THE JUDGMENT OF A COURT OF THE UNITED STATES TO BE REGISTERED, RECORDED, DOCKETED, INDEXED, OR OTHERWISE CONFORMED TO RULES AND REQUIREMENTS RELATING TO JUDGMENTS OF THE COURTS OF THE STATE.


SUBSECTION (B) CHANGES CURRENT LAW BY IMPOSING A TWENTY-YEAR STATUTE OF LIMITATIONS ON THE COLLECTION OF CRIMINAL FINES. UNDER EXISTING LAW, THE GOVERNMENT’S RIGHT TO SEEK EXECUTION OF A CRIMINAL SENTENCE, INCLUDING A FINE, IS NOT SUBJECT TO TIME LIMITATIONS. [FN448] CURRENTLY, SUCH CASES MAY BE CLOSED ONLY THROUGH PAYMENT IN FULL, DEATH OF THE DEBTOR, OR PRESIDENTIAL PARDON. THE LIMITATION PERIOD ESTABLISHED BY SUBSECTION (B) WILL PERMIT THE CLOSING OF FILES BY UNITED STATES ATTORNEYS FOR CASES WHICH ARE SO OLD THAT COLLECTION OF FINES IS UNLIKELY. WITH THE NEW ENFORCEMENT TOOLS OF SECTION 3613, IT SEEMS
REASONABLE TO CONCLUDE THAT IF A DEBTOR IS PURSUED UNSUCCESSFULLY FOR THE TWENTY-YEAR PERIOD, IT IS UNLIKELY THAT ADDITIONAL ENFORCEMENT EFFORTS WOULD PROVE FRUITFUL. A NUMBER OF UNPRODUCTIVE CLERICAL TASKS WILL THUS BE ELIMINATED BY THIS PROVISION. THE PERIOD FOR COLLECTION MAY BE EXTENDED BY A WRITTEN AGREEMENT ENTERED INTO BY THE DEFENDANT AND THE ATTORNEY GENERAL PRIOR TO THE EXPIRATION OF THE PERIOD. THIS ALLOWANCE FOR AN EXTENSION IS SIMILAR TO THAT EXISTING IN THE TAX AREA. [FN449]

SUBSECTION (B) ALSO PROVIDES THAT THE RUNNING OF THE TWENTY-YEAR STATUTE OF LIMITATIONS IS TO BE SUSPENDED ‘DURING ANY INTERVAL FOR WHICH THE RUNNING OF THE PERIOD OF LIMITATIONS FOR COLLECTION OF A TAX WOULD BE SUSPENDED’ PURSUANT TO THE FOLLOWING PROVISIONS OF LAW:

(A) 26 U.S.C. 6503(B), RELATING TO CASES WHERE THE ASSETS OF THE TAXPAYER ARE IN THE CONTROL OF CUSTODY OF A COURT IN A PROCEEDING BEFORE ANY UNITED STATES, DISTRICT OF COLUMBIA, OR STATE COURT; THE SUSPENSION OF THE LIMITATIONS PERIOD IS ALSO EXTENDED FOR SIX MONTHS AFTER THE COURT PROCEEDING ENDS;
(B) 26 U.S.C. 6503(C), RELATING TO CASES WHERE THE TAXPAYER IS OUTSIDE THE UNITED STATES IF THE ABSENCE IS FOR A CONTINUOUS PERIOD OF AT LEAST SIX MONTHS;
(C) 26 U.S.C. 6503(F), RELATING TO CASES WHERE THE PROPERTY OF A THIRD PERSON HAS BEEN WRONGFULLY SEIZED;
(D) 26 U.S.C. 7508(A)(1)(I), RELATING TO CASES WHERE THE PERSON IS SERVING IN THE ARMED FORCES OF THE UNITED STATES, OR IN SUPPORT OF SUCH FORCES, DURING TIME OF WAR, OR IS IN A HOSPITAL AS A RESULT OF A COMBAT INJURY, AND FOR 180 DAYS THEREAFTER; AND
(E) SECTION 513 OF THE ACT OF OCTOBER 17, 1940, 54 STAT. 1190, RELATING TO CASES WHERE THE PERSON IS SERVING IN THE MILITARY.

FINALLY, SUBSECTION (B) PROVIDES THAT A LIEN BECOMES UNENFORCEABLE AND LIABILITY TO PAY A FINE EXPIRES UPON THE DEATH OF THE INDIVIDUAL FINED. THIS IS IN KEEPING WITH PRESENT LAW, AND REFLECTS ONE OF THE DIFFERENCES BETWEEN A CRIMINAL FINE AND A TAX LIABILITY, DESPITE THEIR GENERALLY SIMILAR TREATMENT IN THIS STATUTE. THE WORD ‘INDIVIDUAL’ IS USED INSTEAD OF ‘PERSON’ TO EXCLUDE ORGANIZATIONS SUCH AS CORPORATIONS FROM THIS PROVISION, AND TO AVOID THE ARGUMENT THAT A FINE AGAINST A CORPORATION IS EXTINGUISHED ON THE DISSOLUTION (AND THEREFORE ‘DEATH’) OF THE CORPORATION. IN SUCH CASE, AN EXISTING FINE WILL MAKE THE UNITED STATES A CREDITOR AGAINST THE ASSETS OF THE DISSOLVED CORPORATION WITH WHATEVER PREFERENCES THE PROVISIONS OF THIS SECTION GRANT.

SUBSECTION (C) PROVIDES THAT CERTAIN SECTIONS OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED, SHALL:

* * * APPLY TO A FINE AND TO THE LIEN IMPOSED BY SUBSECTION (A) AS IF THE LIABILITY OF THE PERSON FINED WERE FOR AN INTERNAL REVENUE TAX ASSESSMENT, EXCEPT TO THE EXTENT THAT THE APPLICATION OF SUCH STATUTES IS MODIFIED BY REGULATIONS ISSUED BY THE ATTORNEY GENERAL TO ACCORD WITH DIFFERENCES IN THE NATURE OF THE LIABILITIES.

AMONG THE PROVISIONS OF TITLE 26 INCORPORATED BY REFERENCE INTO SECTION 3613, THE MOST SIGNIFICANT, OF COURSE, IS THE ADMINISTRATIVE LEVY POWER REFERRED TO PREVIOUSLY. THE FOLLOWING IS A SUMMARY OF THE PROVISIONS OF THE TAX CODE CROSS-REFERENCED IN SECTION 3613 AND MADE APPLICABLE TO THE COLLECTION OF A FINE:

(I) 26 U.S.C. 6323 (OTHER THAN 6323(F)(4)), WHICH CONTAINS NOTICE AND FILING PROVISIONS, COMPLIANCE WITH WHICH IS NECESSARY TO INSURE THE VALIDITY OF A TAX LIEN AGAINST CERTAIN THIRD PERSONS; PRIORITY RULES ARE ALSO SET FORTH;
(II) 26 U.S.C. 6331, WHICH AUTHORIZES THE SECRETARY TO COLLECT A TAX BY
LEVY ON THE PROPERTY OF A DELINQUENT TAXPAYER IF THE LIEN HAS NOT BEEN SATISFIED; AS HAS BEEN STATED, INCORPORATING THIS POWER INTO THE SCHEME FOR COLLECTION OF FINES IS THE MOST SIGNIFICANT CHANGE WROUGHT BY SECTION 3613; IT SHOULD BE NOTED THAT 26 U.S.C. 6502, WHICH ESTABLISHES A SIX-YEAR LIMITATION PERIOD ON THE USE OF AN ADMINISTRATIVE LEVY, HAS NOT BEEN INCLUDED IN THE SECTION 3613 CROSS-REFERENCES FROM TITLE 26; THUS, THE TWENTY-YEAR PERIOD SET FORTH IN SECTION 3613(B) WILL ALSO APPLY TO THE LEVY POWER IN THE AREA OF CRIMINAL FINE COLLECTION;

(III) 26 U.S.C. 6332, WHICH REQUIRES SURRENDER OF PROPERTY SUBJECT TO LEVY, AND ALSO PROVIDES FOR ENFORCEMENT OF THE LEVY BY CIVIL PENALTY;

(IV) 26 U.S.C. 6333, WHICH PROVIDES FOR DEMANDED BY THE SECRETARY OF BOOKS AND RECORDS RELATING TO THE PROPERTY SUBJECT TO LEVY;

(V) 26 U.S.C. 6334, WHICH PROVIDES THAT CERTAIN PROPERTY (INCLUDING VARIOUS UNEMPLOYMENT BENEFITS, RETIREMENT BENEFITS, WORKMAN'S COMPENSATION, AND TOOLS OF A TRADE UP TO A VALUE OF $250) IS EXEMPT FROM LEVY; THESE EXEMPTIONS ARE LIMITED AND STANDARD; COMPARISON SHOULD BE MADE TO THE GREATER AND MORE VARIED NUMBER OF EXCEPTIONS PROVIDED FOR IN STATE LAWS TO WHICH THE FEDERAL GOVERNMENT IS NOW SUBJECT;

(VI) 26 U.S.C. 6335, WHICH SETS FORTH THE PROCEDURE TO BE USED IN THE SALE OF PROPERTY SEIZED PURSUANT TO LEVY;

(VII) 26 U.S.C. 6336, WHICH COVERS THE SALE OF PERISHABLE GOODS;

(VIII) 26 U.S.C. 6337, WHICH PROVIDES FOR REDEMPTION OF PROPERTY BEFORE SALE, AND, WITH RESPECT TO REAL PROPERTY, REDEMPTION AFTER SALE;

(IX) 26 U.S.C. 6338, WHICH PROVIDES THAT A CERTIFICATE OF SALE IS TO BE GIVEN TO THE PURCHASER OF THE PROPERTY SOLD, AND THAT A DEED SHALL ALSO BE GIVEN WHERE THE PROPERTY SOLD IS REAL ESTATE;


(XI) 26 U.S.C. 6340, WHICH REQUIRES RECORDS TO BE KEPT OF ALL SALES;

(XII) 26 U.S.C. 6341, WHICH REQUIRES THE SECRETARY TO DETERMINE WHICH EXPENSES ARE TO BE ALLOWED IN ALL CASES OF LEVY AND SALE;

(XIII) 26 U.S.C. 6342, WHICH SETS FORTH THE ORDER IN WHICH THE PROCEEDS OF THE LEVY AND SALE ARE TO BE APPLIED TO THE TAXPAYER'S LIABILITY;

(XIV) 26 U.S.C. 6343, WHICH AUTHORIZES THE SECRETARY TO RELEASE THE LEVY AND TO RETURN THE PROPERTY, OR PROCEEDS, WHERE THE PROPERTY HAS BEEN WRONGFULLY LEVIED;

(XV) 26 U.S.C. 6901, WHICH RELATES TO THE LIABILITY OF A TRANSFEREE IN CERTAIN INSTANCES FOR A TAX OF THE TRANSFEROR IN ORDER TO PREVENT A SUCCESSFUL TRANSFER TO AVOID LIABILITY;

(XVI) 26 U.S.C. 7402, WHICH GRANTS JURISDICTION TO THE FEDERAL COURTS IN TAX COLLECTION MATTERS;

(XVII) 26 U.S.C. 7403, WHICH ALLOWS THE FILING OF AN ACTION TO ENFORCE A LIEN, OR TO SUBJECT PROPERTY TO THE PAYMENT OF A TAX, WHETHER OR NOT A LEVY HAS BEEN MADE; THE COURT MAY APPOINT A RECEIVER TO ENFORCE THE LIEN;

(XVIII) 26 U.S.C. 7405, WHICH ALLOWS A CIVIL SUIT TO BE BROUGHT TO RECOVER ERRONEOUS REFUNDS;

(XIX) 26 U.S.C. 7423, WHICH AUTHORIZES THE SECRETARY TO ALLOW REPAYMENT TO AN OFFICER OR EMPLOYEE OF THE UNITED STATES OF THE FULL AMOUNT OF SUMS THAT MAY BE RECOVERED AGAINST HIM IN ANY COURT, FOR ANY TAXES COLLECTED BY HIM OR ANY DAMAGES RECOVERED AGAINST HIM IN CONNECTION WITH ANYTHING DONE BY HIM IN THE PERFORMANCE OF HIS OFFICIAL DUTY;

(XX) 26 U.S.C. 7424, WHICH PERMITS INTERVENTION BY THE UNITED STATES IN ANY CIVIL ACTION TO ASSERT ANY LIEN ON PROPERTY WHICH IS THE SUBJECT OF THE
SUBSECTION (A) IS TO BE CONSIDERED A NOTICE OF A LIEN FOR TAXES PAYABLE TO THE UNITED STATES FOR THE PURPOSE OF ANY STATE OR LOCAL LAW PROVIDING FOR THE FILING OF A NOTICE OF A TAX LIEN. BECAUSE THE LIEN CREATED BY A CRIMINAL FINE IS TO BE TREATED AS IF IT WERE A TAX LIEN, THE FILING PROVISIONS OF 26 U.S.C. 6323 WILL APPLY TO FINES. IF THE ATTORNEY GENERAL DECLARES THAT STATE OR LOCAL OFFICIALS HAVE DETERMINED THAT SUCH FILING IS UNACCEPTABLE, THEN 28 U.S.C. 1962, WHICH PROVIDES FOR THE REGISTRATION, RECORDING, DOCKETING, OR INDEXING OF FEDERAL COURT JUDGMENTS, WILL APPLY INSTEAD.

SUBCHAPTER C-- IMPRISONMENT

(SECTIONS 3621-3625)


SECTION 3621. IMPRISONMENT OF A CONVICTED PERSON

THIS SECTION IS DERIVED FROM EXISTING LAW.

IN THE ABSENCE OF UNUSUAL CIRCUMSTANCES, FEDERAL COURTS CURRENTLY WILL NOT REVIEW A DECISION AS TO THE PLACE OF CONFINEMENT. [FN455] THE COMMITTEE, BY LISTING FACTORS FOR THE BUREAU TO CONSIDER IN DETERMINING THE APPROPRIATENESS OR SUITABILITY OF ANY AVAILABLE FACILITY, DOES NOT INTEND TO RESTRICT OR LIMIT THE BUREAU IN THE EXERCISE OF ITS EXISTING DISCRETION SO LONG AS THE FACILITY MEETS THE MINIMUM STANDARDS OF HEALTH AND HABITABILITY OF THE BUREAU, BUT INTENDS SIMPLY TO SET FORTH THE APPROPRIATE FACTORS THAT THE BUREAU SHOULD CONSIDER IN MAKING THE DESIGNATIONS.

PROPOSED 18 U.S.C. 3621(C), DEALING WITH DELIVERY OF THE ORDER OF COMMITMENT TO THE PERSON IN CHARGE OF A PENAL OR CORRECTIONAL FACILITY, IS DRAWN FROM EXISTING 18 U.S.C. 4084 WITH LITTLE CHANGE.

PROPOSED 18 U.S.C. 3621(D), WHICH IS DERIVED FROM 18 U.S.C. 3012, PROVIDES THAT THE UNITED STATES MARSHALL SHALL, WITHOUT CHARGE, DELIVER A PRISONER INTO COURT OR RETURN HIM TO A PRISON FACILITY ON ORDER OF A COURT OF THE UNITED STATES OR ON REQUEST OF AN ATTORNEY FOR THE GOVERNMENT.

SECTION 3622. TEMPORARY RELEASE OF A PRISONER

PROPOSED 18 U.S.C. 3622 IS DERIVED FROM 18 U.S.C. 4028(C), AND PERMITS TEMPORARY RELEASE OF A PRISONER BY THE BUREAU OF PRISONS FOR SPECIFIED REASONS. THE ONLY CRITERION FOR SUCH RELEASE IN CURRENT LAW IS THAT THERE BE 'REASONABLE CAUSE TO BELIEVE * * * (THE PRISONER) WILL HONOR HIS TRUST.' UNDER SECTION 3622, THE RELEASE WOULD ALSO HAVE TO APPEAR TO BE CONSISTENT WITH THE PURPOSE FOR WHICH THE SENTENCE WAS IMPOSED AND WITH ANY PERTINENT POLICY STATEMENTS OF THE SENTENCING COMMISSION, AND THE RELEASE WOULD HAVE TO APPEAR TO BE CONSISTENT WITH THE PUBLIC INTEREST. THESE REQUIREMENTS EMPHASIZE FACTORS IMPORTANT TO THE OVERALL CORRECTIONAL PROGRAM FOR THE DEFENDANT, RATHER THAN THE SOLE FACTOR OF THE PROBABILITY OF THE PRISONER'S RETURN TO THE FACILITY AT THE APPROPRIATE TIME.

SECTION 3622(A) CARRIES FORWARD FROM CURRENT LAW THE LIST OF PURPOSES FOR WHICH A PRISONER MAY BE RELEASED FOR A PERIOD NOT TO EXCEED THIRTY DAYS, INCLUDING VISITS TO A DYING RELATIVE, TO ATTEND THE FUNERAL OF A RELATIVE, TO OBTAIN MEDICAL TREATMENT NOT OTHERWISE AVAILABLE, TO CONTACT A PROSPECTIVE EMPLOYER, AND TO PRESERVE OR REESTABLISH FAMILY OR COMMUNITY TIES. AUTHORITY FOR A LIMITED RELEASE IS ALSO TO BE FOUND IN THE CATCH-ALL CLAUSE AT THE END OF THE SUBSECTION, CARRIED FORWARD FROM CURRENT LAW, PERMITTING RELEASE *143 **3326 FOR ANY OTHER SIGNIFICANT PURPOSE CONSISTENT WITH THE PUBLIC INTEREST.

PROPOSED 18 U.S.C. 3622(B) AND (C) CARRY FORWARD THE PROVISIONS OF 18 U.S.C. 4082(C)(2) PERMITTING TEMPORARY RELEASE OF AN OFFENDER, WHILE CONTINUING IN OFFICIAL DETENTION AT THE PENAL OR CORRECTIONAL FACILITY, FOR WORK AT PAID EMPLOYMENT OR PARTICIPATION IN A TRAINING PROGRAM IN
THE COMMITTEE ON A VOLUNTARY BASIS. SECTION 3622(B) ADDS A NEW PROVISION PERMITTING TEMPORARY RELEASE TO PARTICIPATE IN AN EDUCATIONAL PROGRAM, TO MAKE IT CLEAR THAT RELEASE MAY BE FOR SUCH PURPOSES AS PURSUING A COURSE OF STUDY IN COLLEGE AS WELL AS FOR VOCATIONAL TRAINING. SUBSECTION (C), RELATING TO EMPLOYMENT, MODIFIES CURRENT LAW (18 U.S.C. 4082(C)(2)) BY DROPPING THE REQUIREMENT THAT LOCAL UNIONS BE CONSULTED AND A PROVISION BARRING WORK RELEASE WHERE OTHER WORKERS MIGHT BE DISPLACED. WHILE THE BUREAU OF PRISONS NEEDS TO BE SENSITIVE TO THE IMPACT OF ITS PROGRAMS ON THE COMMUNITY, THE COMMITTEE BELIEVES THAT IT SHOULD HAVE MORE FLEXIBILITY THAN PROVIDED IN CURRENT LAW IN DEVELOPING WORK PROGRAMS IN APPROPRIATE CASES. THE COMMITTEE BELIEVES THAT THE LONG-RANGE GAIN TO THE PRISONER AND TO THE COMMUNITY FROM A WELL-CONCEIVED WORK PROGRAM WILL NOT ADVERSELY AFFECT THE COMMUNITY INTERESTS IN ADEQUATE EMPLOYMENT OPPORTUNITIES.

THE COMMITTEE DOES NOT INTEND THAT WORK RELEASE UNDER THIS SUBSECTION BE EXPANDED TO THE EXTENT THAT IT DEVELOPS INTO A DEVICE FOR EARLY RELEASE FROM PRISON. A SENTENCE TO IMPRISONMENT MEANS CONFINEMENT IN AN APPROPRIATE CORRECTIONAL FACILITY WITH A PROGRAM DESIGNED TO MEET THE NEEDS OF THE PARTICULAR PRISONER, CONSIDERING THE PURPOSES OF HIS SENTENCE AND HIS PARTICULAR NEEDS.

SUBSECTION (C)(1) CARRIES FORWARD THE PROVISIONS OF CURRENT LAW THAT REQUIRE THAT WORK IN THE COMMUNITY MUST BE AT THE SAME RATES AND UNDER THE SAME CONDITIONS AS FOR SIMILAR EMPLOYMENT IN THE COMMUNITY INVOLVED. SUBSECTION (C)(2) REQUIRES THAT THE PRISONER AGREE TO PAY COSTS INCIDENT TO HIS DETENTION AS A CONDITION OF WORK RELEASE. UNDER CURRENT LAW, 18 U.S.C. 4082(C), THE PRISONER MAY BE REQUIRED TO MAKE SUCH PAYMENTS.

AS WITH SUBSECTION (A), TEMPORARY RELEASE UNDER SUBSECTIONS (B) AND (C) IS WITHIN THE DISCRETION OF THE BUREAU OF PRISONS; THERE IS NO ABSOLUTE RIGHT TO WORK RELEASE OR OTHER OUTSIDE PRIVILEGES. [FN456] FAILURE TO REMAIN WITHIN THE CONFINES PERMITTED BY THE RELEASE, AND FAILURE TO RETURN TO THE CORRECTIONS FACILITY AS REQUIRED, WOULD, AS UNDER CURRENT LAW, BE TREATED AS AN ESCAPE. [FN457]

SECTION 3623. TRANSFER OF A PRISONER TO STATE AUTHORITY


THE LAST REQUIREMENT OF PUBLIC INTEREST PLACES THE ENTIRE TRANSFER PROCEDURE DIRECTLY WITHIN THE DISCRETION OF THE DIRECTOR OF THE BUREAU OF PRISONS. THIS GRANTING OF DISCRETION TO THE DIRECTOR FOLLOWS CLOSELY
SECTION 3621(B) WHICH PERMITS THE BUREAU TO DESIGNATE THE PLACE OF THE PRISONER'S CONFINEMENT, WHETHER OR NOT SUCH PLACE IS MAINTAINED BY THE FEDERAL GOVERNMENT. UNDER BOTH STATUTES, THE EXERCISE OF DISCRETION BY THE BUREAU WILL NOT BE DISTURBED OTHER THAN IN EXCEPTIONAL CIRCUMSTANCES. [FN458] IT SHOULD BE NOTED THAT AT NO TIME IS IT NECESSARY FOR THE PRISONER TO CONSENT TO THE TRANSFER TO STATE AUTHORITIES. MOREOVER, GENERALY, A PRISONER CAN HAVE NO VALID OBJECTION TO A TRANSFER. [FN459]

IN ADDITION, THE COMMITTEE CLEARLY INTENDS THAT THE FEDERAL GOVERNMENT WILL NOT LOSE JURISDICTION OF ANY PRISONER WHOSE FEDERAL SENTENCE HAS NOT EXPIRED SIMPLY BECAUSE IT PERMITS A STATE TO TAKE THE PRISONER INTO CUSTODY UNDER THIS SECTION. [FN460] IN MOST CIRCUMSTANCES, HOWEVER, THE FEDERAL GOVERNMENT MAY HAVE TO AVOID THE COMPLETION OF STATE PROCEEDINGS BEFORE REGAINING CUSTODY OF THE PRISONER. THIS SECTION PROVIDES, AND COMMON SENSE DICTATES, THAT IF MORE THAN ONE REQUEST FROM A STATE IS PRESENTED WITH RESPECT TO A CERTAIN PRISONER, THE DIRECTOR MUST DETERMINE WHICH REQUEST, IF ANY IS TO BE HONORED, SHOULD BE GIVEN PRIORITY. THIS PROCEDURE, TOO, IS WITHIN THE DISCRETION OF THE DIRECTOR.

FINALLY, THE SECTION PROVIDES THAT THE COSTS OF TRANSFERRING A PRISONER TO A STATE AUTHORITY WILL BE BORNE BY THE STATE REQUESTING THE TRANSFER.

SECTION 3624. RELEASE OF A PRISONER

PROPOSED 18 U.S.C. 3624(A) DESCRIBES THE METHOD BY WHICH THE RELEASE DATE OF A PRISONER IS DETERMINED.

SECTION 3624(A) REPLACES A CONFUSING ARRAY OF STATUTES AND ADMINISTRATIVE PROCEDURES CONCERNING THE DETERMINATION OF THE DATE OF RELEASE OF A PRISONER. PERHAPS THE MOST CONFUSING ASPECT OF THE CURRENT LAW PROVISIONS IS THE FACT THAT, FOR A REGULAR ADULT PRISONER WHOSE TERM OF IMPRISONMENT EXCEEDS ONE YEAR, THERE ARE TWO MECHANISMS FOR DETERMINING THE RELEASE DATE, EACH OF WHICH REQUIRES RECORDKEEPING AND CONSTANT EVALUATION OF PRISONER ELIGIBILITY FOR RELEASE. THE PRISONER IS ULTIMATELY RELEASED ON THE EARLIER OF THE TWO RELEASE DATES THAT RESULT FROM THE PARALLEL DETERMINATIONS.

*145 **3328 FIRST, 18 U.S.C. 4163 REQUIRES THAT A PRISONER WHO HAS NOT BEEN RELEASED EARLIER, FOR EXAMPLE ON PAROLE, MUST BE RELEASED AT THE EXPIRATION OF HIS SENTENCE LESS CREDIT FOR GOOD CONDUCT. [FN461]


FOR A PRISONER WHOSE TERM OF IMPRISONMENT EXCEEDS ONE YEAR IN LENGTH, AT THE SAME TIME THAT THE BUREAU OF PRISONS IS KEEPING RECORDS ON GOOD TIME ALLOWANCES, THE UNITED STATES PAROLE COMMISSION IS PERIODICALLY EVALUATING WHETHER THE PRISONER SHOULD BE RELEASED ON PAROLE. A PRISONER SENTENCED TO A TERM OF IMPRISONMENT OF NOT LESS THAN SIX MONTHS NOR MORE THAN ONE YEAR IS RELEASED AT THE EXPIRATION OF SENTENCE LESS CREDIT FOR GOOD TIME, EXCEPT THAT THE JUDGE MAY SPECIFY THAT THE PRISONER WILL BE RELEASED AS IF ON PAROLE AFTER SERVING ONE-THIRD OF HIS SENTENCE. [FN463]

IF THE SENTENCE OF A REGULAR ADULT OFFENDER IS LESS THAN SIX MONTHS LONG, HE IS INELIGIBLE FOR EITHER PAROLE [FN464] OR RECEIPT OF GOOD TIME ALLOWANCE [FN465] (OTHER THAN INDUSTRIAL OR MERITORIOUS GOOD TIME), [FN466] AND HIS RELEASE DATE IS SET BY OPERATION OF LAW AT THE EXPIRATION
OF HIS TERM OF IMPRISONMENT LESS ANY ACCUMULATED INDUSTRIAL OR
MERITORIOUS GOOD TIME. [FN467]

THERE ARE ALSO SPECIALIZED SENTENCING STATUTES FOR CERTAIN YOUNG
OFFENDERS FOR RELEASE DATES TO BE SET BY THE PAROLE COMMISSION FOR ALL
OFFENDERS WHO COME WITHIN THEIR TERMS, THUS MAKING THE PROVISIONS OF
18 U.S.C. 4163, RELATING TO THE RELEASE OF THE PRISONER AT THE EXPIRATION
OF SENTENCE LESS GOOD TIME, INAPPLICABLE. [FN468]

A 'YOUTH OFFENDER' [FN469] GIVEN AN INDETERMINATE SENTENCE UNDER THE
FEDERAL YOUTH CORRECTIONS ACT [FN470] IS IMMEDIATELY ELIGIBLE FOR PAROLE,
[FN471] AND MUST BE RELEASED ON PAROLE BEFORE THE EXPIRATION OF FOUR
YEARS FROM THE DATE OF CONVICTION. [FN472] IF THE YOUTH OFFENDER IS
SENTENCED UNDER THE FEDERAL YOUTH CORRECTIONS ACT TO A SENTENCE *146
**3329 UP TO THAT PERMITTED FOR THE OFFENSE FOR A PERSON SENTENCED AS
AN ADULT, [FN473] HE IS LIKEWISE IMMEDIATELY ELIGIBLE FOR PAROLE, [FN474]
AND MUST BE RELEASED AT LEAST TWO YEARS BEFORE THE EXPIRATION OF HIS
TERM OF IMPRISONMENT. [FN475]

SIMILAR REQUIREMENTS FOR RELEASE ON PAROLE APPLY TO YOUNG ADULT
OFFENDERS (BETWEEN 22 AND 26 YEARS OLD AT THE TIME OF CONVICTION) WHOM
THE JUDGE DECIDES TO SENTENCE PURSUANT TO THE FEDERAL YOUTH
CORRECTIONS ACT. [FN476]

PROPOSED 18 U.S.C. 3624(A) REPLACES THE MULTIPLICITY OF RELEASE DATE
STATUTES WITH A SINGLE PROVISION THAT DESCRIBES THE MECHANISM FOR
SETTING THE RELEASE DATE. UNLIKE CURRENT LAW, TWO MECHANISMS WILL NEVER
BE USED SIMULTANEOUSLY, THUS ELIMINATING THE UNNECESSARY CONFUSION
CAUSED BY EXISTING REQUIREMENTS.

SECTION 3642(A) PROVIDES THAT A PRISONER IS TO BE RELEASED AT THE
EXPIRATION OF HIS TERM OF IMPRISONMENT LESS ANY CREDIT TOWARD THE
SERVICE OF HIS SENTENCE FOR SATISFACTORY PRISON BEHAVIOR ACCUMULATED
PURSUANT TO SUBSECTION (B). THUS, AS DISCUSSED IN THE INTRODUCTION TO
THIS REPORT AND IN CONNECTION WITH SUBCHAPTER D OF CHAPTER 227, EVERY
SENTENCE TO A TERM OF IMPRISONMENT WILL REPRESENT THE ACTUAL TIME TO BE
SERVED, LESS GOOD TIME. THERE WILL BE NO ARTIFICIALLY HIGH SENTENCES
IMPOSED TO ALLOW FOR THE OPERATION OF THE PAROLE SYSTEM, WHICH HAS NO
ROLE AS TO PRISONERS SENTENCED UNDER THE BILL.

SECTION 3624(A) ALSO CONTAINS A PROVISION WHICH PERMITS THE BUREAU OF
PRISONS TO RELEASE THE PRISONER ON THE LAST PRECEDING WEEKDAY IF THE
DATE OF THE EXPIRATION OF HIS TERM OF IMPRISONMENT FALLS ON A WEEKEND OR
A LEGAL HOLIDAY. THIS EARLY RELEASE IS DISCRETIONARY WITH THE BUREAU;
 NEVERTHELESS, THE BUREAU MAY NOT KEEP THE PRISONER INCARCERATED LONGER
THAN HIS TERM. THEREFORE, IF THE PRISONER IS NOT RELEASED ON THE WEEKDAY
BEFORE THE WEEKEND OR LEGAL HOLIDAY, HE MUST BE RELEASED ON THE
SATURDAY, SUNDAY, OR HOLIDAY. THIS SUBSECTION CARRIES FORWARD EXISTING
LAW. [FN477]

PROPOSED 18 U.S.C. 3624(B) CONTAINS THE PROVISIONS CONCERNING THE
EARNING OF CREDIT TOWARD EARLY RELEASE FOR SATISFACTORY PRISON
BEHAVIOR. IT APPLIES ONLY TO PERSONS WHO ARE SENTENCED TO TERMS OF
IMPRISONMENT LONGER THAN ONE YEAR, EXCEPT THOSE SENTENCED TO LIFE
IMPRISONMENT. THE DUPLICATION OF EFFORT IN CURRENT LAW, REQUIRING
COMPUTATION OF GOOD TIME ALLOWANCES FOR EVERY PRISONER WHOSE TERM OF
IMPRISONMENT IS SIX MONTHS LONG OR LONGER [FN478] EVEN IF THE PRISONER
WILL ULTIMATELY HAVE HIS RELEASE DATE SET BY THE PAROLE COMMISSION,
[FN479] OF COURSE DOES NOT OCCUR UNDER THE COMMITTEE'S DETERMINATE
SENTENCING SYSTEM. COMPUTATION OF CREDIT TOWARD EARLY RELEASE
PURSUANT TO SECTION 3624(B) WILL BE CONSIDERABLY LESS COMPLICATED THAN
UNDER CURRENT LAW IN MANY RESPECTS. CURRENT LAW PROVIDES A DIFFERENT
RATE OF CREDIT FOR GOOD BEHAVIOR FOR DIFFERENT LENGTHS OF PRISON TERMS,
WHILE SECTION 3624(B) PROVIDES A UNIFORM MAXIMUM RATE OF 36 DAYS A YEAR FOR ALL TIME IN PRISON BEYOND THE FIRST YEAR. IN ADDITION, CURRENT LAW PERMITS FORFEITURE OR WITHHOLDING OF ANY AMOUNT OF GOOD TIME THAT HAS BEEN EARNED UP TO THE TIME OF THE FORFEITURE OR WITHHOLDING, AND THE RESTORATION OF ANY AMOUNT OF THE FORFEITED OR WITHHELD GOOD TIME. [FN481] SECTION 3624(B) PROVIDES FOR AUTOMATIC VESTING OF CREDIT TOWARD EARLY RELEASE CAN BE AFFECTED BY A VIOLATION OF THE PRISON RULES. [FN482] CREDIT FOR THE LAST YEAR WOULD BE PRORATED. THE RESULT OF THE COMPLEXITY OF CURRENT LAW PROVISIONS CONCERNING GOOD TIME ALLOWANCES IS TO INCREASE THE UNCERTAINTY OF THE PRISONER AS TO HIS RELEASE DATE, WITH A RESULTING ADVERSE EFFECT ON PRISONER MORALE. CURRENT LAW ALSO PROBABLY FAILS TO HAVE THE INTENDED EFFECT ON MAINTAINING PRISON DISCIPLINE. [FN483] PRISONERS TEND TO EXPECT THAT GOOD TIME WILL BE RESTORED, AND IT USUALLY IS. THUS, ONLY THE PRISONER WHO HAS FORFEITED GOOD TIME THAT HAS NOT BEEN RESTORED, AND WHO IS THUS INELIGIBLE FOR PAROLE, IS ACTUALLY AFFECTED BY THE PROVISIONS FOR FORFEITURE.

IT IS THE BELIEF OF THE COMMITTEE THAT THE SIMPLIFIED PROVISIONS OF SECTION 3624(B) WILL HAVE A POSITIVE EFFECT ON PRISONER BEHAVIOR. THE CREDIT TOWARD EARLY RELEASE IS EARNED AT A STEADY AND EASILY DETERMINED RATE THAT WILL HAVE AN OBVIOUS IMPACT ON THE PRISONER'S RELEASE DATE. THE RATE IS SUFFICIENTLY HIGH (APPROXIMATELY 10 PERCENT OF THE PART OF A TERM OF IMPRISONMENT THAT EXCEEDS ONE YEAR) TO PROVIDE AN INCENTIVE FOR GOOD INSTITUTIONAL BEHAVIOR, YET NOT SO HIGH THAT IT WILL CARRY FORWARD THE UNCERTAINTIES AS TO RELEASE DATES THAT OCCUR UNDER CURRENT LAW. THE NEW PROVISIONS WILL ALSO BE EASIER (AND PROBABLY CHEAPER) TO ADMINISTER THAN THOSE UNDER CURRENT LAW. THE CREDIT TOWARD EARLY RELEASE WILL VEST AUTOMATICALLY UNLESS THE BUREAU OF PRISONS DETERMINES THAT A VIOLATION OF PRISON RULES SHOULD RESULT IN WITHHOLDING OF SOME OR ALL OF THE CREDIT TOWARD EARLY RELEASE FOR A PARTICULAR PERIOD. IN ADDITION, THE BUREAU OF PRISONS WILL HAVE TO DETERMINE THE RELEASE DATES FOR CREDIT TOWARD EARLY RELEASE ONLY FOR THOSE PRISONERS WHOSE TIME IN PRISON WILL ACTUALLY DEPEND UPON THE CREDIT THEY HAVE EARNED, RATHER THAN ALSO MAKING THIS DETERMINATION FOR PRISONERS WHOSE RELEASE DATES WILL BE SET BY THE PAROLE COMMISSION.

IT SHOULD BE NOTED THAT SUBSECTION (B) PERMITS THE WITHHOLDING OF CREDIT TOWARD EARLY RELEASE ONLY FOR VIOLATION OF INSTITUTIONAL DISCIPLINARY REGULATIONS THAT HAVE BEEN APPROVED BY THE ATTORNEY GENERAL AND GIVEN TO THE PRISONER. THUS, THE PRISONER WILL BE PUT ON NOTICE AS TO THE ACTIONS THAT MAY RESULT IN HIS FAILURE TO EARN CREDIT TOWARD EARLY RELEASE.

PROPOSED 18 U.S.C. 3624(C) IS NEW. IT PROVIDES THAT, TO THE EXTENT PRACTICABLE, THE LAST TEN PERCENT OF A TERM OF IMPRISONMENT, NOT IN EXCESS OF SIX MONTHS, SHOULD BE SPENT IN CIRCUMSTANCES THAT AFFORD THE PRISONER A REASONABLE OPPORTUNITY TO ADJUST TO AND PREPARE FOR REENTRY INTO THE COMMUNITY.

IT IS INTENDED THAT THE BUREAU OF PRISONS HAVE SUBSTANTIAL DISCRETION IN DETERMINING WHAT OPPORTUNITY FOR REENTRY SHOULD BE MADE AVAILABLE TO EACH PARTICULAR PRISONER UNDER THE CIRCUMSTANCES OF HIS CASE. THE PROBATION SYSTEM IS REQUIRED, TO THE EXTENT PRACTICABLE, TO OFFER ASSISTANCE TO PRISONERS AT THIS PRE-RELEASE STAGE. THIS WILL PERMIT PROBATION OFFICERS TO ASSIST PRISONERS IN SEEKING EMPLOYMENT AND MEDICAL OR SOCIAL SERVICES AS NEEDED.

PROPOSED 18 U.S.C. 3624(D), RELATING TO THE ALLOTMENT OF CLOTHING, TRANSPORTATION, AND FUNDS TO A PRISONER RELEASED AT THE EXPIRATION OF HIS TERM OF IMPRISONMENT, IS DERIVED FROM 18 U.S.C. 4281 AND 4284, WITH
SEVERAL CHANGES. THE AMOUNT OF MONEY TO BE FURNISHED A PRISONER HAS BEEN RAISED TO A MAXIMUM OF $500 RATHER THAN $100, AND THE PROVISION OF 18 U.S.C. 4284 FOR LOANS TO PRISONERS HAS BEEN OMITTED. THE COMMITTEE HAS CONCLUDED THAT A SMALL AMOUNT OF FINANCIAL ASSISTANCE MAY BE SUFFICIENT TO GET AN OFFENDER STARTED IN THE RIGHT DIRECTION, BUT THAT THE $100 MAXIMUM SUM PERMITTED UNDER EXISTING LAW MAY OFTEN BE INADEQUATE. THE LOAN PROVISIONS IN EXISTING LAW HAVE NOT PROVED SUCCESSFUL, HAVING CAUSED GREATER ADMINISTRATIVE COSTS AND DIFFICULTIES THAN THE AMOUNT OF MONEY INVOLVED JUSTIFIES. ACCORDINGLY, THE TOTAL AMOUNT OF MONEY WHICH CAN BE GIVEN A PRISONER HAS BEEN RAISED TO $500 WITH NO PROVISION FOR A SMALL LOAN. THE DETERMINATION OF THE AMOUNT TO BE GIVEN EACH PRISONER UNDER SECTION 3624(D) IS TO BE MADE BY THE DIRECTOR OF THE BUREAU OF PRISONS, RATHER THAN THE ATTORNEY GENERAL, IN KEEPING WITH OTHER AMENDMENTS PLACING DAY-TO-DAY CONTROL OF THE OPERATIONS OF THE BUREAU OF PRISONS IN THE DIRECTOR. A NEW PROVISIONS HAS BEEN ADDED TO SPECIFY THAT THE DIRECTOR SHALL MAKE THE DETERMINATION OF THE AMOUNT TO BE GIVEN TO A PARTICULAR PRISONER ACCORDING TO THE PUBLIC INTEREST AND THE NEEDS OF THE PRISONER. THE LANGUAGE HAS ALSO BEEN CLARIFIED TO REQUIRE THE DIRECTOR TO PROVIDE A PRISONER WITH SOME MONEY UNLESS HE DETERMINES THAT THE PRISONER'S FINANCIAL SITUATION IS SUCH THAT NO MONEY SHOULD BE PROVIDED.

FINALLY, AS UNDER CURRENT LAW, THE PRISONER MUST BE FURNISHED TRANSPORTATION TO ONE OF THREE PLACES: (1) THE PLACE OF CONVICTION; (2) HIS BONA FIDE RESIDENCE WITHIN THE UNITED STATES; OR (3) ANY OTHER PLACE AUTHORIZED BY THE DIRECTOR OF THE BUREAU OF PRISONS. THE BUREAU OF PRISONS COULD, OF COURSE, PROVIDE TRANSPORTATION EXPENSES RATHER THAN ACTUALLY PROVIDING TRANSPORTATION, BUT THE FUNDS FOR TRANSPORTATION ARE TO BE IN ADDITION TO THE AMOUNT OF MONEY PROVIDED THE PRISONER UNDER SECTION 3624(D)(2) TO ASSIST HIM UPON HIS RELEASE. THIS PROVISION IS ESSENTIALLY THE SAME AS THAT CONTAINED IN 18 U.S.C. 4281, EXCEPT THAT UNDER THAT PROVISION THE DETERMINATION OF THE PLACE TO WHICH A PRISONER WOULD BE TRANSPORTED WAS MADE BY THE ATTORNEY GENERAL. IN MAKING THIS DETERMINATION THE DIRECTOR WILL NECESSARILY HAVE TO TAKE COGNIZANCE OF THE TERMS AND CONDITIONS OF SUPERVISED RELEASE IF SUCH A TERM IS IMPOSED PURSUANT TO SECTION 3583. SUBSECTION (E) PROVIDES THAT A PRISONER WHOSE SENTENCE INCLUDES A TERM OF SUPERVISED RELEASE SHALL BE RELEASED TO THE SUPERVISION OF A PROBATION OFFICER. IT ALSO SPECIFIES THAT THE TERM BEGINS ON THE DATE OF RELEASE AND THAT IT RUNS CONCURRENTLY WITH ANY OTHER TERM OF SUPERVISED RELEASE, PROBATION, OR PAROLE UNLESS THE PERSON IS IMPRISONED *149 **3332 OTHER THAN FOR A BRIEF PERIOD AS A CONDITION OF PROBATION OR SUPERVISED RELEASE.

SECTION 3625. INAPPLICABILITY OF THE ADMINISTRATIVE PROCEDURE ACT

THIS SECTION MAKES CLEAR THAT CERTAIN OF THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT DO NOT APPLY TO ANY DETERMINATION, DECISION, OR ORDER OF THE BUREAU OF PRISONS. [FN484] THIS RESULT IS IN ACCORD WITH RECENT CASE LAW, [FN485] AND WILL ASSURE THAT THE BUREAU OF PRISONS IS ABLE TO MAKE DECISIONS CONCERNING THE APPROPRIATE FACILITY, CORRECTIONS PROGRAM, AND DISCIPLINARY MEASURES FOR A PARTICULAR PRISONER WITHOUT CONSTANT SECOND-GUESSING. THE PROVISION, OF COURSE, WOULD NOT ELIMINATE, AND IS NOT INTENDED TO ELIMINATE, CONSTITUTIONAL CHALLENGES BY PRISONERS UNDER THE APPROPRIATE PROVISIONS OF LAW. CONSTITUTIONAL REQUIREMENTS IN PERSONAL DISCIPLINARY ACTIONS HAVE BEEN
ESTABLISHED BY THE SUPREME COURT. [FN486] THE COMMITTEE FEELS THAT THERE IS NO NEED TO ADD ADDITIONAL DUE PROCESS PROCEDURES TO THOSE SPECIFIED BY THE COURTS. THE SECTIONS OF THE APA MADE INAPPLICABLE TO THE BUREAU OF PRISONS ARE PARALLEL TO THOSE CURRENTLY MADE INAPPLICABLE TO THE PAROLE COMMISSION.

THE PHRASE 'DETERMINATION, DECISION, OR ORDER' IS INTENDED TO MEAN ADJUDICATION OF SPECIFIC CASES AS OPPOSED TO PROMULGATING OF GENERALLY APPLICABLE REGULATIONS.

SECTION 202(A)(4) OF THE BILL CREATES A NEW SECTION 3673 OF TITLE 18 THAT DEFINES TERMS USED IN PROPOSED CHAPTERS 227 AND 229 OF TITLE 18, UNITED STATES CODE.


SECTION 202(B) CONTAINS TECHNICAL AMENDMENTS TO THE CHAPTER ANALYSIS OF PART II OF TITLE 18, U.S.C. NECESSITATED BY THE BILL.

SECTION 203(A) OF THE BILL ADDS TO CHAPTER 235 OF TITLE 18, U.S.C. A NEW SECTION 3742, RELATING TO APPELLATE REVIEW OF SENTENCES.

SECTION 3742. REVIEW OF A SENTENCE

1. IN GENERAL

THIS SECTION ESTABLISHES A LIMITED PRACTICE OF APPELLATE REVIEW OF SENTENCES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM. THE COMMITTEE IS ESPECIALLY INDEBTED TO THE WORK OF FORMER SENATOR ROMAN L. HRUSKA FOR THE CONTENTS OF THIS SECTION. HE HAS LED A LONG AND STEADFAST EFFORT TO INTRODUCE APPELLATE REVIEW OF SENTENCING--AN EFFORT STRETCHING BACK OVER SEVERAL CONGRESSES. [FN487]

**APPPELLATE COURTS HAVE LONG FOLLOWED THE PRINCIPLE THAT SENTENCES IMPOSED BY DISTRICT COURTS WITHIN LEGAL LIMITS SHOULD NOT BE DISTURBED. [FN488] THE SENTENCING PROVISIONS OF THE REPORTED BILL ARE DESIGNED TO PRESERVE THE CONCEPT THAT THE DISCRETION OF A SENTENCING JUDGE HAS A PROPER PLACE IN SENTENCING AND SHOULD NOT BE DISPLACED BY THE DISCRETION OF AN APPELLATE COURT. AT THE SAME TIME, THEY ARE INTENDED TO AFFORD ENOUGH GUIDANCE AND CONTROL OF THE EXERCISE OF THAT DISCRETION TO PROMOTE FAIRNESS AND RATIONALITY, AND TO REDUCE UNWARRANTED DISPARITY, IN SENTENCING. SECTION 3742 ACCOMMODATES ALL OF THESE CONSIDERATIONS BY MAKING APPELLATE REVIEW OF SENTENCES AVAILABLE EQUALLY TO THE DEFENDANT AND THE GOVERNMENT, AND BY CONFINING IT TO CASES IN WHICH THE SENTENCES ARE ILLEGAL, ARE IMPOSED AS THE RESULT OF AN INCORRECT APPLICATION OF THE SENTENCING GUIDELINES, OR ARE OUTSIDE THE RANGE SPECIFIED IN THE GUIDELINES AND UNREASONABLE.

IT IS AN ANOMALY TO PROVIDE FOR APPELLATE CORRECTION OF PREJUDICIAL TRIAL ERRORS AND NOT TO PROVIDE FOR APPELLATE CORRECTION OF INCORRECT OR UNREASONABLE SENTENCES. [FN489] THE REASON GIVEN FOR UNAVAILABILITY OF APPELLATE REVIEW OF SENTENCES UNDER CURRENT LAW IS THE FACT THAT SENTENCING JUDGES HAVE TRADITIONALLY HAD ALMOST ABSOLUTE DISCRETION TO IMPOSE ANY SENTENCE LEGALLY AVAILABLE IN A PARTICULAR CASE. IN DOING SO, THE JUDGES HAVE NOT BEEN REQUIRED TO STATE REASONS FOR THEIR DECISIONS, [FN490] AND RARELY HAVE DONE SO. THUS, EVEN IF APPELLATE REVIEW OF SENTENCES WERE AVAILABLE UNDER CURRENT LAW, THE COURTS OF APPEALS WOULD HAVE DIFFICULTY ASSESSING THE REASONABLENESS OF A SENTENCING DECISION SINCE THEY WOULD BE UNABLE TO TELL IN MANY CASES WHY THE

APPELLATE REVIEW OF SENTENCES IS ESSENTIAL TO ASSURE THAT THE GUIDELINES ARE APPLIED PROPERLY AND TO PROVIDE CASE LAW DEVELOPMENT OF THE APPROPRIATE REASONS FOR SENTENCING OUTSIDE THE GUIDELINES. THIS, IN TURN, WILL ASSIST THE SENTENCING COMMISSION IN REFINING THE SENTENCING GUIDELINES AS THE NEED ARISES. FOR EXAMPLE, IF THE COURTS FOUND THAT A PARTICULAR OFFENSE OR OFFENDER CHARACTERISTIC THAT WAS NOT CONSIDERED, OR NOT ADEQUATELY REFLECTED, IN FORMULATION OF THE GUIDELINES WAS AN APPROPRIATE REASON FOR IMPOSING SENTENCES THAT DIFFERED FROM THOSE RECOMMENDED IN THE GUIDELINES, THE SENTENCING COMMISSION MIGHT WISH TO CONSIDER AMENDING THE GUIDELINES TO REFLECT THE FACTOR. ALTHOUGH SOME PERSONS HAVE CHALLENGED THE WISDOM AND VALIDITY OF PERMITTING AN APPEAL OF A SENTENCE BY THE GOVERNMENT, THE COMMITTEE IS CONVINCED THAT NEITHER OBJECTION HAS MERIT. IT IS CLEARLY DESIRABLE, IN THE INTEREST OF REDUCING UNWARRANTED SENTENCE DISPARITY, TO PERMIT THE GOVERNMENT, ON BEHALF OF THE PUBLIC, TO APPEAL AND HAVE INCREASED A SENTENCE THAT IS BELOW THE APPLICABLE GUIDELINE AND THAT IS FOUND TO BE UNREASONABLE. IF ONLY THE DEFENDANT COULD APPEAL HIS SENTENCE, THERE WOULD BE NO EFFECTIVE OPPORTUNITY FOR THE REVIEWING COURTS TO CORRECT THE INJUSTICE ARISING FROM A SENTENCE THAT WAS PATENTLY TOO LENIENT. [FN491] THIS CONSIDERATION HAS LED MOST WESTERN NATIONS TO CONSIDER REVIEW AT THE BEHEST OF EITHER THE DEFENDANT OR THE PUBLIC TO BE A FUNDAMENTAL PRECEPT OF A RATIONAL SENTENCING SYSTEM, AND THE COMMITTEE CONSIDERS IT TO BE A CRITICAL PART OF THE FOUNDATION FOR THE BILL'S SENTENCING STRUCTURE. THE UNEQUAL AVAILABILITY OF APPELLATE REVIEW, MOREOVER, WOULD HAVE A TENDENCY TO SKEW THE SYSTEM, SINCE IF APPELLATE REVIEW WERE A ONE-WAY STREET, SO THAT THE TRIBUNAL COULD ONLY REDUCE EXCESSIVE SENTENCES BUT NOT ENHANCE INADEQUATE ONES, THEN THE EFFORT TO ACHIEVE GREATER CONSISTENCY MIGHT WELL RESULT IN A GRADUAL SCALING DOWN OF SENTENCES TO THE LEVEL OF THE MOST LENIENT ONES. CERTAINLY THE DEVELOPMENT OF A PRINCIPLED AND BALANCED BODY OF APPELLATE CASE LAW WOULD BE SEVERELY
HAMPERED.
WITH RESPECT TO VALIDITY, IT IS CLEAR THAT A SYSTEM, SUCH AS IS PROVIDED BY
THE REPORTED BILL, IN WHICH SENTENCE INCREASE IS POSSIBLE AS A
CONSEQUENCE OF SENTENCE REVIEW INITIATED BY THE GOVERNMENT, IS NOT
OBJECTIONABLE ON CONSTITUTIONAL GROUNDS. TITLE X OF THE ORGANIZED CRIME
CONTROL ACT OF 1970 INCLUDES A PROVISION (18 U.S.C. 3576) PERMITTING A
SENTENCE IMPOSED UNDER THE DANGEROUS SPECIAL OFFENDER PROVISION TO BE
INCREASED UPON APPEAL BY THE UNITED STATES. [FN492] THE SUPREME COURT IN
UNITED STATES V. DIFRANCESCO [FN493] *152 **3335 HELD THAT THE
AUTHORITY CONTAINED IN THE STATUTE FOR GOVERNMENT APPEAL OF SENTENCE
DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE. ACCORDING TO THE COURT:
THE DOUBLE JEOPARDY CONSIDERATIONS THAT BAR REPROSECUTION AFTER AN
ACQUITTAL DO NOT PROHIBIT REVIEW OF A SENTENCE. WE HAVE NOTED * * * THE
BASIC DESIGN OF THE DOUBLE JEOPARDY PROVISION, THAT IS, AS A BAR AGAINST
REPEATED ATTEMPTS TO CONVICT WITH CONSEQUENT SUBJECTION OF THE
DEFENDANT TO EMBARRASSMENT, EXPENSE, ANXIETY, AND INSECURITY, AND THE
POSSIBILITY THAT HE MAY BE FOUND GUILTY EVEN THOUGH INNOCENT. THESE
CONSIDERATIONS HOWEVER, HAVE NO SIGNIFICANT APPLICATION TO THE
PROSECUTION'S STATUTORILY GRANTED RIGHT TO REVIEW A SENTENCE. THIS
LIMITED APPEAL DOES NOT INVOLVE A RETRIAL OR APPROXIMATE THE ORDEAL OF A
TRIAL ON THE BASIC ISSUE OF GUILT OR INNOCENCE. UNDER SEC. 3576, THE
APPEAL IS TO BE TAKEN PROMPTLY AND IS ESSENTIALLY ON THE RECORD OF THE
SENTENCING COURT. THE DEFENDANT, OF COURSE, IS CHARGED WITH KNOWLEDGE
OF THE STATUTE AND ITS APPEAL PROVISIONS, AND HAS NO EXPECTATION OF
FINALITY IN HIS SENTENCE UNTIL THE APPEAL IS CONCLUDED OR THE TIME TO
APPEAL HAS EXPIRED. TO BE SURE, THE APPEAL MAY PROLONG THE PERIOD OF ANY
ANXIETY THAT MAY EXIST, BUT IT DOES SO ONLY FOR THE FINITE PERIOD PROVIDED
BY THE STATUTE. THE APPEAL IS NO MORE OF AN ORDEAL THAN ANY GOVERNMENT
APPEAL UNDER 18 U.S.C. 3731 FROM THE DISMISSAL OF AN INDICTMENT OR
INFORMATION. THE DEFENDANT'S PRIMARY CONCERN AND ANXIETY OBVIOUSLY
RELATE TO THE DETERMINATION OF INNOCENCE OR GUILT, AND THAT ALREADY IS
BEHIND HIM. THE DEFENDANT IS SUBJECT TO NO RISK OF BEING HARASSED AND
THEN CONVICTED, ALTHOUGH INNOCENT. FURTHERMORE, A SENTENCE IS
CHARACTERISTICALLY DETERMINED IN LARGE PART ON THE BASIS OF INFORMATION,
SUCH AS THE PRESENTENCE REPORT, DEVELOPED OUTSIDE THE COURTROOM. IT IS
PURELY A JUDICIAL DETERMINATION, AND MUCH THAT GOES INTO IT IS THE RESULT
OF INQUIRY THAT IS NONADVERSARY IN NATURE. [FN494]
THE COURT ALSO HELD THAT THERE WAS NO DOUBLE JEOPARDY PROBLEM WITH THE
FACT THAT THE DEFENDANT'S SENTENCE COULD BE INCREASED ON SUCCESSFUL
GOVERNMENT APPEAL OF THE SENTENCE, MAKING CLEAR THAT THE BAR AGAINST
DOUBLE PUNISHMENTS APPLIED TO A TOTAL PUNISHMENT IN EXCESS OF THE
STATUTORY MAXIMUM FOR THE OFFENSE, NOT TO AN INCREASE IN THE SENTENCE
WITHIN STATUTORY LIMITS. [FN495] FINALLY, THE *153 **3336 COURT NOTED
THE GROWING CRITICISM OF ARBITRARY SENTENCING PRACTICES, AND INDICATED
THAT 'APPELLATE REVIEW CREATES A CHECK UPON THIS UNLIMITED POWER, AND
SHOULD LEAD TO A GREATER DEGREE OF CONSISTENCY IN SENTENCING.' [FN496]

2. PROVISIONS OF THE BILL, AS REPORTED

SECTION 3742 SETS FORTH PROCEDURES FOR APPEAL IN THREE CASES: APPEAL OF
A SENTENCE IMPOSED IN VIOLATION OF LAW, APPEAL OF A SENTENCE THAT
REFLECTS AN INCORRECT APPLICATION OF THE SENTENCING GUIDELINES
PROMULGATED PURSUANT TO PROPOSED 28 U.S.C. 994(A)(2); APPEAL OF A
SENTENCE OUTSIDE THE GUIDELINES; AND APPEAL OF A SENTENCE IN A CASE IN
WHICH THERE IS NO GUIDELINE APPLICABLE TO THE OFFENSE COMMITTED. EITHER

THE COMMITTEE AGREES WITH THE JUDICIAL CONFERENCE THAT A DEFENDANT WHO IS IMPRISONED FOR A MINOR OFFENSE PURSUANT TO AN ABOVE-GUIDELINE SENTENCE, WOULD GAIN LITTLE COMFORT FROM KNOWING THAT HE HAS BEEN DENIED APPELLATE RIGHTS BECAUSE THE OFFENSE FOR WHICH HE HAS BEEN IMPRISONED IS RELATIVELY MINOR. [FN499]

*154 **3337 THE SENTENCE REVIEW PROCESS UNDER SECTION 3742 BEGINS UNDER SUBSECTIONS (A) AND (B) WITH THE FILING OF NOTICE OF APPEAL OF SENTENCE WITH THE DISTRICT COURT. THE GOVERNMENT MAY PETITION FOR REVIEW OF A SENTENCE ONLY WITH THE PERSONAL APPROVAL OF THE ATTORNEY GENERAL OR THE SOLICITOR GENERAL IN ORDER TO ASSURE THAT SUCH APPEALS ARE NOT ROUTINELY FILED FOR EVERY SENTENCE BELOW THE GUIDELINES. THE LIMITATIONS ON BOTH DEFENDANT AND GOVERNMENT APPEAL OF SENTENCES OUTSIDE THE GUIDELINES BASED UPON THE SIZE OF THE SENTENCE IMPOSED ARE FURTHER RESTRICTIONS ON THE USE OF APPELLATE REVIEW OF SENTENCES IN ORDER TO AVOID UNNECESSARY APPEALS. CLEARLY, SENTENCES AT THE BOTTOM RANGE ARE LESS LIKELY TO BE ABUSIVE TO DEFENDANTS. THE SAME APPLIES TO THE GOVERNMENT WHEN SENTENCES IMPOSED APPROACH THE UPPER RANGE OF SENTENCES RECOMMENDED. THE GUIDELINES, THEREFORE, PROVIDE A PRACTICAL BASIS FOR DISTINGUISHING THE CASES WHERE REVIEW IS NOT NEEDED FROM THOSE WHERE APPEAL WOULD MOST LIKELY BE FRIVOLOUS.

BOTH SECTIONS 3742(A) AND 3742(B) REFER TO THE SENTENCE BEING APPEALED AS AN 'OTHERWISE FINAL SENTENCE'. THIS LANGUAGE IS IN ACCORD WITH THE PROVISIONS OF SECTIONS 3562(B), 3572(C), AND 3582(B) REGARDING REVIEWABILITY OF SENTENCES. THOSE SECTIONS MAKE CLEAR THAT A SENTENCE TO A FINE, TO A TERM OF IMPRISONMENT, OR TO A TERM OF PROBATION IS FINAL EXCEPT TO THE EXTENT THAT IT MAY BE MODIFIED OR CORRECTED THROUGH SUBSEQUENT COURT ACTION. THE COMMITTEE INTENDS THAT A SENTENCE BE SUBJECT TO MODIFICATION THROUGH THE APPELLATE PROCESS, ALTHOUGH IT IS FINAL FOR OTHER PURPOSES. [FN500]

UNDER SUBSECTION (C), THE CLERK OF THE COURT THAT IMPOSED THE SENTENCE
SHALL CERTIFY TO THE COURT OF APPEALS THAT PORTION OF THE RECORD IN THE CASE THAT IS DESIGNATED AS PERTINENT BY EITHER OF THE PARTIES, THE PRESENTENCE REPORT, AND INFORMATION SUBMITTED DURING THE SENTENCING PROCEEDING, INCLUDING THE COURT’S STATEMENT OF REASONS AS CALLED FOR BY SECTION 3553(B). UNDER SUBSECTION (D), UPON REVIEW OF THE RECORD, THE COURT OF APPEALS IS TO DETERMINE WHETHER THE SENTENCE WAS IMPOSED IN VIOLATION OF LAW; WAS IMPOSED AS A RESULT OF AN INCORRECT APPLICATION OF THE SENTENCING GUIDELINES; OR IS OUTSIDE THE GUIDELINES AND IS UNREASONABLE, HAVING REGARD FOR: (1) THE FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE, AS SET FORTH IN CHAPTER 227, AND (2) THE REASONS FOR THE SENTENCE STATED BY THE SENTENCING COURT.

UNDER SUBSECTION (E), IF THE COURT OF APPEALS FINDS THAT THE SENTENCE WAS NOT IMPOSED IN VIOLATION OF LAW, OR AS A RESULT OF INCORRECT APPLICATION OF THE GUIDELINES, AND IS NOT UNREASONABLE, IT IS TO AFFIRM THE SENTENCE.

IF THE COURT DETERMINES THAT THE SENTENCE WAS IMPOSED IN VIOLATION OF LAW OR AS A RESULT OF AN INCORRECT APPLICATION OF THE GUIDELINES, IT IS REQUIRED TO REMAND THE CASE FOR FURTHER SENTENCING PROCEEDINGS OR CORRECT THE SENTENCE.

FINALLY, IF THE COURT DETERMINES THAT A SENTENCE OUTSIDE THE GUIDELINES IS UNREASONABLE AND TOO HIGH, AND THE APPEAL WAS FILED BY THE DEFENDANT, IT IS TO SET ASIDE THE SENTENCE AND EITHER IMPOSE A LESSER SENTENCE, REMAND FOR IMPOSITION OF A LESSER SENTENCE, OR REMAND FOR FURTHER SENTENCING PROCEEDINGS.

*155 **3338 If the court determines that a sentence outside the guidelines is unreasonable and too low, and the appeal was filed by the government, the court is to set aside the sentence and either impose a greater sentence, remand for imposition of a greater sentence, or remand for further sentencing proceedings. It should be noted that a sentence cannot be increased upon a section 3742(a)(3) appeal by the defendant.

As to the procedures to be followed, the committee intends that the federal rules of appellate procedure be applicable to a proceeding under this section. Many of these rules will be applicable as they now exist; others may need modification. The committee expects that the judicial conference and its advisory committees will issue specific proposed amendments to cover the details of these procedures where necessary.

The committee believes that section 3742 creates for the first time a comprehensive system of review of sentences that permits the appellate process to focus attention on those sentences whose review is crucial to the functioning of the sentencing guidelines system, while also providing adequate means for correction of erroneous and clearly unreasonable sentences. [FN501]

Section 203(B) of the bill contains a technical amendment to the sectional analysis of chapter 235 of title 18.

Section 204 of the bill amends chapter 403 of title 18, U.S.C. relating to juvenile delinquency, in order to conform it to the changes made in adult sentencing laws.

Section 204(A) of the bill amends section 5037 of title 18, U.S.C. by replacing current subsections (A) and (B), relating to disposition after a finding of juvenile delinquency, with the disposition provisions from S. 1630 in the 97th congress. [FN502]

Under proposed 18 U.S.C. 5037(A), if the court finds that a juvenile is a juvenile delinquent, the court is required to hold a disposition hearing within 20 days after the juvenile delinquency hearing. After the
DISPOSITION HEARING, THE COURT MAY SUSPEND THE FINDING OF JUVENILE DELINQUENCY, ENTER AN ORDER OF RESTITUTION PURSUANT TO SECTION 3556, PLACE THE JUVENILE ON PROBATION, OR COMMIT HIM TO OFFICIAL DETENTION. THE PROVISIONS OF CHAPTER 207 OF TITLE 18 ARE SPECIFICALLY MADE APPLICABLE TO THE DECISION WHETHER TO RELEASE OR DETAIN THE JUVENILE PENDING AN APPEAL OR A PETITION FOR A WRIT OF CERTIORARI AFTER THE DISPOSITION.


OFFICIAL DETENTION FOR A CLASS A, B, OR C FELONY IS A MAXIMUM OF FIVE YEARS OR THE MAXIMUM SENTENCE APPLICABLE TO AN ADULT OFFENDER.

SECTION 204(B) OF THE BILL REPEALS SECTION 5041 OF TITLE 18, U.S.C. IN LIGHT OF THE ABOLITION OF THE PAROLE SYSTEM IN FEDERAL LAW. THE SECTION DESCRIBES THE ROLE OF THE PAROLE SYSTEM IN DETERMINING RELEASE DATES UNDER CURRENT LAW. IT IS EXPECTED THAT THE TIME SET AT THE DISPOSITION HEARING FOR A JUVENILE PLACED IN THE CUSTODY OF THE ATTORNEY GENERAL PURSUANT TO 18 U.S.C. 5037(B) WILL REPRESENT THE REAL TIME TO BE SPENT BY THE JUVENILE IN A MANNER SIMILAR TO THAT FOR ADULT OFFENDERS UNDER THE BILL.

SECTION 204(C) AMENDS SECTION 5042 OF TITLE 18, RELATING TO PAROLE AND PROBATION REVOCATION, BY STRIKING OUT REFERENCES TO PAROLE AND PAROLEES.

SECTION (D) AMENDS THE SECTIONAL ANALYSIS OF CHAPTER 403 OF TITLE 18 TO ACCORD WITH THE OTHER AMENDMENTS MADE BY SECTION 204.

SECTION 205 OF THE BILL CONTAINS A NUMBER OF AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE THAT ARE NECESSITATED BY THE AMENDMENTS TO THE SENTENCING PROVISIONS.

SECTION 205(A) OF THE BILL MAKES SEVERAL CHANGES IN RULE 32, MOSTLY TO CONFORM IT TO CHANGES IN THE SENTENCING LAWS MADE BY THE BILL. CERTAIN PROVISIONS NOW FOUND IN CURRENT 18 U.S.C. 3653 HAVE ALSO BEEN ADDED TO THIS RULE IN A REVISED FORM.

SUBDIVISION (A)(1) OF RULE 32, RELATING TO THE SENTENCING HEARING, MODIFIES THE CURRENT REQUIREMENT THAT A SENTENCE BE IMPOSED WITHOUT UNNECESSARY DELAY BY PERMITTING THE COURT, UPON A JOINT MOTION OF THE DEFENDANT AND THE GOVERNMENT, TO POSTPONE THE IMPOSITION OF SENTENCE FOR A PERIOD REASONABLY NECESSARY TO RESOLVE AN UNRESOLVED FACTOR IMPORTANT TO THE SENTENCING DETERMINATION. SUCH FACTORS AS COOPERATING WITH THE GOVERNMENT, TESTIFYING AGAINST A CODEFENDANT, ACTING AS AN UNDERCOVER AGENT, AS WELL AS PROVIDING OTHERWISE UNAVAILABLE INFORMATION, MAY BE IMPORTANT TO THE SENTENCING DECISION. THIS MODIFICATION RECOGNIZES THE INTERESTS OF ALL CONCERNED IN WEIGHING SUCH FACTORS PRIOR TO THE SENTENCING HEARING WHENEVER POSSIBLE. IN
ADDITION, SUBDIVISION (A)(1) IS AMENDED TO REQUIRE THAT THE COURT SPECIFY IN OPEN COURT AND BEFORE IMPOSING SENTENCE THE CATEGORIES ESTABLISHED IN THE SENTENCING GUIDELINES PROMULGATED BY THE SENTENCING COMMISSION THAT IT BELIEVES APPLY TO THE DEFENDANT.

BEFORE IMPOSING THE SENTENCE THE COURT MUST ALSO DETERMINE THAT THE DEFENDANT AND HIS ATTORNEY HAD SUFFICIENT TIME AND OPPORTUNITY TO READ AND DISCUSS THE PRESENTENCE INVESTIGATION REPORT. THE COURT MUST GIVE THE DEFENDANT'S COUNSEL AN OPPORTUNITY TO SPEAK ON HIS BEHALF AND MUST ALSO INQUIRE OF THE DEFENDANT PERSONALLY IF HE WOULD LIKE TO MAKE A STATEMENT ON HIS OWN BEHALF OR PRESENT ANY MITIGATING INFORMATION.

SUBDIVISION (A)(2) OF THE RULE, AS NOW IN EFFECT, IMPOSES A DUTY UPON THE COURT TO ADVISE THE DEFENDANT OF HIS RIGHT TO APPEAL IN A CASE WHICH HAS GONE TO TRIAL ON A PLEA OF NOT GUILTY, BUT DOES NOT IMPOSE ANY SUCH DUTY FOLLOWING A PLEA OF GUILTY OR NOLO CONTENDERE. THIS BASIC APPROACH IS CONTINUED IN SUBDIVISION (A)(2) OF THE AMENDED RULE WITH AN ADDITION MADE BY SECTION 205(A)(2) OF THE BILL TO COVER THE MATTER OF ADVICE REGARDING THE DEFENDANT'S RIGHT, IF ANY, TO OBTAIN REVIEW OF HIS SENTENCE.

*157 **3340 SUBDIVISION (C) OF THE RULE AS NOW IN EFFECT GOVERNS THE MAKING OF PRESENTENCE INVESTIGATIONS AND REPORTS PRIOR TO THE IMPOSITION OF SENTENCE OR 'THE GRANTING OF PROBATION.' IT IS NO LONGER APPROPRIATE TO TREAT SENTENCING AND THE GRANTING OF PROBATION SEPARATELY. UNDER PROPOSED SUBCHAPTER B OF CHAPTER 227 OF TITLE 18, THE PROCEDURE OF SUSPENDING THE IMPOSITION OR EXECUTION OF SENTENCE BEFORE PLACING A DEFENDANT ON PROBATION [FN503] HAS BEEN ABOLISHED-- PROBATION HAS BECOME A SENTENCE IN AND OF ITSELF. ACCORDINGLY, RULE 32(C) HAS BEEN REWRITTEN TO DELETE REFERENCES TO THE GRANTING OF PROBATION. HOWEVER, THE LAW IS UNCHANGED IN THAT 'SENTENCE' IS USED IN THE RULE TO THE SAME EFFECT. FOR SIMILAR REASONS THIS REVISED RULE OMITS THE REFERENCE NOW APPEARING IN SUBDIVISION (D) TO SUSPENDING THE IMPOSITION OF SENTENCE.

SUBDIVISION (C)(1) OF RULE 32 IS AMENDED BY SECTION 205(A)(4) OF THE BILL TO REQUIRE THAT A PROBATION OFFICER MAKE A PRESENTENCE INVESTIGATION AND REPORT BEFORE IMPOSITION OF SENTENCE UNLESS THE COURT FINDS THAT THERE IS IN THE RECORD INFORMATION SUFFICIENT TO ENABLE THE MEANINGFUL EXERCISE OF SENTENCING AUTHORITY PURSUANT TO 18 U.S.C. 3553. THIS CHANGE IS NECESSITATED BY THE FACT THAT IT IS ESSENTIAL THAT THE JUDGE HAVE ALL THE INFORMATION HE NEEDS IN ORDER ACCURATELY TO APPLY THE SENTENCING GUIDELINES. IT IS EXPECTED THAT THE SENTENCING JUDGE WILL ORDINARILY WISH THE SENTENCING REPORT TO BE PREPARED TO ASSIST HIM IN HIS SENTENCING DECISION.

SUBDIVISION (C)(2) OF RULE 32 IS AMENDED BY SECTION 205(A)(5) OF THE BILL TO SPELL OUT IN SOME DETAIL THE INFORMATION THAT SHOULD BE INCLUDED IN THE PRESENTENCE REPORT IN ORDER TO ASSURE THE ACCURATE APPLICATION OF THE GUIDELINES. THIS AMENDMENT ASSURES THAT THE INFORMATION RELATING TO THE REQUIREMENTS OF THE SENTENCING GUIDELINES SYSTEM IS CONTAINED IN THE PRESENTENCE REPORT. THAT PART OF RULE 32(C) RELATING TO THE CONTENTS OF THE PRESENTENCE REPORT HAS BEEN SUBSTANTIALLY EXPANDED FROM CURRENT LAW TO PROVIDE THAT THE REPORT WILL CONTAIN, IN ADDITION TO THE INFORMATION CONCERNING THE HISTORY AND CHARACTERISTICS OF THE DEFENDANT (INCLUDING HIS PRIOR CRIMINAL RECORD, IF ANY, HIS FINANCIAL CONDITION, AND ANY BEHAVIOR CHARACTERISTICS PERTINENT TO SENTENCING), THE CLASSIFICATION OF THE OFFENSE AND DEFENDANT UNDER THE SENTENCING GUIDELINES THAT THE PROBATION OFFICER BELIEVES ARE APPLICABLE TO THE DEFENDANT, THE KINDS OF SENTENCE AND THE SENTENCING RANGE UNDER THE GUIDELINES THAT APPLY TO THOSE CLASSIFICATIONS, AND ANY AGGRAVATING OR MITIGATING CIRCUMSTANCES THE PROBATION OFFICER BELIEVES MAY INDICATE
THAT A LOWER OR HIGHER SENTENCE OR A SENTENCE OF A DIFFERENT KIND THAN THAT SPECIFIED IN THE GUIDELINES SHOULD BE IMPOSED.
UNLESS THE COURT ORDERS OTHERWISE, POSSIBLE NONPRISON PROGRAMS AVAILABLE AND APPROPRIATE FOR THE DEFENDANT SHOULD BE INCLUDED IN THE REPORT.
THE BILL ALSO CARRIES FORWARD FROM THE VICTIM AND WITNESS PROTECTION ACT OF 1982, REQUIREMENTS THAT THE PRESENTENCE REPORT INCLUDE INFORMATION CONCERNING HARM, INCLUDING FINANCIAL, SOCIAL, PSYCHOLOGICAL, AND PHYSICAL HARM, DONE TO OR LOSS SUFFERED BY THE VICTIM, AND CONCERNING RESTITUTION NEEDS OF THE VICTIM. THE PRESENTENCE REPORT SHOULD ALSO CONTAIN ANY POLICY STATEMENT OF THE SENTENCING COMMISSION PERTINENT TO IMPOSITION OF SENTENCE ON THE DEFENDANT.
SUBDIVISION (C)(3)(A) OF RULE 32 HAS BEEN AMENDED BY SECTION 205(A)(6) OF THE BILL TO ASSURE THAT THE INFORMATION RELATING TO THE REQUIREMENTS OF REVISED SUBDIVISION (C)(2) CONTAINED IN THE PRESENTENCE REPORT ARE MADE AVAILABLE TO THE DEFENDANT, BUT THAT THE PROBATION OFFICER'S FINAL RECOMMENDATION AS TO SENTENCE IS NOT MADE AVAILABLE. THIS ASSURES THAT THE DEFENDANT WILL RECEIVE INFORMATION SUCH AS THE PROBATION OFFICER'S CONCLUSIONS AS TO WHICH GUIDELINES APPLY TO THE DEFENDANT AND WHETHER THERE ARE AGGRAVATING OR MITIGATING CIRCUMSTANCES THAT MAY INDICATE THAT THE SENTENCE SHOULD BE OUTSIDE THE GUIDELINES, BUT WILL NOT RECEIVE THE FINAL SENTENCING RECOMMENDATION OF THE PROBATION OFFICER. THE LATTER PROVISION REPRESENTS A COMMITTEE AMENDMENT IN THE 97TH CONGRESS TO S. 1630 MADE AT THE SUGGESTION OF JUDGE TJOFLAT [FN504] WHO EXPRESSED CONCERN THAT DISCLOSURE OF THE FINAL SENTENCING RECOMMENDATION MIGHT INHIBIT THE PROBATION OFFICER IN MAKING THE RECOMMENDATIONS.
SECTION 205(B) AMENDS RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE IN ORDER TO ACCORD WITH THE PROVISIONS OF PROPOSED SECTION 3742 OF TITLE 18 CONCERNING APPELLATE REVIEW OF SENTENCE. NEW SUBDIVISION (A) REQUIRES THE COURT TO CORRECT A SENTENCE THAT IS DETERMINED ON APPEAL UNDER 18 U.S.C. 3742 TO HAVE BEEN IMPOSED IN VIOLATION OF LAW, TO HAVE BEEN IMPOSED AS A RESULT OF AN INCORRECT APPLICATION OF THE GUIDELINES, OR TO BE UNREASONABLE. NEW SUBDIVISION (B) PERMITS THE COURT, ON MOTION OF THE GOVERNMENT, TO LOWER A SENTENCE WITHIN ONE YEAR AFTER ITS IMPOSITION TO REFLECT A DEFENDANT'S SUBSEQUENT, SUBSTANTIAL ASSISTANCE IN THE INVESTIGATION OR PROSECUTION OF ANOTHER PERSON WHO HAS COMMITTED AN OFFENSE, TO THE EXTENT THAT SUCH ASSISTANCE IS A FACTOR RECOGNIZED IN APPLICABLE GUIDELINES OR POLICY STATEMENTS ISSUED BY THE SENTENCING COMMISSION.
SECTION 205(C) AMENDS RULE 38 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE IN ORDER TO MAKE TECHNICAL CHANGES NECESSITATED BY THE ENACTMENT OF PROVISIONS FOR APPELLATE REVIEW OF SENTENCE.
AT PRESENT, RULE 38 PROVIDES FOR THE STAYING OF SENTENCES OF DEATH, IMPRISONMENT, THE PAYMENT OF A FINE, AND OF AN ORDER PLACING A DEFENDANT ON PROBATION, 'IF AN APPEAL IS TAKEN.' EACH OF THE RELETTERED SUBDIVISIONS OF RULE 38 HAS BEEN WRITTEN TO ALLOW FOR STAY OF SENTENCE IF AN APPEAL IS TAKEN FROM A CONVICTION OR A SENTENCE. MOREOVER, SINCE PROBATION HAS BEEN CAST AS A SENTENCE, THE PHRASE, 'SENTENCE OF PROBATION,' HAS BEEN USED IN SUBDIVISION (D) INSTEAD OF 'AN ORDER PLACING THE DEFENDANT ON PROBATION.' A NEW SUBDIVISION (E) HAS BEEN ADDED PROVIDING FOR A STAY OF SENTENCE UNDER SECTION 3554 (ORDER OF CRIMINAL FORFEITURE), 3555 (ORDER OF NOTICE TO VICTIMS), OR 3556 (ORDER OF RESTITUTION) IF AN APPEAL OF THE SENTENCE IS FILED. THE SUBDIVISION PERMITS THE COURT TO ISSUE REASONABLY NECESSARY PROTECTIVE ORDERS. FINALLY, A NEW SUBDIVISION (F) IS ADDED TO
STAY A CIVIL OR EMPLOYMENT DISABILITY ARISING UNDER A FEDERAL STATUTE IF IT IS APPEALED AND TO PERMIT THE COURT TO TAKE ACTION NECESSARY TO PROTECT THE INTEREST SOUGHT TO BE PROTECTED BY THE IMPOSITION OF THE DISABILITY PENDING DISPOSITION OF THE APPEAL.  

**SECTION 205(D) OF THE BILL MAKES A CORRECTION IN A CROSS-REFERENCE IN RULE 40 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.**  

SECTION 205(E) OF THE BILL AMENDS RULE 54 TO REDEFINE THE TERM 'PETTY OFFENSE' IN SUBDIVISION (C) TO REFER TO THE GRADING OF OFFENSES PRESCRIBED BY PROPOSED SECTION 3583 OF TITLE 18, AND TO ADD A DEFINITION OF THE WORD 'GRADE' THAT SPECIFIES THAT THE WORD GRADE INCLUDES THE ISSUE WHETHER, FOR THE PURPOSES OF SECTION 3571 (RELATING TO THE SENTENCE OF FINE), A MISDEMEANOR RESULTED IN THE LOSS OF HUMAN LIFE.  

SECTION 205(F) OF THE BILL AMENDS THE TABLE OF RULES OF THE FEDERAL RULES OF CRIMINAL PROCEDURE TO ACCORD WITH THE OTHER AMENDMENTS TO THE RULES.

SECTION 206 CONTAINS A NUMBER OF TECHNICAL AMENDMENTS TO THE RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES TO TAKE INTO ACCOUNT THE NEW GRADING STRUCTURE FOR FEDERAL OFFENSES.

SECTION 207(A) OF THE BILL ADDS A NEW CHAPTER 58 TO TITLE 28 OF THE UNITED STATES CODE. THAT CHAPTER CREATES THE UNITED STATES SENTENCING COMMISSION AND OUTLINES ITS FUNCTIONS.

CHAPTER 58 OF TITLE 28-- UNITED STATES SENTENCING COMMISSION

SECTION 991. UNITED STATES SENTENCING COMMISSION; ESTABLISHMENT AND PURPOSE


PLACEMENT OF THE COMMISSION IN THE JUDICIAL BRANCH IS BASED UPON THE COMMITTEE'S STRONG FEELING THAT EVEN UNDER THIS LEGISLATION, SENTENCING SHOULD REMAIN PRIMARILY A JUDICIAL FUNCTION. AT THE SAME TIME, HOWEVER, THE COMMITTEE BELIEVES THAT SENTENCING POLICY SHOULD BE FORMULATED AFTER EXAMINING A WIDE SPECTRUM OF VIEWS.

IN ORDER TO ASSURE A BROADLY REPRESENTATIVE MEMBERSHIP ON THE SENTENCING COMMISSION, THE COMMITTEE HAS PROVIDED THAT THE PRESIDENT WILL SELECT THE MEMBERS AFTER CONSULTING WITH REPRESENTATIVES OF JUDGES PROSECUTING ATTORNEYS, DEFENSE ATTORNEYS, LAW ENFORCEMENT OFFICIALS, SENIOR CITIZENS, VICTIMS OF CRIME, AND OTHERS INTERESTED IN THE CRIMINAL JUSTICE PROCESS. AT LEAST TWO OF THE MEMBERS SHALL BE FEDERAL JUDGES IN REGULAR ACTIVE SERVICE SELECTED FROM A LIST OF SIX RECOMMENDED CANDIDATES PREPARED FOR THE PRESIDENT BY THE JUDICIAL CONFERENCE OF THE UNITED STATES.

THIS REQUIREMENT THAT TWO OF THE COMMISSION MEMBERS BE ACTIVE FEDERAL JUDGES WAS INCLUDED AT THE REQUEST OF THE JUDICIAL CONFERENCE. THE COMMITTEE HAD ANTICIPATED THAT SOME NUMBER OF MEMBERS OF THE SENTENCING COMMISSION WOULD BE JUDGES. THIS AMENDMENT CLARIFIES THAT INTENT.

THE CHAIRMAN IS TO BE APPOINTED AS SUCH, AND WILL REMAIN FOR THE
DURATION OF HIS TERM UNLESS REMOVED FROM OFFICE FOR MALFEASANCE OR NEGLECT OF DUTY. [FN505] ALL VOTING MEMBERS ARE REMOVABLE FROM THE COMMISSION BY THE PRESIDENT FOR MALFEASANCE IN OFFICE OR NEGLECT OF DUTY.

IN ADDITION TO THE SEVEN VOTING MEMBERS, THE COMMISSION WILL HAVE ONE PERMANENT NON-VOTING EX OFFICIO MEMBER, THE ATTORNEY GENERAL OF HIS DESIGNEE, AND, UNDER THE PROVISIONS OF SECTION 225(B)(5) OF THIS TITLE, ONE TEMPORARY NON-VOTING EX OFFICIO MEMBER, THE CHAIRMAN OF THE UNITED STATES PAROLE COMMISSION.

THE COMMISSION SHOULD BE A BODY WHICH CAN COOPERATE IN THE PROMULGATION OF CLEAR AND CONSISTENT SENTENCING POLICY. BY REQUIRING CONSULTATION WITH VARIOUS GROUPS AS TO POTENTIAL MEMBERS OF THE COMMISSION, IT CAN BE EXPECTED THAT THEY WILL REPRESENT SOME DIVERSITY OF BACKGROUNDS.

THE EXTRAORDINARY POWERS AND RESPONSIBILITIES VESTED IN THE COMMISSION, AS WELL AS THE ENORMOUS POTENTIAL FOR UNPARALLELED IMPROVEMENT IN THE FAIRNESS AND EFFECTIVENESS OF FEDERAL CRIMINAL JUSTICE AS A WHOLE, DEMAND THE HIGHEST QUALITY OF MEMBERSHIP. FOR SUCH A CRITICAL POSITION, PRESIDENTIAL APPOINTMENTS BASED ON POLITICS RATHER THAN MERIT WOULD, AND SHOULD, BE AN EMBARRASSMENT TO THE APPOINTING AUTHORITY. THE COMMITTEE IS CONVINCED THAT WITHOUT SUPERIOR AND PROFESSIONAL MEMBERS THE COMMISSION, AND INDEED SENTENCING REFORM, CAN NEVER ACHIEVE THE PROGRESS SO SORELY NEEDED.


*160 **3343* SUBSECTION (B) SETS OUT THE TWO BASIC PURPOSES OF THE SENTENCING COMMISSION. THE MOST IMPORTANT PURPOSE OF THE COMMISSION IS THE ESTABLISHMENT OF SENTENCING POLICIES AND PRACTICES FOR THE FEDERAL CRIMINAL JUSTICE SYSTEM THAT ARE DESIGNED TO MEET THREE GOALS. FIRST, THE POLICIES AND PRACTICES ESTABLISHED SHOULD ASSURE THAT, TO THE MAXIMUM EXTENT POSSIBLE, THE FEDERAL SENTENCING PRACTICES AND POLICIES CARRY OUT THE FOUR PURPOSES OF SENTENCING SET FORTH IN SECTION 3553(A)(2) OF TITLE 18, UNITED STATES CODE. THESE PURPOSES ARE DETERRENCE, PROTECTION OF THE PUBLIC FROM FURTHER CRIMES BY THE DEFENDANT, ASSURANCE OF JUST PUNISHMENT, AND PROMOTION OF REHABILITATION. SECOND, THE POLICIES AND PRACTICES ARE REQUIRED TO PROVIDE CERTAINTY
AND FAIRNESS IN MEETING THE PURPOSES OF SENTENCING. IN DOING SO, THE POLICIES AND PRACTICES ARE REQUIRED TO AVOID 'UNWARRANTED SENTENCE DISPARITIES AMONG DEFENDANTS WITH SIMILAR RECORDS WHO HAVE BEEN FOUND GUILTY OF SIMILAR CRIMINAL CONDUCT WHILE MAINTAINING SUFFICIENT FLEXIBILITY TO PERMIT INDIVIDUALIZED SENTENCES WHEN WARRANTED BY MITIGATING OR AGGRAVATING FACTORS NOT TAKEN INTO ACCOUNT IN THE ESTABLISHMENT OF GENERAL SENTENCING PRACTICES.' THIS REQUIREMENT ESTABLISHES TWO FACTORS-- THE PRIOR RECORDS OF OFFENDERS AND THE CRIMINAL CONDUCT FOR WHICH THEY ARE TO BE SENTENCED-- AS THE PRINCIPAL DETERMINANTS OF WHETHER TWO OFFENDERS' CASES ARE SO SIMILAR THAT A DIFFERENCE BETWEEN THEIR SENTENCES SHOULD BE CONSIDERED A DISPARITY THAT SHOULD BE AVOIDED UNLESS IT IS WARRANTED BY OTHER FACTORS. THE KEY WORD IN DISCUSSING UNWARRANTED SENTENCE DISPARITIES IS 'UNWARRANTED.' THE COMMITTEE DOES NOT MEAN TO SUGGEST THAT SENTENCING POLICIES AND PRACTICES SHOULD ELIMINATE JUSTIFIABLE DIFFERENCES BETWEEN THE SENTENCES OF PERSONS CONVICTED OF SIMILAR OFFENSES WHO HAVE SIMILAR RECORDS. THE COMMISSION IS, IN FACT, REQUIRED TO CONSIDER A NUMBER OF FACTORS IN PROMULGATING SENTENCING GUIDELINES TO DETERMINE WHAT IMPACT ON THE GUIDELINES, IF ANY, WOULD BE WARRANTED BY DIFFERENCES AMONG DEFENDANTS WITH RESPECT TO THOSE FACTORS. [FN508] AS DISCUSSED IN THE INTRODUCTION OF THIS REPORT, THE COMMITTEE BELIEVES THAT THE SENTENCING GUIDELINES SYSTEM WILL ENHANCE, RATHER THAN DETRACT FROM, THE INDIVIDUALIZATION OF SENTENCES. EACH SENTENCE WILL BE THE RESULT OF CAREFUL CONSIDERATION OF THE PARTICULAR CHARACTERISTICS OF THE OFFENSE AND THE OFFENDER, RATHER THAN BEING DEPENDENT ON THE IDENTITY OF THE SENTENCING JUDGE AND THE NATURE OF HIS SENTENCING PHILOSOPHY.

THIRD, THE SENTENCING POLICIES AND PRACTICES ARE REQUIRED TO REFLECT, TO THE EXTENT PRACTICABLE, ADVANCEMENT IN KNOWLEDGE OF HUMAN BEHAVIOR IN THE CONTEXT OF THE CRIMINAL JUSTICE PROCESS. THIS IS AN EXPLICIT RECOGNITION OF THE UNFORTUNATE FACT THAT WE DO NOT KNOW VERY MUCH ABOUT HOW TO DETER CRIMINAL CONDUCT OR REHABILITATE OFFENDERS. IT ALSO MAKES CLEAR THAT THE PURPOSES SET FORTH IN SUBSECTION (B) ARE THE GOALS TO BE REACHED BY THE SENTENCING PROCESS AND THAT THEY CANNOT BE REALISTICALLY ASSURED IN EVERY CASE. SUBSECTION (B)(1)(C) IS DESIGNED TO ENCOURAGE THE CONSTANT REFINEMENT OF SENTENCING POLICIES AND PRACTICES AS MORE IS LEARNED ABOUT THE EFFECTIVENESS OF DIFFERENT APPROACHES.


SECTION 992. TERMS OF OFFICE; COMPENSATION

SUBSECTION (A) SETS UP A STAGGERED SYSTEM OF APPOINTMENTS FOR THE CHAIRMAN AND VOTING MEMBERS OF THE COMMISSION SUCH THAT, ONCE IN OPERATION, THE COMMISSION MEMBERSHIP WILL BE REPLACED, OR REAPPOINTED, OVER A PERIOD OF SIX YEARS-- AT LEAST TWO MEMBERS, OR ONE MEMBER AND THE CHAIRMAN, EVERY TWO YEARS. THIS IS ACHIEVED BY MAKING THE INITIAL APPOINTMENTS FOR THREE MEMBERS TO ONLY FOUR-YEAR TERMS, AND FOR TWO OTHER MEMBERS TO ONLY TWO-YEAR TERMS, WHILE THE FIRST CHAIRMAN AND ONE MEMBER SERVE FULL SIX-YEAR TERMS. THIS STAGGERED SYSTEM SHOULD PROVIDE A DESIRABLE BALANCE BETWEEN CONTINUITY AND THE INNOVATION AND NEW

SUBSECTION (B) PROVIDES THAT A VOTING MEMBER MAY SERVE NO MORE THAN TWO FULL TERMS, AND THAT A MEMBER APPOINTED TO SERVE AN UNEXPIRED TERM SHALL SERVE ONLY THE REMAINDER OF SUCH A TERM. THIS ALSO MEANS THAT IF A VOTING MEMBER IS APPOINTED TO A TERM AFTER IT BEGINS, AND IT HAS BEEN VACANT DURING THE EXPIRED PART, SUCH MEMBER WILL ALSO SERVE ONLY THE REMAINDER OF A TERM. IF ONE OF THE ORIGINAL COMMISSIONERS APPOINTED TO THE ABBREVIATED TWO- OR FOUR-YEAR TERM WERE REAPPOINTED, HE COULD BE REAPPOINTED A SECOND TIME AS WELL SINCE THE INITIAL TERM WAS NOT A FULL TERM.


THE BILL SPECIFICALLY AUTHORIZES A FEDERAL JUDGE TO BE APPOINTED AS A MEMBER OF THE COMMISSION WITHOUT HAVING TO RESIGN HIS APPOINTMENT AS A FEDERAL JUDGE. THE COMMITTEE FEELS THAT THIS IS APPROPRIATE SINCE THE JUDGE WILL REMAIN IN THE JUDICIAL BRANCH AND WILL BE ENGAGED IN ACTIVITIES CLOSELY RELATED TO TRADITIONAL JUDICIAL ACTIVITIES, AND THAT SUCH A PROVISION IS NECESSARY TO ASSURE THAT HIGHLY QUALIFIED CANDIDATES ARE NOT ROUTINELY EXCLUDED IN PRACTICE BECAUSE OF THE SUBSTANTIAL BURDEN OF HAVING TO RESIGN A LIFETIME APPOINTMENT IN ORDER TO SERVE ON THE SENTENCING COMMISSION.
THE NON-VOTING EX OFFICIO MEMBERS WOULD, OF COURSE, RECEIVE NO EXTRA COMPENSATION FOR THEIR ROLES ON THE COMMISSION, BUT WOULD RECEIVE TRAVEL EXPENSES AUTHORIZED BY THEIR AGENCY IF NECESSARY TO THE PERFORMANCE OF THEIR DUTIES WITH REGARD TO THE COMMISSION.

SECTION 993. POWERS AND DUTIES OF CHAIRMAN

SECTION 993 PROVIDES THAT THE CHAIRMAN, WHO IS APPOINTED AS SUCH BY THE PRESIDENT, WITH THE ADVICE AND CONSENT OF THE SENATE, PURSUANT TO SECTION 991(A), IS TO CALL AND PRESIDE AT MEETINGS OF THE SENTENCING COMMISSION. AFTER THE COMMISSION BECOMES PART-TIME, MEETINGS SHALL BE HELD FOR AT LEAST TWO WEEKS IN EACH QUARTER OF THE YEAR. THE CHAIRMAN MUST ALSO DIRECT THE PREPARATION OF APPROPRIATIONS REQUESTS AND THE USE OF FUNDS BY THE SENTENCING COMMISSION.

SECTION 994. DUTIES OF THE COMMISSION

SUBSECTION (A) REQUIRES THE SENTENCING COMMISSION TO PROMULGATE SENTENCING GUIDELINES AND POLICY STATEMENTS TO BE USED BY THE SENTENCING JUDGES IN DETERMINING THE APPROPRIATE SENTENCE IN A PARTICULAR CASE. THE SENTENCING GUIDELINES AND POLICY STATEMENTS ARE TO BE PROMULGATED PURSUANT TO THE RULES AND REGULATIONS OF THE SENTENCING COMMISSION [FN509] AND MUST BE CONSISTENT WITH ALL PERTINENT PROVISIONS OF TITLE 18 AND 28. GUIDELINES AND POLICY STATEMENTS MUST BE ADOPTED BY THE AFFIRMATIVE VOTE OF AT LEAST FOUR MEMBERS OF THE COMMISSION. UNDER SUBSECTION (A)(1)(A), THE GUIDELINES ARE REQUIRED TO PROVIDE GUIDANCE FOR THE JUDGE IN DETERMINING WHETHER TO SENTENCE A CONVICTED DEFENDANT TO PROBATION, TO PAY A FINE, OR TO A TERM OF IMPRISONMENT. THIS GUIDANCE MAY PROVE TO BE ONE OF THE MOST IMPORTANT PARTS OF THE GUIDELINES PROCESS, SINCE CURRENT LAW PROVIDES NO GUIDANCE OR MECHANISM FOR GUIDANCE TO JUDGES ON THIS CRUCIAL DECISION, LEADING TO CONSIDERABLE UNWARRANTED DISPARITY WHICH THERE IS NO MECHANISM TO CORRECT. THE PAROLE COMMISSION IS NOW ABLE TO ALLEVIATE SOME OF THE DISPARITY AMONG SENTENCES TO TERMS OF IMPRISONMENT; HOWEVER, IT HAS NO JURISDICTION TO ELIMINATE DISPARITY AMONG DECISIONS WHETHER OR NOT TO SENTENCE CONVICTED DEFENDANTS TO TERMS OF IMPRISONMENT. THE DISPARITY IS ILLUSTRATED BY THE DATA IN THE FOLLOWING CHARGE FROM THE BOOK, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: [FN510]

TABLE 2.-- PERCENTAGE OF CONVICTED OFFENDERS PLACED ON PROBATION, 1972

BEFORE THEY ARE EVEN PUT IN PLACE. FOR EXAMPLE, IF THERE WERE PAROLE
ELIGIBILITY FOR HALF A PRISON TERM, THE SENTENCING COMMISSION PROBABLY
WOULD NOT KNOW WHETHER TO ISSUE GUIDELINES THAT RECOMMENDED PRISON
TERMS THAT **165 **3348 WERE TWICE AS LONG AS THE COMMISSION THOUGHT
SHOULD BE SERVED OR TERMS THAT REFLECTED ACTUAL TIME TO BE SERVED. IF,
DESPITE THE GUIDELINES, THE PAROLE COMMISSION WERE TO RETAIN THE POWER
to release prisoners after a fixed eligibility period, it is likely that the
sentencing judges would try to second-guess both the guidelines and
the parole commission and, in fixing a defendant's sentence, try to
determine when the offender actually would be released. It is hard to
conceive of a step that would be more damaging to the entire
sentencing system found in the reported bill. [FN511]
SUBSECTION (A)(1)(B) REQUIRES THAT THE SENTENCING GUIDELINES RECOMMEND
an appropriate amount of fine or appropriate length of a term of
probation or imprisonment. In recommending an appropriate fine, the
commission could, of course, provide a formula or set of principles for
determining an appropriate fine relative to the damage caused, the gain
to the defendant, or the ability of the defendant to pay, consistent
with the flexibility possible because of the high maximum fines set forth
in proposed subchapter C of chapter 227 of title 18, U.S.C. rather than
specifying a dollar amount of fine.
SUBSECTION (A)(1)(C) REQUIRES THAT THE SENTENCING GUIDELINES RECOMMEND
whether a category of defendant convicted of a particular offense who
is sentence to a term of imprisonment should be required to serve a
term of supervised release, and, if so, what length of term is
appropriate.
The committee added a new subsection (A)(1)(D) in S. 1630 in the 97th
congress that requires that the sentencing guidelines include
recommendations as to whether sentences to terms of imprisonment
should be ordered to run concurrently or consecutively. The committee
has taken this approach instead of the approach in earlier versions of
the bill that set, in section 3584 of title 18, a ceiling on the maximum
term of imprisonment that could be imposed for multiple offenses. The
committee believes that the new provision when read with the revised
version of 28 U.S.C. 994(L) will lead to carefully considered
determinations as to the appropriateness of concurrent, consecutive,
or overlapping sentences in cases of multiple offenses.
The list of determinations concerning which the guidelines should make
recommendations is not necessarily inclusive. For example, the
sentencing commission may wish to make recommendations in the
guidelines in some cases as to, for example, a requirement of
restitution or a particularly appropriate condition of probation for a
category of offender convicted of a particular offense.
Under subsection (A)(2), the commission is required to issue general
policy statements concerning application of the guidelines and other
aspects of sentencing and sentence implementation that would further
the ability of the federal criminal justice system to **166 **3349 ACHIEVE
the purposes of sentencing set forth in section 101(B) of title 18. The
policy statements are required to address the questions of the
appropriate use of: the sanctions of order of criminal forfeiture,
[FN512] order of restitution, [FN513] and order of notice to victims,
[FN514] conditions of probation, [FN515] and supervised release, [FN516]
sentence modification provisions for fines, [FN517] probation, [FN518]
and imprisonment, [FN519] authority under rule 11(E) of the federal
rules of criminal procedure to accept or reject a plea agreement; and
temporary release under proposed section 3622 of title 18 and
PRERELEASE CUSTODY UNDER PROPOSED SECTION 3624(C) OF TITLE 18. THESE POLICY STATEMENTS COULD ALSO ADDRESS, FOR EXAMPLE, SUCH QUESTIONS AS THE APPROPRIATENESS OF SENTENCES OUTSIDE THE GUIDELINES WHERE THERE EXISTS A PARTICULAR AGGRAVATING OR MITIGATING FACTOR WHICH DOES NOT OCCUR SUFFICIENTLY FREQUENTLY TO BE INCORPORATED IN THE GUIDELINES THEMSELVES, AND COULD DESCRIBE FACTORS THAT THE SENTENCING COMMISSION FOUND SHOULD NOT AFFECT A SENTENCE. THE POLICY STATEMENTS MIGHT ALSO ADDRESS SUCH ISSUES AS THE KIND OF RECOMMENDATIONS A JUDGE MIGHT MAKE PURSUANT TO PROPOSED SECTION 3582(A) OF TITLE 18 TO THE BUREAU OF PRISONS AS TO AN APPROPRIATE PRISON FACILITY FOR A DEFENDANT COMMITTED TO ITS CUSTODY. ANOTHER IMPORTANT FUNCTION OF THE POLICY STATEMENTS MIGHT BE TO ALERT FEDERAL DISTRICT JUDGES TO EXISTING DISPARITIES WHICH ARE NOT ADEQUATELY CURED BY THE GUIDELINES, WHILE OFFERING RECOMMENDATIONS AS TO HOW SUCH SITUATIONS SHOULD BE TREATED IN THE FUTURE.

ANOTHER AREA IN WHICH THE SENTENCING COMMISSION MIGHT WISH TO ISSUE GENERAL POLICY STATEMENTS CONCERNS THE IMPOSITION OF SENTENCE UPON ORGANIZATIONS CONVICTED OF CRIMINAL OFFENSES. UNDER PROPOSED SECTION 3551(C), SUCH AN ORGANIZATION MAY BE SENTENCED TO PROBATION PURSUANT TO PROPOSED SUBCHAPTER B OF CHAPTER 227, TO PAY A FINE PURSUANT TO PROPOSED SUBCHAPTER C OF CHAPTER 227, TO FORFEIT PROPERTY PURSUANT TO PROPOSED 18 U.S.C. 3554, TO GIVE NOTICE TO VICTIMS PURSUANT TO PROPOSED 18 U.S.C. 3555, TO MAKE RESTITUTION PURSUANT TO PROPOSED 18 U.S.C. 3556, OR TO ANY COMBINATION OF SUCH PENALTIES THAT THE SENTENCING JUDGE DEEMS FITTING UNDER THE CIRCUMSTANCES. GIVEN THE BREADTH OF DISCRETION THUS AVAILABLE TO THE COURT IN THE CONTEXT OF SENTENCING AN ORGANIZATIONAL DEFENDANT, THE COMMITTEE BELIEVES THAT IT WOULD BE A PROPER FOR THE SENTENCING COMMISSION, BY MEANS OF POLICY STATEMENTS, TO PROVIDE GUIDANCE TO SENTENCING JUDGES CONCERNING SUCH MATTERS AS: (1) CONSIDERATIONS RELEVANT TO THE COORDINATION OF CRIMINAL SANCTIONS IMPOSED WITH ANY CIVIL REMEDIES THAT MAY BE AVAILABLE UNDER THE CIRCUMSTANCES; (2) CONSIDERATIONS RELEVANT TO THE IMPOSITION OF SANCTIONS INVOLVING FORFEITURE, NOTICE TO VICTIMS, AND RESTITUTION; AND (3) CONSIDERATIONS RELEVANT TO THE SELECTION OF CONDITIONS OF PROBATION INVOLVING SUCH JUDICIAL MONITORING OF THE ACTIVITIES OF A CONVICTED ORGANIZATION AS MAY BE APPROPRIATE UNDER THE CIRCUMSTANCES OF THE CASE. [FN520] *167 **3350 UNDER SUBSECTION (A)(3), THE SENTENCING COMMISSION IS REQUIRED TO ISSUE EITHER GUIDELINES OR POLICY STATEMENTS CONCERNING THE APPROPRIATE USE OF PROBATION REVOCATION UNDER PROPOSED 18 U.S.C. 3565, AND OF THE PROVISIONS FOR MODIFICATION OF THE TERM OR CONDITIONS OF PROBATION OR SUPERVISED RELEASE UNDER PROPOSED 18 U.S.C. 3563(C), 3564(D), AND 3583(E).

THE PROVISION OF SUBSECTION (A)(2)(D), CONCERNING THE ISSUANCE OF POLICY STATEMENTS WITH REGARD TO PLEA ACCEPTANCE, IS ESPECIALLY IMPORTANT. THE GUIDELINE SENTENCING PROVISIONS OF S. 1437 IN THE 95TH CONGRESS WERE CRITICIZED ON THE GROUND THAT, WHILE STRUCTURING AND RATIONALIZING THE EXERCISE OF JUDICIAL SENTENCING DISCRETION, THEY DID NOT ALSO ADDRESS THE EXERCISE OF PROSECUTORIAL DISCRETION AT THE CHARGING AND PLEA AGREEMENT STAGES OF CRIMINAL PROCEEDINGS. AS A RESULT OF THIS OMISSION, IT WAS CLAIMED, PROSECUTORIAL DECISIONS-- PARTICULARLY DECISIONS TO REDUCE CHARGES IN EXCHANGE FOR GUILTY PLEAS-- COULD EFFECTIVELY DETERMINE THE RANGE OF SENTENCE TO BE IMPOSED, AND COULD WELL REDUCE THE BENEFITS OTHERWISE TO BE EXPECTED FROM THE BILL'S GUIDELINE SENTENCING SYSTEM. ONE APPROACH THAT HAS BEEN SUGGESTED FOR DEALING WITH THIS SITUATION IS TO HAVE SENTENCING JUDGES REVIEW CHARGE-
REDUCTION PLEA AGREEMENTS TO ENSURE THAT SUCH AGREEMENTS DO NOT RESULT IN UNDUE LENIENCY OR UNWARRANTED SENTENCING DISPARITIES. [FN521] SUBSECTION (A)(2)(D), IN COMBINATION WITH THE BILL’S MODIFICATION OF RULE 11(E) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE (TO CLARIFY THAT THE RULE COVERS WITHHOLDING OF CHARGES AS WELL AS DISMISSAL OF CHARGES) AND THE ADDITION OF SUBSECTION (Q) OF SECTION 994 (TO REQUIRE CAREFUL ATTENTION BY THE SENTENCING COMMISSION TO THE EFFECTS OF PLEA AGREEMENTS ON SENTENCING UNDER THE NEW ACT), IS INTENDED TO IMPLEMENT THIS SUGGESTION. IT WOULD REQUIRE THE SENTENCING COMMISSION TO PROMULGATE POLICY STATEMENTS FOR USE BY A SENTENCING COURT IN DETERMINING WHETHER, PURSUANT TO RULE 11(E)(2), TO ACCEPT A CHARGE-REDUCTION AGREEMENT DESCRIBED IN RULE 11(E)(1). THIS APPROACH IS INTENDED TO PROVIDE AN OPPORTUNITY FOR MEANINGFUL JUDICIAL REVIEW OF PROPOSED CHARGE-REDUCTION PLEA AGREEMENTS, AS WELL AS OTHER FORMS OF PLEA AGREEMENTS, WHILE AT THE SAME TIME TO GUARD AGAINST IMPROPER JUDICIAL INTRUSION UPON THE RESPONSIBILITIES OF THE EXECUTIVE BRANCH. IT SHOULD BE NOTED THAT A SENTENCE THAT IS INCONSISTENT WITH THE SENTENCING GUIDELINES IS SUBJECT TO APPELLATE REVIEW, [FN522] WHILE ONE THAT IS CONSISTENT WITH GUIDELINES BUT INCONSISTENT WITH THE POLICY STATEMENTS IS NOT. THIS IS NOT INTENDED TO UNDERMINE THE VALUE OF THE POLICY STATEMENTS. IT IS, INSTEAD, A RECOGNITION THAT THE POLICY STATEMENTS MAY BE MORE GENERAL IN NATURE THAN THE GUIDELINES AND THUS MORE DIFFICULT TO USE IN DETERMINING THE RIGHT TO APPELLATE REVIEW. NEVERTHELESS, THE SENTENCING JUDGE IS REQUIRED TO TAKE THE POLICY STATEMENTS INTO ACCOUNT IN DECIDING WHAT SENTENCE TO IMPOSE [FN523] AND IT IS EXPECTED THAT THE POLICY STATEMENTS WILL BE CONSULTED AT ALL STAGES OF THE CRIMINAL JUSTICE SYSTEM, INCLUDING THE APPELLATE COURTS, IN EVALUATING THE APPROPRIATENESS OF THE SENTENCE AND CORRECTIONS PROGRAM APPLIED TO A PARTICULAR CASE.

UNDER SUBSECTION (B), THE COMMISSION IS TO DEVISE CATEGORIES BASED ON CHARACTERISTICS OF THE OFFENSE AND CATEGORIES BASED ON CHARACTERISTICS OF THE OFFENDER. [FN524] FOR EACH COMBINATION OF A CATEGORY OF OFFENSE AND A CATEGORY OF OFFENDER, A SENTENCE OR SENTENCING RANGE IS TO BE RECOMMENDED THAT IS CONSISTENT WITH ALL PERTINENT PROVISIONS OF TITLE 18 OF THE UNITED STATES CODE. THIS SUBSECTION IS OF MAJOR SIGNIFICANCE. IT CONTEMPLATES A DETAILED SET OF SENTENCING GUIDELINES, TO BE USED AS INDICATED IN SUBSECTION (A) AND PROPOSED SUBCHAPTERS A THROUGH D OF CHAPTER 227 OF TITLE 18, THAT ARE DESIGNED TO ACHIEVE THE PURPOSES OF SENTENCING SET FORTH IN TITLE 18. THE COMMITTEE EXPECTS THAT THERE WILL BE NUMEROUS GUIDELINE RANGES, EACH RANGE DESCRIBING A SOMEWHAT DIFFERENT COMBINATION OF OFFENDER CHARACTERISTICS AND OFFENSE CIRCUMSTANCES. THERE WOULD BE EXPECTED TO BE, FOR EXAMPLE, SEVERAL GUIDELINE RANGES FOR A SINGLE OFFENSE VARYING ON THE BASIS OF AGGRAVATING AND MITIGATING CIRCUMSTANCES. [FN525] THE GUIDELINES MAY BE DESIGNED AND PROMULGATED FOR USE IN THE FORM OF A SERIES OF GRIDS, CHARTS, FORMULAS, OR OTHER APPROPRIATE DEVICES, OR PERHAPS A COMBINATION OF SUCH DEVICES. WHATEVER THEIR FORM, THE GENERAL LOGIC UNDERLYING THE EFFECTS OF INDIVIDUAL FACTORS WOULD PRESUMABLY BE APPARENT, OR AT LEAST WOULD BE TRACEABLE TO SENTENCING COMMISSION DETERMINATIONS. THE RESULT SHOULD BE A COMPLETE SET OF GUIDELINES THAT COVERS IN ONE MANNER OR ANOTHER ALL IMPORTANT VARIATIONS THAT COMMONLY MAY BE EXPECTED IN CRIMINAL CASES, AND THAT RELIABLY BREAKS CASES INTO THEIR RELEVANT COMPONENTS AND ASSURES CONSISTENT AND FAIR RESULTS. [FN526] WHETHER THE SENTENCING COMMISSION CONCLUDES THAT IT SHOULD PROMULGATE, FOR EXAMPLE, A SEPARATE GUIDELINES MATRIX FOR EACH STATUTE DESCRIBING AN OFFENSE, OR ONE GUIDELINES MATRIX FOR PROPERTY **3351 **
OFFENSES AND ANOTHER FOR OFFENSES AGAINST THE PERSON, THE RESULT WILL
BE SETS OF GUIDELINES CONSIDERABLY MORE DETAILED THAN THE EXISTING
PAROLE GUIDELINES.
THE SUBSECTION REQUIRES THAT, IF THE GUIDELINES RECOMMEND A TERM OF
IMPRISONMENT FOR A PARTICULAR CATEGORY OF OFFENSE COMMITTED BY A
PARTICULAR CATEGORY OF OFFENDER, THE MAXIMUM OF THE SENTENCING RANGE
RECOMMENDED MAY NOT EXCEED THE MINIMUM OF THAT RANGE BY MORE THAN 25
PERCENT. FOR A PARTICULAR PENAL OFFENSE, THEREFORE, WHILE THERE MIGHT BE
NUMEROUS GUIDELINE RANGES, EACH KEYED TO ONE OR MORE VARIATIONS IN
RELEVANT FACTORS, NO ONE PARTICULAR GUIDELINE RANGE MAY VARY BY MORE
THAN 25 PERCENT FROM ITS MINIMUM TO ITS MAXIMUM; ALL THE RANGES
TOGETHER, HOWEVER, WOULD BE EXPECTED TO COVER THE SPECTRUM FROM NO,
OR LITTLE, IMPRISONMENT TO THE STATUTORY MAXIMUM, OR CLOSE TO IT, FOR THE
APPLICABLE CLASS OF OFFENSE. THE BREADTH OF THE SENTENCING RANGE
PROVIDED IN EACH GUIDELINE IS A MATTER FOR THE COMMISSION TO DECIDE SO
LONG AS IT IS WITHIN THE 25-PERCENT LIMIT SPECIFIED IN SUBSECTION (B). THE
RANGE MAY BE NARROW WHERE THE PURPOSES OF SENTENCING CAN
BE SERVED BY A SINGLE SENTENCE OR A NARROW RANGE OF SENTENCES IN ALL
SIMILAR CASES. THE RANGE MAY NECESSARILY BE WIDER WHERE
MISCELLANEOUS FACTORS NOT ENTIRELY PROVIDED FOR IN THE GUIDELINES MAY
CHANGE THE APPROPRIATE SENTENCE IN A PARTICULAR CASE. A RANGE MAY ALSO
BE WIDER WHERE NO SUCH FACTORS EXIST, BUT WHERE THE COMMISSION IS NOT
SUFFICIENTLY CONFIDENT IN ITS JUDGMENT AS TO THE APPROPRIATE SENTENCE TO
SUGGEST A NARROW RANGE. FOR THIS GROUP OF CASES, THE GUIDELINE RANGE
MIGHT WELL BECOME MORE NARROW AS, OVER TIME, THE COMMISSION IS ABLE TO
REFINE ITS GUIDELINES.
THE COMMISSION IS FREE TO INCLUDE IN THE GUIDELINES ANY MATTERS IT
CONSIDERS PERTINENT TO SATISFY THE PURPOSES OF SENTENCING. THE
COMMITTEE IS AWARE THAT GUIDELINES ADDRESSING THIS WIDE RANGE OF
SENTENCING ALTERNATIVES-- RATHER THAN JUST THE LENGTH OF TERMS OF
IMPRISONMENT, FOR EXAMPLE, COVERED BY THE CURRENT PAROLE COMMISSION
GUIDELINES-- WILL BE DIFFICULT TO DEVELOP. THAT IS TRUE ESPECIALLY IN VIEW
OF THE 25-PERCENT LIMITATION ON THE DIFFERENCE BETWEEN THE MAXIMUM AND
MINIMUM TERMS OF IMPRISONMENT SPECIFIED IN A SINGLE GUIDELINE RANGE. THE
COMMITTEE EXPECTS THE COMMISSION TO ISSUE GUIDELINES SUFFICIENTLY
DETAILED AND REFINED TO REFLECT EVERY IMPORTANT FACTOR RELEVANT TO
SENTENCING FOR EACH CATEGORY OF OFFENSE AND EACH CATEGORY OF OFFENDER,
GIVE APPROPRIATE WEIGHT TO EACH FACTOR, AND DEAL WITH VARIOUS
COMBINATIONS OF FACTORS. BY DOING, THE COMMISSION WILL BE ABLE TO
MAINTAIN THE PROPER RELATIONSHIP BETWEEN ITS FUNCTION AND THAT OF THE
COURTS OF APPEALS IN CONTRIBUTING TO PURPOSEFUL AND CONSISTENT
SENTENCING. IT IS FOR THESE REASONS, AMONG OTHERS, THAT THE COMMISSION
IS TO BE CREATED 24 MONTHS BEFORE THE GUIDELINES ARE TO BE PUT INTO USE,
AND THAT THE COMMISSION WILL HAVE FULL-TIME MEMBERS AND AN EXTENSIVE
RESEARCH CAPABILITY.
SUBSECTION (C) LISTS A NUMBER OF OFFENSE CHARACTERISTICS THAT THE
SENTENCING COMMISSION IS REQUIRED TO EXAMINE FOR THE PURPOSE OF
DETERMINING WHETHER AND TO WHAT EXTENT THEY ARE PERTINENT TO THE
ESTABLISHMENT OF CATEGORIES OF OFFENSES FOR USE IN THE SENTENCING
GUIDELINES AND POLICY STATEMENTS DEALING WITH THE NATURE, EXTENT, PLACE
OF SERVICE, OR OTHER INCIDENTS OF AN APPROPRIATE SENTENCE. THE
COMMISSION IS REQUIRED TO DETERMINE WHETHER AND TO WHAT EXTENT EACH
FACTOR MIGHT BE PERTINENT TO THE QUESTION OF THE KIND OF SENTENCE THAT
SHOULD BE IMPOSED; THE SIZE OF A FINE OR THE LENGTH OF A TERM OF
PROBATION, IMPRISONMENT, OR SUPERVISED RELEASE; AND THE CONDITIONS OF
PROBATION, SUPERVISED RELEASE, OR IMPRISONMENT. THE SENTENCING
COMMISSION MIGHT CONCLUDE, FOR EXAMPLE, THAT THERE WAS AN INCREASE IN THE INCIDENCE OF A PARTICULAR OFFENSE THAT JUSTIFIED AN INCREASE IN THE GUIDELINES SENTENCES FOR THE OFFENSE IN ORDER TO DETER OTHERS FROM COMMITTING THE OFFENSE. THE COMMISSION MIGHT ALSO CONCLUDE, ON THE BASIS OF FURTHER RESEARCH, THAT SOME KINDS OF OFFENSES MAY BE MORE EASILY DETERRED THAN OTHERS, AND THAT THIS MIGHT APPROPRIATELY BE REFLECTED IN THE GUIDELINES.

SUBSECTION (C)(7) SPECIFIES THAT THE COMMISSION CONSIDER THE RELEVANCE TO THE SENTENCING DECISION OF THE CURRENT INCIDENCE OF THE OFFENSE IN THE COMMUNITY AND IN THE NATION AS A WHOLE.

SUBSECTION (D) LISTS A NUMBER OF OFFENDER CHARACTERISTICS THAT THE SENTENCING COMMISSION IS REQUIRED TO EXAMINE IN ORDER TO DETERMINE WHETHER AND TO WHAT EXTENT THEY ARE PERTINENT TO THE ESTABLISHMENT OF CATEGORIES OF OFFENDERS FOR USE IN THE SENTENCING GUIDELINES AND POLICY STATEMENTS CONCERNING THE NATURE, EXTENT, PLACE OF SERVICE, OR OTHER INCIDENTS OF AN APPROPRIATE SENTENCE. THE COMMISSION IS REQUIRED TO DETERMINE WHETHER AND TO WHAT EXTENT EACH FACTOR MIGHT BE PERTINENT TO THE QUESTION OF THE KIND OF SENTENCE THAT SHOULD BE IMPOSED; THE SIZE OF A FINE OR THE LENGTH OF A TERM OF PROBATION, IMPRISONMENT, OR SUPERVISED RELEASE; AND THE CONDITIONS OF PROBATION, SUPERVISED RELEASE, OR IMPRISONMENT. THE SENTENCING COMMISSION MAY CONCLUDE, WITH RESPECT TO ANY OF THE LISTED FACTORS, THAT, FOR EXAMPLE, THE FACTOR SHOULD NOT PLAY A ROLE AT ALL IN SENTENCING FOR A PARTICULAR PURPOSE, OR THAT, FOR EXAMPLE, IT IS RELEVANT TO THE TYPE OF PRISON FACILITY TO WHICH A DEFENDANT IS SENT IF HE IS SENTENCED TO A TERM OF IMPRISONMENT, BUT IS NOT RELEVANT TO THE QUESTION WHETHER HE SHOULD BE SENTENCED TO A TERM OF IMPRISONMENT, PROBATION, OR A FINE. THE SENTENCING COMMISSION IS ALSO REQUIRED UNDER SUBSECTION (D) TO DETERMINE WHETHER OTHER FACTORS NOT SPECIFICALLY LISTED ARE RELEVANT TO THE SENTENCING DECISION.

SUBSECTION (D) CONTAINS A SPECIFIC PROVISION THAT ‘THE COMMISSION SHALL ASSURE THAT THE GUIDELINES AND POLICY STATEMENTS ARE ENTIRELY NEUTRAL AS TO THE RACE, SEX, NATIONAL ORIGIN, CREED, AND SOCIO-ECONOMIC STATUS OF OFFENDERS. [FN530] THE COMMITTEE ADDED THE PROVISION TO MAKE IT ABSOLUTELY CLEAR THAT IT WAS NOT THE PURPOSE OF THE LIST OF OFFENDER CHARACTERISTICS SET FORTH IN SUBSECTION (D) TO SUGGEST IN ANY WAY THAT THE COMMITTEE BELIEVED THAT IT MIGHT BE APPROPRIATE, FOR EXAMPLE, TO AFFORD PREFERENTIAL TREATMENT TO DEFENDANTS OF A PARTICULAR RACE OR RELIGION OR LEVEL OF AFFLUENCE, OR TO RELEGATE TO PRISONS DEFENDANTS WHO ARE POOR, UNEDUCATED, AND IN NEED OF EDUCATION AND VOCATIONAL TRAINING. [FN531]

*172 **3355 SUBSECTION (D)(1) SPECIFIES THAT THE COMMISSION CONSIDER WHAT EFFECT THE AGE OF THE DEFENDANT SHOULD HAVE ON THE SENTENCING DECISION. THE FACTOR DERIVES IN PART FROM THE FACT THAT, UNDER THE YOUTH CORRECTIONS ACT AND THE YOUNG ADULT OFFENDER PROVISIONS IN CURRENT LAW, THE YOUTH OF AN OFFENDER FREQUENTLY PLAYS A ROLE IN THE SENTENCING DECISION. THIS ROLE MAY, DEPENDING UPON THE WAY IN WHICH THE CURRENT LAW PROVISIONS ARE APPLIED, RESULT IN A MORE HARSH OR LESS HARSH SENTENCE THAN A REGULAR ADULT OFFENDER WOULD RECEIVE FOR THE SAME OFFENSE COMMITTED UNDER SIMILAR CIRCUMSTANCES. THE SENTENCE MIGHT BE MORE HARSH TODAY IF THE DEFENDANT IS SENTENCED TO AN INDETERMINATE SENTENCE UNDER 18 U.S.C. 5010(B) FOR A RELATIVELY MINOR OFFENSE. UNDER 18 U.S.C. 5017(C), SUCH A DEFENDANT IS REQUIRED TO BE RELEASED UPON PAROLE IN NO MORE THAN FOUR YEARS, AND TO BE UNCONDITIONALLY RELEASED IN SIX YEARS, YET THIS SENTENCE COULD APPLY TO AN OFFENSE FOR WHICH AN ADULT MIGHT BE SENTENCED, FOR EXAMPLE, TO ONLY ONE OR TWO YEARS IN PRISON. CONVERSELY, IF THE YOUNG OFFENDER IS SENTENCED FOR A MORE SERIOUS
OFFENSE UNDER THE YOUTH CORRECTIONS ACT PROVISIONS THAT PERMIT THE IMPOSITION OF A SENTENCE UP TO THAT APPLICABLE FOR THE SAME OFFENSE IF COMMITTED BY AN ADULT, HE MAY ACTUALLY SERVE LESS TIME IN PRISON THAN HIS ADULT COUNTERPART-- THE PAROLE GUIDELINES THAT APPLY TO PERSONS SENTENCED UNDER THE YOUTH CORRECTIONS ACT FOR ALL BUT THE LEAST SERIOUS OFFENSES PROVIDE EARLIER PAROLE RELEASE DATES THAN FOR AN ADULT CONVICTED OF AN OFFENSE WITH THE SAME SEVERITY RATING WHO HAS THE SAME 'PAROLE PROGNOSIS' OR 'SALIENT FACTOR' SCORE. AN ADDITIONAL PROBLEM WITH THE YOUTH CORRECTIONS ACT IS THAT JUDGES ARE INCONSISTENT IN THEIR USE OF THE SENTENCING PROVISIONS OF THE ACT. FOR EXAMPLE, SOME JUDGES USE THE ACT'S SENTENCING PROVISIONS FOR MOST YOUTHFUL OFFENDERS, WHILE OTHERS WILL NOT USE IT FOR THOSE INVOLVED IN SERIOUS FELONIES. THE COMMITTEE BELIEVES THAT, WHILE CONSIDERATION OF YOUTH IN DETERMINING THE APPROPRIATE SENTENCE MAY BE JUSTIFIED, THE CONSIDERATION SHOULD BE EMPLOYED IN A MUCH MORE RATIONAL AND CONSISTENT WAY THAN IT IS TODAY. ACCORDINGLY, THE BILL REPEALS THE YOUTH CORRECTIONS ACT AND THE YOUNG ADULT OFFENDER SENTENCING PROVISIONS AND REQUIRES THE SENTENCING COMMISSION IN SUBSECTION (D)(1) TO CONSIDER, IN PROMULGATING THE SENTENCING GUIDELINES AND POLICY STATEMENTS, WHAT EFFECT AGE-- INCLUDING YOUTH, ADULTHOOD, AND OLD AGE-- SHOULD HAVE ON THE 'NATURE, EXTENT, PLACE OF SERVICE, OR OTHER INCIDENTS OF AN APPROPRIATE SENTENCE.' SUBSECTION (D)(2) SPECIFIES THAT THE COMMISSION DETERMINE WHAT EFFECT, IF ANY, THE EDUCATION OF THE OFFENDER SHOULD HAVE ON THE NATURE, EXTENT, PLACE OF SERVICE, OR OTHER INCIDENTS OF AN APPROPRIATE SENTENCE. SUBSECTION (E) SPECIFIES THAT EDUCATION SHOULD BE AN INAPPROPRIATE CONSIDERATION IN DETERMINING THE APPROPRIATE LENGTH OF SUCH A TERM. THE COMMISSION MIGHT CONCLUDE, HOWEVER, THAT THE NEED FOR AN EDUCATIONAL PROGRAM MIGHT CALL FOR A SENTENCE TO PROBATION IF SUCH A SENTENCE WERE OTHERWISE ADEQUATE TO MEET THE PURPOSES OF SENTENCING, EVEN IN A CASE IN WHICH THE GUIDELINES MIGHT *173 **3356 OTHERWISE CALL FOR A SHORT TERM OF IMPRISONMENT. CLEARLY, EDUCATION CONSIDERATIONS WILL PLAY AN IMPORTANT ROLE IN SUCH DETERMINATIONS AS THE CONDITIONS OF PROBATION OR SUPERVISED RELEASE, THE NATURE OF THE PRISON FACILITY TO WHICH AN OFFENDER IS SENT, AND THE TYPE OF PROGRAMS TO BE MADE AVAILABLE TO AN OFFENDER IN PRISON. [FN532] SUBSECTION (D)(3) SPECIFIES THAT THE COMMISSION DETERMINE THE EFFECT, IF ANY, THAT THE VOCATIONAL SKILLS OF THE OFFENDER SHOULD HAVE ON THE INCIDENTS OF THE SENTENCE. THE CONSIDERATIONS FOR THE COMMISSION, INCLUDING THE RESTRICTIONS OF SUBSECTION (E), ARE SIMILAR TO THOSE FOR THE EDUCATION FACTOR. SUBSECTION (D)(4) SPECIFIES THAT THE COMMISSION SHALL DETERMINE WHAT EFFECT, IF ANY, THE DEFENDANT'S 'MENTAL AND EMOTIONAL CONDITION TO THE EXTENT THAT SUCH CONDITION MITIGATES THE DEFENDANT'S CULPABILITY OR TO THE EXTENT THAT SUCH CONDITION IS OTHERWISE PLAINLY RELEVANT' SHOULD HAVE ON THE ATTRIBUTES OF THE SENTENCE. THE COMMISSION MIGHT CONCLUDE THAT A PARTICULAR SET OF OFFENSE AND OFFENDER CHARACTERISTICS CALLED FOR PROBATION WITH A CONDITION OF PSYCHIATRIC TREATMENT, RATHER THAN IMPRISONMENT. CONSIDERATION OF THIS FACTOR MIGHT ALSO LEAD THE COMMISSION TO CONCLUDE, IN A PARTICULARLY SERIOUS TYPE OF CASE, THAT THERE WAS NO ALTERNATIVE FOR THE PROTECTION OF THE PUBLIC BUT TO INCARCERATE THE OFFENDER AND PROVIDE NEEDED TREATMENT IN A PRISON SETTING. SUBSECTION (D)(5) REQUIRES CONSIDERATION OF THE DEFENDANT'S PHYSICAL CONDITION, INCLUDING DRUG DEPENDENCE. DRUG DEPENDENCE, IN THE COMMITTEE'S VIEW, GENERALLY SHOULD NOT PLAY A ROLE IN THE DECISION WHETHER OR NOT TO INCARCERATE THE OFFENDER. IN AN UNUSUAL CASE, HOWEVER, IT MIGHT CAUSE THE COMMISSION TO RECOMMEND THAT THE
DEFENDANT BE PLACED ON PROBATION IN ORDER TO PARTICIPATE IN A COMMUNITY
DRUG TREATMENT PROGRAM, POSSIBLY AFTER A BRIEF STAY IN PRISON, FOR
'DRYING OUT,' AS A CONDITION OF PROBATION. OTHER HEALTH PROBLEMS OF THE
DEFENDANT MIGHT CAUSE THE COMMISSION TO CONCLUDE THAT IN CERTAIN
CIRCUMSTANCES INVOLVING A PARTICULARLY SERIOUS ILLNESS A DEFENDANT WHO
MIGHT OTHERWISE BE SENTENCED TO PRISON SHOULD BE PLACED ON PROBATION.
THIS IS CONSISTENT WITH THE PROVISION OF PROPOSED SECTION 3582(C)
PERMITTING THE DIRECTOR OF THE BUREAU OF PRISONS TO PETITION THE COURT
FOR REDUCTION OF A TERM OF IMPRISONMENT IN A COMPPELLING CASE, SUCH AS
TERMINAL CANCER. OF COURSE, THE PHYSICAL CONDITION OF THE DEFENDANT
WOULD PLAY AN APPROPRIATE ROLE IN THE DETERMINATION OF THE CONDITIONS
OF PROBATION AND THE PROGRAMS THAT WOULD BE MADE AVAILABLE TO THE
DEFENDANT IN PRISON, SUCH AS DRUG OR ALCOHOL TREATMENT PROGRAMS. IT
SHOULD BE NOTED THAT DRUG TREATMENT PROGRAMS AT THE PRESENT TIME ARE
MADE AVAILABLE TO PRISONERS ON A VOLUNTARY BASIS, BUT ARE NOT REQUIRED
SINCE PRISON OFFICIALS HAVE YET FOUND NO WAY TO MAKE COMPULSORY
PROGRAMS EFFECTIVE.
SUBSECTION (D)(6) SPECIFIES THAT THE COMMISSION SHOULD CONSIDER
THE RELEVANCE OF THE DEFENDANT'S EMPLOYMENT RECORD TO THE ATTRIBUTES OF
SENTENCE. THE CONSIDERATIONS HERE, INCLUDING THE PROVISIONS OF
SUBSECTION (E), ARE SIMILAR TO THOSE FOR THE EDUCATION AND VOCATIONAL
SKILL OF THE DEFENDANT.

*174 **3357* SUBSECTION (D)(7) SPECIFIES THAT THE COMMISSION CONSIDER
THE EXTENT TO WHICH FAMILY TIES AND RESPONSIBILITIES ARE PERTINENT TO THE
SENTENCING DECISION. AS STATED IN SUBSECTION (E), THE COMMITTEE BELIEVES
THAT THE FACTOR IS GENERALLY INAPPROPRIATE IN DETERMINING TO SENTENCE A
DEFENDANT TO A TERM OF IMPRISONMENT OR IN DETERMINING THE LENGTH OF A
TERM OF IMPRISONMENT. THE COMMISSION CERTAINLY COULD CONCLUDE,
HOWEVER, THAT, FOR EXAMPLE, A PERSON WHOSE OFFENSE WAS NOT EXTREMELY
SERIOUS BUT WHO SHOULD BE SENTENCED TO PRISON SHOULD BE ALLOWED TO
WORK DURING THE DAY, WHILE SPENDING EVENINGS AND WEEKENDS IN PRISON,
IN ORDER TO BE ABLE TO CONTINUE TO SUPPORT HIS FAMILY. EVEN MORE
FREQUENTLY, PERHAPS, FAMILY TIES MIGHT PLAY A ROLE IN SUCH MATTERS AS THE
LOCATION OF THE PRISON FACILITY IN WHICH A PRISONER IS TO BE HOUSED, THE
USE OF FURLOUGH, AND THE LOCATION OF PRE-RELEASE CUSTODY.
SUBSECTION (D)(8) SPECIFIES THAT THE COMMISSION CONSIDER THE EXTENT TO
WHICH COMMUNITY TIES ARE PERTINENT TO THE SENTENCING DECISION. UNDER
SUBSECTION (E), THE COMMITTEE AGAIN HAS FOUND THAT THIS FACTOR IS
GENERALLY INAPPROPRIATE IN DETERMINING TO SENTENCE A DEFENDANT TO A
TERM OF IMPRISONMENT OR IN DETERMINING THE APPROPRIATE LENGTH OF A TERM
OF IMPRISONMENT. LIKE FAMILY TIES AND RESPONSIBILITIES, THIS FACTOR COULD
PLAY A ROLE IN DETERMINING IN WHICH PRISON FACILITY A DEFENDANT MIGHT BE
INCARCERATED.
SUBSECTION (D)(9) SPECIFIES THAT THE COMMISSION IS TO CONSIDER THE
EXTENT TO WHICH THE DEFENDANT'S ROLE IN THE OFFENSE SHOULD AFFECT THE
SENTENCING DECISION. THIS FACTOR INCLUDES SUCH MATTERS AS WHETHER THE
DEFENDANT INITIATED THE OFFENSE OR FOLLOWED SOMEONE ELSE'S LEAD, OR
WHETHER THE DEFENDANT WAS A MAJOR PARTICIPANT OR ACTED ONLY IN A MINOR
CAPACITY. THE COMMISSION MIGHT REASONABLY CONCLUDE THAT THE ANSWERS
ARE IMPORTANT IN DETERMINING BOTH THE NATURE OF THE SENTENCE AND ITS
LENGTH AND CONDITIONS.
SUBSECTION (D)(10) SPECIFIES THAT THE COMMISSION CONSIDER THE EXTENT TO
WHICH THE DEFENDANT'S CRIMINAL HISTORY SHOULD AFFECT HIS SENTENCE. THIS
FACTOR INCLUDES NOT ONLY THE NUMBER OF PRIOR CRIMINAL ACTS-- WHETHER OR
NOT THEY RESULTED IN CONVICTIONS-- THE DEFENDANT HAS ENGAGED IN, BUT
THEIR SERIOUSNESS, THEIR RECENTNESS OR REMOTENESS, AND THEIR INDICATION
WHETHER THE DEFENDANT IS A 'CAREER CRIMINAL' OR A MANAGER OF A CRIMINAL ENTERPRISE.
SUBSECTION (D)(11) SPECIFIES THAT THE COMMISSION CONSIDER THE RELEVANCE TO THE SENTENCING DECISION OF THE DEGREE OF THE DEFENDANT'S DEPENDENCE ON CRIMINAL ACTIVITY FOR A LIVELIHOOD.
SUBSECTIONS (E) THROUGH (M) OF SECTION 994 CONTAIN GENERAL STATEMENTS OF LEGISLATIVE DIRECTION FOR THE COMMISSION TO FOLLOW IN PROMULGATING GUIDELINES.
SUBSECTION (E) SPECIFICALLY REQUIRES THAT THE SENTENCING COMMISSION INSURE THAT THE SENTENCING GUIDELINES AND POLICY STATEMENTS REFLECT THE 'GENERAL INAPPROPRIATENESS' OF CONSIDERING EDUCATION, VOCATIONAL SKILLS, EMPLOYMENT RECORD, FAMILY TIES AND RESPONSIBILITIES, AND COMMUNITY TIES OF THE DEFENDANT IN RECOMMENDING A TERM OF IMPRISONMENT OR THE LENGTH OF A TERM OF IMPRISONMENT. AS DISCUSSED IN CONNECTION WITH SUBSECTION (D), EACH OF THESE FACTORS MAY PLAY OTHER ROLES IN THE SENTENCING DECISION; THEY MAY, IN AN APPROPRIATE CASE, CALL FOR THE USE OF A TERM OF PROBATION INSTEAD OF IMPRISONMENT, IF CONDITIONS OF PROBATION CAN BE FASHIONED THAT WILL PROVIDE A NEEDED PROGRAM TO THE DEFENDANT AND ASSURE THE SAFETY OF THE COMMUNITY.
THE PURPOSE OF THE SUBSECTION IS, OF COURSE, TO GUARD AGAINST THE INAPPROPRIATE USE OF INCARCERATION FOR THOSE DEFENDANTS WHO LACK EDUCATION, EMPLOYMENT, AND STABILIZING TIES. IT SHOULD BE EMPHASIZED, HOWEVER, THAT THE COMMITTEE DECIDED TO DESCRIBE THESE FACTORS AS 'GENERALLY INAPPROPRIATE,' RATHER THAN ALWAYS INAPPROPRIATE, TO THE DECISION TO IMPOSE A TERM OF IMPRISONMENT OR DETERMINE ITS LENGTH, IN ORDER TO PERMIT THE SENTENCING COMMISSION TO EVALUATE THEIR RELEVANCE, AND TO GIVE THEM APPLICATION IN PARTICULAR SITUATIONS FOUND TO WARRANT THEIR CONSIDERATION. THE COMMITTEE BELIEVES THAT IT IS IMPORTANT TO ENCOURAGE THE SENTENCING COMMISSION TO EXPLORE THE RELEVANCY TO THE PURPOSES OF SENTENCING OF ALL KINDS OF FACTORS, WHETHER THEY ARE OBVIOUSLY PERTINENT OR NOT; TO SUBJECT THOSE FACTORS TO INTELLIGENT AND DISPASSIONATE PROFESSIONAL ANALYSIS; AND ON THIS BASIS TO RECOMMEND, WITH SUPPORTING REASONS, THE FAIREST AND MOST EFFECTIVE GUIDELINES IT CAN DEVISE. THERE ARE SUFFICIENT CHECKS BUILT INTO THE SYSTEM TO AVOID ABERRATIONS, AND THUS THE GUIDANCE IN THIS SUBSECTION IS CAUTIONARY RATHER THAN PROSCRIPTIVE.
SUBSECTION (F) DIRECTS THAT THE COMMISSION, IN PROMULGATING SENTENCING GUIDELINES, PROMOTE THE PURPOSES OF THE GUIDELINES, PARTICULARLY THE AVOIDANCE OF UNWARRANTED SENTENCING DISPARITY. [FN533]
SUBSECTION (G) DIRECTS THE COMMISSION, IN PROMULGATING SENTENCING GUIDELINES PURSUANT TO SUBSECTION (A)(1), TO SEEK TO SATISFY THE PURPOSES OF SENTENCING, TAKING INTO ACCOUNT THE NATURE AND CAPACITY OF THE PENAL, CORRECTIONAL, AND OTHER FACILITIES AND SERVICES AVAILABLE. THE PURPOSE OF THE REQUIREMENT IS TO ASSURE THE MOST APPROPRIATE USE OF THE FACILITIES AND SERVICES TO CARRY OUT THE PURPOSES OF SENTENCING, AND TO ASSURE THAT THE AVAILABLE CAPACITY OF THE FACILITIES AND SERVICES IS KEPT IN MIND WHEN THE GUIDELINES ARE PROMULGATED. IT IS NOT INTENDED, HOWEVER, TO LIMIT THE SENTENCING COMMISSION IN RECOMMENDING GUIDELINES THAT IT BELIEVES WILL BEST SERVE THE PURPOSES OF SENTENCING. INSTEAD, IT IS INTENDED THAT THE COMMISSION BE AWARE OF THE SYSTEM'S CAPACITY IN ORDER TO ASSURE THAT IT IS NOT INADVERTENTLY EXCEEDED, AND THAT THE COMMISSION MAKE RECOMMENDATIONS AS TO ANY CHANGES IN THAT CAPACITY THAT IT BELIEVES TO BE NECESSARY IN LIGHT OF ITS SENTENCING GUIDELINES.
SUBSECTION (H) WAS ADDED TO THE BILL IN THE 98TH CONGRESS TO REPLACE A PROVISION PROPOSED BY SENATOR KENNEDY ENACTED IN S. 2572, AS PART OF
PROPOSED 18 U.S.C. 3581, THAT WOULD HAVE MANDATED A SENTENCING JUDGE TO IMPOSE A SENTENCE AT OR NEAR THE STATUTORY MAXIMUM FOR REPEAT VIOLENT OFFENDERS AND REPEAT DRUG OFFENDERS. THE COMMITTEE BELIEVES THAT SUCH A DIRECTIVE TO THE SENTENCING COMMISSION WILL BE MORE EFFECTIVE; THE GUIDELINES DEVELOPMENT PROCESS CAN ASSURE CONSISTENT AND RATIONAL IMPLEMENTATION OF THE COMMITTEE'S VIEW THAT SUBSTANTIAL PRISON TERMS SHOULD BE IMPOSED ON REPEAT VIOLENT OFFENDERS AND REPEAT DRUG TRAFFICKERS.

SUBSECTION (I)Requires that the Sentencing Guidelines provide a substantial term of imprisonment for a convicted defendant who fits into one of five categories: a defendant who has a history of prior federal, state, or local felony convictions for offenses committed on different occasions; a defendant who has committed the offense as part of a pattern of criminal activity from which he derived a substantial portion of his income; a defendant who committed the offense in furtherance of a conspiracy with three or more persons engaging in racketeering activity in which the defendant played a managerial role; a defendant who committed a violent felony while on pretrial release or release while awaiting sentence or appeal for another felony; or a defendant who committed an offense described in Section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), if the offense involved a substantial quantity of controlled substances. The first three categories are derived from the dangerous special offender sentencing provisions now contained in 18 U.S.C. 3575(E) and the dangerous special drug offender provisions of 21 U.S.C. 849(E). However, rather than providing enhanced sentences above the maximum sentence provided for any other similar offense, as is done in current 18 U.S.C. 3575(B), Section 994(I) requires that the guidelines insure a substantial sentence to imprisonment that is nevertheless within the range generally available for the offense. The fourth category was added on the Senate floor as an amendment to S. 1437 in the 95th Congress S. 1630, as introduced, in order to assure a substantial term of imprisonment for major drug traffickers. It should be noted that Subsections (H) and (I) are not necessarily intended to be an exhaustive list of types of cases in which the guidelines should specify a substantial term of imprisonment, nor of types of cases in which terms at or close to authorized maxima should be specified.

SUBSECTION (K) Requires the sentencing commission to insure that the guidelines reflect the general appropriateness of a sentence other than imprisonment for a first offender whose offense is not a crime of violence or an otherwise serious offense, [FN334] and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury. Subsection (K) makes clear that a sentence to a term of imprisonment for rehabilitative purposes is to be avoided. A term imposed for another purpose of sentencing may, however, have a rehabilitative focus if rehabilitation in such a case is an appropriate secondary purpose of the sentence.

SUBSECTION (L) Directs the commission to promulgate guidelines that reflect the appropriateness of imposing an incremental penalty for each offense if a defendant is convicted of a number of offenses that are part of the same course of conduct, and if a defendant is convicted of multiple offenses committed at different times, including cases in which the subsequent offense is a violation of 18 U.S.C. 3146, relating to bail jumping, or is committed while the person is on pretrial release.
Pursuant to Section 3502 of Title 18. If no such incremental penalty were provided (e.g., were all sentences to be imposed without regard to the commission of other offenses *177 **3360 and made to run concurrently), an offender who commits one offense would be faced with no deterrent to the commission of another during the interval before he is called to account for the first. [FN535] It is the Committee's intent that, to the extent feasible, the sentences for each of the multiple offenses be determined separately and the degree to which they should overlap be specified. Under this approach, if the conviction for one of the offenses is overturned, it will be unnecessary to recalculate the sentence.

Subsection (L) also requires that the guidelines reflect the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit or soliciting the commission of an offense and for an offense that was the sole object of the solicitation or conspiracy.

Subsection (M) requires that the Commission insure that the guidelines reflect that in many cases current sentences do not accurately reflect the seriousness of the offense. The Commission is directed, as a starting point, to ascertain the average sentence imposed for different categories of cases and the average length of time served in prison when such terms were imposed, [FN536] but the bill makes clear that the Commission need not follow the current average sentences if it finds that they do not adequately reflect the purposes of sentencing set forth in proposed 18 U.S.C. 3553(A)(2). It is not intended that the Sentencing Commission necessarily continue to follow the average sentencing practices were in order more effectively to evaluate the appropriateness of continuing or changing past practices. [FN537] The Commission might conclude that a category of offenders, for example, first offenders convicted of a particular nonviolent offense that did not involve substantial harm to the victim, were too frequently sentenced to terms of imprisonment, and that for many of them a term of probation might sufficiently carry out the punishment, deterrence, incapacitation, and rehabilitation purposes necessary, particularly if a fine, restitution or community service substantial enough to reflect the seriousness of the offense were imposed as a condition. On the other hand, the Commission might conclude that a category of major white collar criminals too frequently was sentenced to probation or too short a term of imprisonment because judges using the old rehabilitation theory of sentencing, did not believe such offenders needed to be rehabilitated and, therefore, saw no need for incarceration. The Commission might conclude that such a category of offenders should serve a term of imprisonment, or a longer term than currently served, for purposes of punishment and deterrence. The Commission might also conclude that a particular category of violent crime or drug trafficking is not punished sufficiently severely *178 **3361 today, and might reflect this conclusion in the guidelines.

Finally, the Commission might conclude that there was insufficient data for a particular combination of offense and offender characteristics on which to base a policy decision on the appropriateness of the existing sentencing pattern. For example, the number of persons convicted of a particularly serious violent offense in the federal system might not be large enough for the data on that category of offense to give an accurate picture of the sentencing practices for that offense, in which case the sentencing commission would have to exercise its best judgment as to what sentence would adequately...
SUBSECTION (N) requires the commission continually to update its guidelines and to consult with a variety of interested institutions and groups. This revision and refinement of the guidelines will represent the bulk of the commission's work once the initial guidelines and policy statements are promulgated. This task will be a formidable one because it includes a continuing effort to refine the guidelines to best achieve the purposes of sentencing. It requires continually updating the guidelines to reflect current views as to just punishment, and to take account of the most recent information on satisfying the purposes of deterrence, incapacitation, and rehabilitation. Perhaps most importantly, this provision mandates that the commission constantly keep track of the implementation of the guidelines in order to determine whether sentencing disparity is effectively being dealt with. In a very substantial way, this subsection complements the appellate review section by providing effective oversight as to how well the guidelines are working. The oversight would not involve any role for the commission in second-guessing individual judicial sentencing actions either at the trial or appellate level. Rather, it would involve an examination of the overall operation of the guidelines system to determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes.

Even without advancements in our ability to increase the effectiveness of various corrections programs for criminal offenders, much can be done to have on going guidelines take fullest advantage of the capability we do have. For example, sound statistical studies on the effectiveness of certain sanctions or treatment programs can be used to increase or decrease use of those particular sentencing alternatives. Recognition of the dimensions of the task is reflected in the extensive powers given the commission under proposed 28 U.S.C. 995, particularly as they relate to research. [FN538]

Subsection (O) requires that proposed amendments to the guidelines be reported, along with a report of the reasons for the recommended amendments, to the congress at or after the beginning of a session of congress but no later than the first of may, and provides that the amendments are to take effect 180 days after they have been reported to congress unless the effective date is enlarged or the guidelines are disapproved or modified by an act of congress.

Subsection (P), one of the provisions inserted by the committee at the suggestion of senator Biden in the 96th congress, requires the sentencing commission and the bureau of prisons to conduct a thorough analysis of the optimum utilization of resources to deal with the federal prison population, and to report to the congress on the results of that study. In conducting the study, the commission and the bureau are required to examine a variety of alternatives, including modernization of existing facilities; inmate classification, and periodic review of the classification, to place inmates in the least restrictive facility necessary to insure adequate security; and use of existing federal facilities, such as those within military jurisdiction.

Subsection (Q) requires the commission to make recommendations to the congress concerning raising or lowering grades for offenses, or otherwise modifying the maximum penalties for offenses. The first set of recommendations is to be made within three years of the date of enactment of the bill, with later recommendations to be made as advisable. The committee believes that the commission will be in a particularly good position to make such recommendations to the
CONGRESS. IT WILL BE ABLE TO MAKE RECOMMENDATIONS BASED ON SUCH CONSIDERATIONS AS, FOR EXAMPLE, THE FACT THAT, FOR A PARTICULAR CATEGORY OF OFFENSES, THE COMMISSION NEVER FOUND IT ADVISABLE TO RECOMMEND A TERM OF IMPRISONMENT EVEN CLOSE TO THE MAXIMUM FOR THE GRADE OF OFFENSE, SUGGESTING THAT THE OFFENSE WAS OVERGRADED. IT MIGHT ALSO FIND FOR A PARTICULAR OFFENSE THAT THE GUIDELINES COULD NOT RECOMMEND WHAT THE COMMISSION FELT WAS AN APPROPRIATELY HIGH SENTENCE BECAUSE THE OFFENSE WAS GRADED TOO LOW. IT MIGHT ALSO FIND AT A LATER DATE A NEED FOR RECOMMENDING INCREASED FINE LEVELS BECAUSE THE FINE LEVELS SET FORTH IN SECTION 3571 OF TITLE 18 HAD BECOME TOO LOW BECAUSE OF INFLATION, OR WERE TOO HIGH OR TOO LOW FOR PARTICULAR CATEGORIES OF OFFENSES.

SUBSECTION (R) REQUIRES THE SENTENCING COMMISSION TO GIVE 'DUE CONSIDERATION' TO A REQUEST BY A DEFENDANT FOR MODIFICATION OF THE SENTENCING GUIDELINES APPLIED TO HIS CASE. THE DEFENDANT COULD REQUEST SUCH MODIFICATION ONLY ON THE BASIS OF CHANGED CIRCUMSTANCES THAT WERE UNRELATED TO HIS INDIVIDUAL CASE, SUCH AS CHANGES IN THE COMMUNITY VIEW OF THE GRAVITY OF THE OFFENSE, OR THE DETERRENT EFFECT PARTICULAR SENTENCES FOR THE OFFENSE MIGHT HAVE ON THE COMMISSION OF THE OFFENSE BY OTHERS. THE COMMISSION IS REQUIRED TO RESPOND, TO STATE REASONS FOR ANY DECLINATION TO MAKE MODIFICATIONS, AND TO KEEP THE CONGRESS INFORMED OF SUCH ACTIONS ON AN ANNUAL BASIS. THE COMMITTEE INCLUDED THIS PROVISION IN THE NINETY-SIXTH CONGRESS IN ORDER TO ASSURE THAT THE COMMISSION IS CONSTANTLY ALERTED TO THE POSSIBLE NEED FOR AMENDMENTS TO THE GUIDELINES. OF COURSE, IF THE COMMISSION ACCEPTS A DEFENDANT'S RECOMMENDATIONS FOR AMENDMENT, IT WOULD SUBMIT THE PROPOSED AMENDMENT, AND A REPORT OF THE REASONS FOR IT, TO THE CONGRESS PURSUANT TO SUBSECTION (O), AND WOULD BE EXPECTED TO MAKE A COPY OF THESE MATERIALS AVAILABLE TO THE DEFENDANT.


*180 **3363* SUBSECTION (T) REQUIRES THE SENTENCING COMMISSION, IN REDUCING THE RECOMMENDED TERM OF IMPRISONMENT FOR A PARTICULAR CATEGORY OF OFFENSE, TO SPECIFY BY WHAT AMOUNT, IF ANY, THE TERM OF A PRISONER SERVING A SENTENCE OUTSIDE THE NEW GUIDELINES RANGE MAY BE REDUCED. THIS SPECIFICATION WOULD THEN BE USED BY THE COURT IN ASSESSING A PRISONER'S PETITION PURSUANT TO PROPOSED 18 U.S.C. 3582(C)(3). IT SHOULD BE NOTED THAT THE COMMITTEE DOES NOT EXPECT THAT THE COMMISSION WILL RECOMMEND ADJUSTING EXISTING SENTENCES UNDER THE PROVISION WHEN GUIDELINES ARE SIMPLY REFINED IN A WAY THAT MIGHT CAUSE ISOLATED INSTANCES OF EXISTING SENTENCES FALLING ABOVE THE OLD GUIDELINES OR WHEN THERE IS ONLY A MINOR DOWNWARD ADJUSTMENT IN THE GUIDELINES. THE COMMITTEE DOES NOT BELIEVE THE COURTS SHOULD BE BURDENED WITH ADJUSTMENTS IN THESE CASES. HOWEVER, IF THERE IS A MAJOR DOWNWARD ADJUSTMENT IN GUIDELINES BECAUSE OF A CHANGE IN THE COMMUNITY VIEW OF THE OFFENSE, THE COMMISSION MAY CONCLUDE THAT THIS ADJUSTMENT SHOULD APPLY TO PERSONS ALREADY SERVING SENTENCES.

SUBSECTION (U) PROVIDES THAT THE POLICY STATEMENTS ISSUED BY THE SENTENCING COMMISSION SHALL INCLUDE A POLICY LIMITING CONSECUTIVE TERMS FOR AN OFFENSE INVOLVING VIOLATION OF A GENERAL PROHIBITION AND AN
OFFENSE INVOLVING A SPECIFIC PROHIBITION CONTAINED WITHIN THE GENERAL PROHIBITION. THE POLICY IS INTENDED TO APPLY TO THOSE OFFENSES WHICH IN EFFECT ARE 'LESSER INCLUDED OFFENSES' IN RELATION TO OTHER, MORE SERIOUS ONES, BUT WHICH FOR MERELY TECHNICAL REASONS DO NOT QUITE COME WITHIN THE DEFINITION OF A LESSER INCLUDED OFFENSE. THE LIMITATION NEED NOT BE A COMPLETE PROHIBITION (EXCEPT WHEN SENTENCING FOR BOTH OFFENSES WOULD BE BARRED BY LAW); ITS EXTENT IS TO BE DETERMINED BY THE COMMISSION.

SUBSECTION (V) PROVIDES THAT THE APPROPRIATE JUDGE OR OFFICER [FN539] WILL SUPPLY THE SENTENCING COMMISSION IN EACH CASE WITH A WRITTEN REPORT OF THE SENTENCE CONTAINING DETAILED INFORMATION AS TO THE VARIOUS FACTORS RELEVANT TO THE SENTENCE AND OTHER INFORMATION FOUND APPROPRIATE BY THE COMMISSION. [FN540] THIS PROVISION IS NECESSARY FOR THE SENTENCING COMMISSION TO BE ABLE TO MONITOR THE EFFECTIVENESS OF VARIOUS SENTENCING POLICIES AND PRACTICES. THE COMMISSION IS REQUIRED TO SUBMIT AT LEAST ANNUALLY TO THE CONGRESS AN ANALYSIS OF THE REPORTS SUBMITTED TO IT UNDER THIS PROVISION, TOGETHER WITH ANY RECOMMENDATIONS FOR LEGISLATION THAT THE ANALYSIS INDICATES IS WARRANTED.


SECTION 995. POWERS OF THE COMMISSION

SUBSECTION (A) ENUMERATES TWENTY-ONE SPECIFIC POWERS OF THE COMMISSION THAT MAY BE EXERCISED BY MAJORITY VOTE OF THE MEMBERS PRESENT AND VOTING, [FN542] AND PROVIDES, IN PARAGRAPH (22) THAT THE COMMISSION MAY PERFORM SUCH OTHER FUNCTIONS AS ARE REQUIRED TO PERMIT FEDERAL COURTS TO MEET THEIR SENTENCING RESPONSIBILITIES, AS PROVIDED IN
SECTION 3553(A) OF TITLE 18, U.S.C. AND TO PERMIT OTHERS INVOLVED IN THE FEDERAL CRIMINAL JUSTICE SYSTEM TO MEET THEIR RELATED RESPONSIBILITIES. THE SECTION REFLECTS THE BROAD RESPONSIBILITY IMPOSED UPON THE COMMISSION TO ASSURE THAT SENTENCING AND THE ADMINISTRATION OF SENTENCES FULFILL THE PURPOSES OF SENTENCING ENUMERATED IN SECTION 3553(A) OF TITLE 18.


PARAGRAPHS (4), (5), (6), AND (7) CONTAIN PROVISIONS COMMON TO FEDERAL COMMISSIONS RELATING TO PROCUREMENT POWER, ACQUISITION OF PROPERTY AND SERVICES, AND CONTRACT AUTHORITY. PARAGRAPH (8) PERMITS THE COMMISSION TO REQUEST INFORMATION FROM FEDERAL AGENCIES AND JUDICIAL OFFICERS REQUIRED IN THE PERFORMANCE OF ITS DUTIES, AND PERMITS THOSE AGENCIES AND OFFICERS TO PROVIDE THE REQUESTED INFORMATION CONSISTENT WITH OTHER PROVISIONS OF LAW. THIS PROVISION IS DESIGNED TO PERMIT THE COMMISSION TO OBTAIN INFORMATION NECESSARY TO ITS RESEARCH CONCERNING EFFICACY OF SENTENCING PRACTICES AND TO THE PREPARATION OF GUIDELINES AND POLICY STATEMENTS RELATING TO SENTENCING MATTERS.

IN ADDITION TO THESE GENERAL ADMINISTRATIVE PROVISIONS, SECTION 995 GIVES THE COMMISSION A NUMBER OF POWERS RELATING SPECIFICALLY TO ITS ROLE IN MONITORING THE EFFECTIVENESS OF THE SENTENCING PRACTICES AND POLICIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM.

Probationers and persons on supervised release, will need an understanding of the guidelines and policy statements in order to assist them in carrying out those supervisory functions.

A number of additional provisions provide for extensive research and data collection and dissemination authority in the sentencing area. [FN543] These functions are essential to the ability of the sentencing commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in proposed 18 U.S.C. 3553(A)(2), [FN544] and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process. [FN545] These functions are to be carried out in cooperation, to the extent practicable, with the administrative office of the United States courts and the federal judicial center. [FN546]

Under subsection (A)(17), the sentencing commission is authorized to conduct programs of instruction in sentencing techniques for persons connected with the sentencing process. [FN547] While the instructional effort would probably be most extensive during the early period of implementing the initial guidelines and policy statements, it is expected that periodic instruction will continue to be necessary, partly to bring personnel up to date on changes in the guidelines and policy statements and on developments in the case law, and partly to instruct new personnel in the federal criminal justice system. The programs could be run in cooperation with the department of justice if both believed this approach would be helpful. [FN548] The programs are expected to be run in cooperation, to the extent practicable, with the administrative office of the United States courts and the federal judicial center. [FN549] Under subsection (A)(19), the commission is authorized to study the feasibility of developing guidelines for the disposition of juvenile delinquents. The parole commission now uses its youth corrections act guidelines for juveniles; it is expected that the sentencing commission will make a similar recommendation for federal judges.

Subsection (B) is a broad statement as to powers and duties similar to section 995(A)(22), and includes specific authority to delegate powers other than promulgation of general policy statements and guidelines for sentencing pursuant to section 994(A), the issuance of general policies and promulgation of rules and regulations pursuant to section 995(A)(1), and the decision as to the factors to be considered in establishment of categories of offenders and offenses pursuant to section 994(B). It also contains language that requires the commission, with respect to its activities under subsections (A)(9), (A)(10), (A)(11), (A)(12), (A)(13), (A)(14), (A)(15), (A)(16), (A)(17), and (A)(18), to the extent practicable, to utilize existing resources of the administrative office of the United States courts and the federal judicial center in order to avoid unnecessary duplication. [FN550]

Subsection (C) requires federal agencies to make services, equipment, personnel, facilities, and information available to the greatest practicable extent upon request of the commission in the execution of its functions.

Subsection (D) provides that a simple majority of the membership then serving shall constitute a quorum for the conduct of business. Except for the promulgation of sentencing guidelines or policy statements, the commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present. [FN551]
REQUIRES THAT GUIDELINES AND POLICY STATEMENTS BE PROMULGATED ONLY BY
AFFIRMATIVE VOTE OF AT LEAST FOUR MEMBERS OF THE COMMISSION. THE PHRASE
IN SUBSECTION (D), 'THE MEMBERSHIP THEN SERVING', MEANS THOSE MEMBERS
WHO HAVE BEEN APPOINTED BY THE PRESIDENT AND CONFIRMED BY THE SENATE.
FOR EXAMPLE, IF ONLY FIVE HAVE BEEN APPOINTED AT A GIVEN TIME, THEN ONLY
THREE ARE NEEDED FOR A QUORUM, AND THE COMMISSION MAY CONDUCT MOST
ROUTINE BUSINESS BY THE VOTE OF TWO.
SUBSECTION (E) REQUIRES THE COMMISSION, EXCEPT WHERE OTHERWISE
PROVIDED BY LAW, TO MAKE AVAILABLE FOR PUBLIC INSPECTION A RECORD OF THE
FINAL VOTE OF EACH MEMBER ON ANY ACTIONS TAKEN.

SECTION 996. DIRECTOR AND STAFF

THE STAFF DIRECTOR IS GIVEN AUTHORITY, UNDER SUBSECTION (A), TO SUPERVISE
THE ACTIVITIES OF THE COMMISSION EMPLOYEES AND PERFORM OTHER DUTIES
ASSIGNED BY THE COMMISSION, AND, UNDER SUBSECTION (B), TO APPOINT SUCH
OFFICERS OR EMPLOYEES AS ARE NECESSARY IN THE EXECUTION OF THE
FUNCTIONS OF THE COMMISSION, SUBJECT TO THE APPROVAL OF THE COMMISSION.
THE COMMITTEE INTENDS THAT THE COMMISSION STAFF CONSIST OF PERSONS
WITH A WIDE VARIETY OF BACKGROUNDS PERTINENT TO CONDUCTING CRIMINAL
JUSTICE RESEARCH AND MAKING RECOMMENDATIONS AS TO SENTENCING POLICY.
THE OFFICERS AND EMPLOYEES OF THE COMMISSION ARE, UNDER SUBSECTION (B),
EXEMPTED FROM MOST CIVIL SERVICE PROVISIONS IN TITLE 5, U.S.C. EXCEPT FOR
THE BENEFITS PROVIDED IN CHAPTERS 81-89.

SECTION 997. ANNUAL REPORT

THIS SECTION REQUIRES THE COMMISSION TO REPORT ANNUALLY TO THE JUDICIAL
CONFERENCE, THE CONGRESS, AND THE PRESIDENT ON THE ACTIVITIES OF THE
COMMISSION.

SECTION 998. DEFINITIONS

THIS SECTION DEFINES THE TERMS 'COMMISSION,' 'COMMISSIONER,' 'GUIDELINES,'
AND 'RULES AND REGULATIONS.'

REPEALERS

SECTION 208(A) OF THE BILL REPEALS A NUMBER OF PROVISIONS OF TITLE 18 OF
THE UNITED STATES CODE.
SECTION 1 OF TITLE 18, WHICH DEFINES FELONIES, MISDEMEANORS, AND PETTY
OFFENSES, IS DELETED AS COVERED IN THE SENTENCING PROVISIONS OF
PROPOSED CHAPTER 227 OF TITLE 18. SECTION 3012, RELATING TO ORDERS
RESPECTING PERSONS IN CUSTODY, IS REPEALED AS REPLACED BY THIS TITLE.
SECTIONS 4082(A), 4082(B), 4082(C), 4082(E), 4084, AND 4085, RELATING TO
COMMITMENT AND TRANSFER, ARE REPEALED AS REPLACED BY THIS TITLE.
CHAPTER 309, RELATING TO GOOD TIME ALLOWANCES AND RELEASE DATES, IS
CHAPTER 311, RELATING TO PAROLE, IS REPEALED AS REPLACED BY THE NEW
SENTENCING PROVISIONS.
*185 **3368 CHAPTER 314, RELATING TO SENTENCING OF NARCOTIC ADDICTS, IS
REPEALED CONSISTENT WITH THE DECISION TO REPEAL SPECIALIZED SENTENCING
PROVISIONS AND REPLACE THEM WITH PROVISIONS FOR SENTENCING GUIDELINES
THAT PERMIT CONSIDERATION OF ALL COMBINATIONS OF OFFENSE AND OFFENDER CHARACTERISTICS IN A SYSTEMATIC MANNER.

SECTIONS 4281, 4283, AND 4284, RELATING TO DISCHARGE AND RELEASE PAYMENTS, ARE DELETED AS COVERED BY PROVISIONS OF PROPOSED CHAPTER 229 OF TITLE 18.


SECTIONS 208(B) THROUGH (E) CONTAIN TECHNICAL AMENDMENTS TO VARIOUS ANALYSES CONTAINED IN TITLE 18 TO REFLECT THE REPEAL OF CERTAIN SECTIONS AND CHAPTERS.

SECTION 209(A) REPEALS SECTIONS 404(B) AND 409 OF THE CONTROLLED SUBSTANCES ACT (21 U.S.C. 844(B) AND 849), THE SPECIALIZED SENTENCING PROVISIONS FOR SPECIAL DANGEROUS DRUG OFFENDERS. THESE SPECIAL DANGEROUS OFFENDER PROVISIONS ARE MORE ADEQUATELY COVERED IN THE SENTENCING GUIDELINES PROVISIONS THAT REQUIRE THE GUIDELINES TO REFLECT A SUBSTANTIAL TERM OF IMPRISONMENT FOR DRUG TRAFFICKERS. SECTION 209(B) MAKES A TECHNICAL CORRECTION.

TECHNICAL AND CONFORMING AMENDMENTS


SECTION 210(B) AMENDS SECTION 242(H) OF THE IMMIGRATION AND NATIONALITY ACT (8 U.S.C. 1252(H)) TO ADD A REFERENCE TO A TERM OF SUPERVISED RELEASE AFTER A REFERENCE TO A PAROLE TERM.

SECTION 211 AMENDS SECTION 4 OF THE ACT OF SEPTEMBER 28, 1962 (16 U.S.C. 460K-3) TO REPLACE A REFERENCE TO PETTY OFFENSES WITH A REFERENCE TO MISDEMEANORS.

SECTION 212 AMENDS SECTION 9 OF THE ACT OF OCTOBER 8, 1944, TO REFLECT THE AUTHORITY OF THE UNITED STATES MAGISTRATE TO TRY AND SENTENCE PERSONS CHARGED WITH THE COMMISSION OF MISDEMEANORS AND INFRINGEMENTS, AS DEFINED IN PROPOSED 18 U.S.C. 3581. SECTION 213(A) AMENDS SECTION 924(A) OF TITLE 18 TO DELETE A REFERENCE TO PAROLE, SINCE PAROLE IS ABOLISHED.

SECTION 213(B) AMENDS SECTION 1161 OF TITLE 18 TO UPDATE A CROSS-REFERENCE.

SECTION 213(C) AMENDS SECTION 1761(A) OF TITLE 18 TO MAKE AN EXCEPTION TO THE RESTRICTION ON TRANSPORTATION OR IMPORTATION OF PRISON-MADE GOODS APPLICABLE TO A PERSON ON SUPERVISED RELEASE AS WELL AS TO ONE ON PAROLE.

SECTION 213(D) AMENDS SECTION 1963 OF TITLE 18 TO CONFORM TO CHANGES IN THE FORFEITURE STATUTES MADE BY THIS TITLE.

SECTION 213(E) AMENDS SECTION 2114 OF TITLE 18 TO MAKE CLEAR THAT IT IS NOT INTENDED THAT THE SENTENCE IN THAT SECTION IS MANDATORY.

SECTION 213(F) AMENDS SECTION 3006A OF TITLE 18 TO REFLECT THE GRADING SCHEME IN THE SENTENCING PROVISIONS AND TO DELETE REFERENCE TO REVOCATION OF PAROLE, SINCE PAROLE IS ABOLISHED BY THIS TITLE.

SECTION 213(G) AMENDS THE NEW BAIL RELEASE PENDING SENTENCE OR APPEAL PROVISIONS IN TITLE I OF THIS ACT TO EXCEPT FROM DETENTION DEFENDANTS FOR WHOM THE GUIDELINE DOES NOT RECOMMEND A TERM OF IMPRISONMENT (NEW 18 U.S.C. 3143(A)) AND TO MAKE PROVISION FOR DETENTION OR RELEASE PENDING GOVERNMENT APPEAL OF A SENTENCE UNDER SECTION 3742 OF THE NEW SENTENCING PROVISIONS OF TITLE 18.
SECTION 213(H) AMENDS THE NEW PROVISION IN TITLE I OF THIS ACT RELATING TO CONSECUTIVE ENHANCED PENALTIES FOR COMMITTING AN OFFENSE WHILE ON RELEASE (NEW 18 U.S.C. 3147) BY ELIMINATING THE MANDATORY NATURE OF THE PENALTIES IN FAVOR OF UTILIZING SENTENCING GUIDELINES.

SECTION 213(I), (J), AND (K)(2) AMEND SECTIONS 3156(B)(2), 3172(2), AND 3401(H) OF TITLE 18 TO REFLECT THE NEW GRADING SCHEME SET FORTH IN SECTION 3581 OF TITLE 18.

SUBSECTION (K) ALSO AMENDS SECTION 3401 BY REPEALING SUBSECTION (G), WHICH RELATES TO MAGISTRATE SENTENCING IN YOUTH OFFENDER CASES, SINCE THE YOUTH OFFENDER PROVISIONS IN CURRENT LAW HAVE BEEN REPEALED.

SECTION 213(L)(2) OF THE BILL AMENDS CROSS-REFERENCES IN SECTION 3670 (FORMERLY SECTION 3619) OF TITLE 18.

SECTION 213(M) OF THE BILL DELETES A REFERENCE TO PAROLE OFFICERS IN SECTION 4004.

SECTION 213(N) OF THE BILL AMENDS CHAPTER 306 OF TITLE 18, RELATING TO TRANSFER OF OFFENDERS TO AND FROM FOREIGN COUNTRIES, IN SEVERAL RESPECTS. FIRST, IT AMENDS SUBSECTION (F) OF SECTION 4101 TO INCLUDE A TERM OF SUPERVISED RELEASE IN THE DEFINITION OF PAROLE. SECOND, IT AMENDS SUBSECTION (G) OF SECTION 4101 TO CONFORM THE DESCRIPTION OF PROBATION TO THE PROVISIONS OF PROPOSED SUBCHAPTER B OF CHAPTER 227 OF TITLE 18. THIRD, IT AMENDS SECTION 4105(C) TO BRING A REFERENCE IN PARAGRAPH (1) INTO CONFORMITY WITH THE REVISED PROVISIONS RELATING TO CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR CONTAINED IN PROPOSED 18 U.S.C. 3624, TO CONFORM CROSS-REFERENCES IN PARAGRAPHS (1) AND (2), TO DELETE PARAGRAPH (3) BECAUSE OF THE NEW PROVISIONS RELATING TO GOOD TIME SET FORTH IN PROPOSED 18 U.S.C. 3624, AND TO AMEND PARAGRAPH (4) TO DELETE REFERENCES TO FORFEITURE OF GOOD TIME AS INCONSISTENT WITH THE PROVISIONS OF PROPOSED 18 U.S.C. 3624. SECTION 4106 IS AMENDED TO PLACE OFFENDERS WHO ARE ON PAROLE IN A FOREIGN COUNTRY WHO ARE TRANSFERRED TO THE UNITED STATES UNDER SUPERVISION BY THE PROBATION SYSTEM RATHER THAN THE PAROLE COMMISSION, WHICH WOULD BE ABOLISHED BY THIS BILL, AND TO PROVIDE THAT AN OFFENDER TRANSFERRED TO SERVE A TERM OF IMPRISONMENT SHALL BE RELEASED IN ACCORD WITH THE PROVISIONS OF PROPOSED 18 U.S.C. 3624(A) AFTER SERVING THE PERIOD OF TIME SPECIFIED IN THE APPLICABLE SENTENCING GUIDELINES (RATHER THAN THE PAROLE COMMISSION'S SETTING THE RELEASE DATE.) IF THE GUIDELINES RECOMMEND A TERM OF SUPERVISED RELEASE FOR SUCH AN OFFENDER, THE OFFENDER WILL BE PLACED ON SUCH A TERM. THE PROVISIONS OF PROPOSED 18 U.S.C. 3742 ARE MADE APPLICABLE TO DETERMINATION OF A RELEASE DATE UNDER THE SUBSECTION, AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT IN WHICH THE OFFENDER IS IMPRISONED OR UNDER SUPERVISION AFTER TRANSFER TO THE UNITED STATES HAS JURISDICTION TO REVIEW THE RELEASE DATE AS THOUGH IT HAD BEEN SET BY THE DISTRICT COURT. SECTION 4106(C) IS REPEALED, SINCE IT RELATES TO PAROLE RELEASE AND PAROLE HAS BEEN ABOLISHED. SECTION 4108(A) IS AMENDED TO REQUIRE THAT, WHEN AN OFFENDER'S CONSENT TO TRANSFER TO THE UNITED STATES IS VERIFIED, THE OFFENDER **187 **3370 BE INFORMED OF THE APPLICABLE GUIDELINE SENTENCE FOR HIS OFFENSE. SECTION 213(Q) OF THE BILL AMENDS SECTION 4321 OF TITLE 18 TO DELETE A REFERENCE TO PAROLE.

SECTION 213(P) OF THE BILL AMENDS SECTION 4351(B) OF TITLE 18 TO MAKE THE CHAIRMAN OF THE SENTENCING COMMISSION A MEMBER OF THE NATIONAL INSTITUTE OF CORRECTIONS ADVISORY BOARD IN PLACE OF THE CHAIRMAN OF THE PAROLE COMMISSION.

SECTION 213(Q) OF THE BILL AMENDS SECTION 5002 OF TITLE 18 TO MAKE THE CHAIRMAN OF THE SENTENCING COMMISSION A MEMBER OF THE ADVISORY CORRECTIONS COUNCIL, AND TO DELETE REFERENCES TO THE PAROLE COMMISSION.
SECTION 214 OF THE BILL AMENDS SECTION 401(B)(1)(A), (B)(1)(B), (B)(2), (B)(5), AND (C) AND SECTION 405 OF THE CONTROLLED SUBSTANCES ACT TO DELETE REFERENCES TO A SPECIAL PAROLE TERM FOR VARIOUS DRUG TRAFFICKING OFFENSES. SECTION 401(B)(4) IS AMENDED TO CONFORM TO THE FACT THAT THE SPECIAL SENTENCING PROVISIONS FOR DRUG POSSESSION HAVE BEEN MOVED TO PROPOSED 18 U.S.C. 3607. SECTION 408(C) IS AMENDED TO DELETE A REFERENCE TO THE CURRENT PAROLE STATUTES.

SECTION 215 OF THE BILL DELETES REFERENCES IN THE CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT TO SPECIAL PAROLE TERMS.

SECTION 216 OF THE BILL AMENDS SECTION 114(B) OF TITLE 23, U.S.C. TO ADD A REFERENCE TO A TERM OF SUPERVISED RELEASE.

SECTION 217 OF THE BILL AMENDS SECTION 5871 OF THE INTERNAL REVENUE CODE OF 1954 TO DELETE A REFERENCE TO ELIGIBILITY FOR PAROLE.

SECTION 218(A) OF THE BILL AMENDS SECTION 509 OF TITLE 28 TO DELETE A REFERENCE TO THE PAROLE COMMISSION. SECTION 218(B) OF THE BILL AMENDS SECTION 591 OF TITLE 28 TO CONFORM TO THE GRADING OF MISDEMEANORS AND INFRACTIONS.

SECTION 218(C) OF THE BILL AMENDS SECTION 2901 OF TITLE 28 TO ADD A REFERENCE TO A TERM OF SUPERVISED RELEASE AND TO CONFORM A CROSS-REFERENCE TO PROPOSED CHAPTER 227 OF TITLE 18.

SECTION 219 OF THE BILL AMENDS SECTION 504(A) OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, WHICH FORBIDS, WITH CERTAIN EXCEPTIONS, A CURRENT OR FORMER MEMBER OF THE COMMUNIST PARTY OR A PERSON CONVICTED OF ONE OF A LIST OF SPECIFIC OFFENSES FROM HOLDING OFFICE IN A LABOR ORGANIZATION, TO SPECIFY THAT THE SENTENCING JUDGE, RATHER THAN THE PAROLE COMMISSION, SHOULD DECIDE WHETHER A PERSON CONVICTED OF A FEDERAL OFFENSE CAN HOLD UNION OFFICE. IF THE OFFENSE IS A STATE OR LOCAL OFFENSE, A JUDGE OF THE UNITED STATES DISTRICT COURT IN WHICH THE OFFENSE WAS COMMITTED MAY, UNDER THE AMENDMENT, MAKE THE DECISION UPON MOTION OF THE DEPARTMENT OF JUSTICE. SECTION 504(A) OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 IS ALSO AMENDED TO SPECIFY THAT DECISIONS UNDER THE SECTION ARE TO BE MADE PURSUANT TO SENTENCING GUIDELINES AND POLICY STATEMENTS PROMULGATED PURSUANT TO PROPOSED 28 U.S.C. 994(A). SECTION 504(A) IS FURTHER AMENDED BY DELETING A REFERENCE TO ADMINISTRATIVE PROCEEDINGS BEFORE THE BOARD OF PAROLE SO AS TO CONFORM WITH CHANGES MADE IN A REFERENCE TO THE SENTENCING COURT. SIMILAR AMENDMENTS ARE MADE BY SECTION 219 OF THE BILL TO SECTION 411(A) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974. IN ADDITION, SECTION 411(C)(3) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 IS AMENDED BY SECTION 220 OF THE BILL, TO ADD A REFERENCE TO A TERM OF SUPERVISED RELEASE AFTER A REFERENCE TO PAROLE.

SECTION 221 AMENDS SECTION 454(B) OF THE COMPREHENSIVE EMPLOYMENT AND TRAINING ACT OF 1973 TO ADD A REFERENCE TO A TERM OF SUPERVISED RELEASE AFTER A REFERENCE TO PAROLE.

SECTION 222(A) AMENDS SECTION 341(A) OF THE PUBLIC HEALTH SERVICE ACT TO DELETE REFERENCES TO HOSPITALIZATION OF DRUG ADDICTS CONVICTED OF AN OFFENSE AND SENTENCED UNDER THE NARCOTIC ADDICT REHABILITATION ACT OF 1966 OR THE FEDERAL YOUTH CORRECTIONS ACT. BOTH THOSE PROVISIONS ARE REPEALED BY THIS BILL IN FAVOR OF PERMITTING SENTENCING GUIDELINES TO RECOMMEND APPROPRIATE SENTENCES FOR ALL COMBINATIONS OF OFFENSE AND OFFENDER CHARACTERISTICS.

SECTION 343(D) OF THE PUBLIC HEALTH SERVICE ACT IS ALSO AMENDED BY SECTION 222 TO ADD A REFERENCE TO A TERM OF SUPERVISED RELEASE AFTER THE REFERENCE TO PAROLE.

SECTION 223 OF THE BILL AMENDS SECTION 11507 OF TITLE 49, U.S.C. TO ADD A REFERENCE TO A TERM OF SUPERVISED RELEASE AFTER THE REFERENCE TO PAROLE.
SECTION 224 AMENDS SECTION 10(B)(7) OF THE MILITARY SELECTIVE SERVICE ACT (50 U.S.C. APP. 460(B)(7)) TO SUBSTITUTE A REFERENCE TO 'RELEASE' FOR A REFERENCE TO 'PAROLE.'

SECTION 225. EFFECTIVE DATE

SUBSECTION (A) OF SECTION 225 CONTAINS THE EFFECTIVE DATE PROVISION FOR THIS TITLE. IT PROVIDES THAT, WITH THREE EXCEPTIONS, THIS TITLE WILL TAKE EFFECT ON THE FIRST DAY OF THE FIRST CALENDAR MONTH BEGINNING TWENTY-FOUR MONTHS AFTER THE DATE OF ENACTMENT.

THE FIRST EXCEPTION, CONTAINED IN SUBSECTION (A)(1)(A), IS THAT THE REPEAL OF THE FEDERAL YOUTH CORRECTIONS ACT, CHAPTER 402 OF TITLE 18, WILL TAKE EFFECT IMMEDIATELY.


EFFECTIVE DATE FOR AN OFFENSE COMMITTED BEFORE THE EFFECTIVE DATE, THE PROCEDURAL AND ADMINISTRATIVE PROVISIONS OF THE TITLE WILL APPLY EXCEPT TO THE EXTENT THAT SUCH PROVISIONS ARE INCONSISTENT WITH THE PREEXISTING LAW.


SUBSECTION (B) ALSO ASSURES THAT, WHILE THE PAROLE COMMISSION REMAINS IN EXISTENCE, THE CHAIRMAN OF THE PAROLE COMMISSION OR HIS DESIGNEE WILL REMAIN A MEMBER OF THE NATIONAL INSTITUTE OF CORRECTIONS, AND THAT THE CHAIRMAN WILL REMAIN A MEMBER OF THE ADVISORY CORRECTIONS COUNCIL EX OFFICIO AND BE AN EX OFFICIO MEMBER OF THE UNITED STATES SENTENCING COMMISSION.

*190 **3373 SECTION 226. REVIEW BY CONGRESS


CONGRESS WILL BE REQUIRED TO REVIEW THE GAO STUDY, ALONG WITH THE SENTENCE COMMISSION REPORT, TO DETERMINE THE EFFECTIVENESS OF THE SENTENCING GUIDELINES SYSTEM, WHETHER ANY CHANGES ARE NEEDED IN THE SYSTEM AND WHETHER THE PAROLE SYSTEM SHOULD BE REINSTATED IN SOME FORM.

*191 **3374 TITLE III-- FORFEITURE

GENERAL STATEMENT AND SUMMARY

1. IN GENERAL

TODAY, FEW IN THE CONGRESS OR THE LAW ENFORCEMENT COMMUNITY FAIL TO RECOGNIZE THAT THE TRADITIONAL CRIMINAL SANCTIONS OF FINE AND IMPRISONMENT ARE INADEQUATE TO DETER OR PUNISH THE ENORMOUSLY PROFITABLE TRADE IN DANGEROUS DRUGS WHICH, WITH ITS INEVITABLE ATTENDANT VIOLENCE, IS PLAGUING THE COUNTRY. CLEARLY, IF LAW ENFORCEMENT EFFORTS TO COMBAT RACKETEERING AND DRUG TRAFFICKING ARE TO BE SUCCESSFUL, THEY MUST INCLUDE AN ATTACK ON THE ECONOMIC ASPECTS OF THESE CRIMES. FORFEITURE IS THE MECHANISM THROUGH WHICH SUCH AN ATTACK MAY BE MADE.


AS IT PASSED THE HOUSE ON DECEMBER 20, 1982, BY A VOTE OF 271-27 AND AS
ADOPTED BY THE SENATE ON THE SAME DATE BY VOICE VOTE. [FN559] THE PRESIDENT
POCKET VETOED H.R. 3963 FOR REASONS UNRELATED TO THE FORFEITURE
PROVISIONS.

IN THIS CONGRESS, FORFEITURE PROVISIONS SIMILAR TO THOSE THAT PASSED THE
SENATE LAST CONGRESS WERE INTRODUCED BY SENATOR THURMOND ON MARCH 16,
1983, AS A PART OF THE ADMINISTRATION'S 'COMPREHENSIVE CRIME CONTROL ACT
OF 1983' (S. 829), BY SENATOR BIDEN IN THE 'NATIONAL SECURITY AND VIOLENT
CRIME CONTROL ACT OF 1983' (S. 830), AND BY SENATOR BIDEN IN A SEPARATE BILL
ON FUTURE BILL ON FORFEITURE (S. 948). COMMENT ON THIS SUBJECT WAS RECEIVED
IN THE HEARINGS ON S. 829 AND RELATED BILLS. [FN560]

IN LARGE MEASURE, THE FORFEITURE IMPROVEMENTS IN TITLE III OF THIS BILL ARE
THE SAME AS THOSE CONTAINED IN S. 829 AND S. 948.

FOR THE MOST PART, TITLE III'S FORFEITURE AMENDMENTS DO NOT FOCUS ON
SIGNIFICANT EXPANSION OF THE SCOPE OF PROPERTY SUBJECT TO FORFEITURE.
(AUTHORITY TO CIVILLY FORFEIT REAL PROPERTY USED IN DRUG TRAFFICKING AND
CLARIFICATION OF THE FORFEITABILITY OF PROCEEDS OF RACKETEERING IS
PROVIDED, HOWEVER.) INSTEAD, THEY FOCUS PRIMARILY ON IMPROVING THE
PROCEDURES APPLICABLE IN FORFEITURE CASES. THE MORE SIGNIFICANT OF THESE
AMENDMENTS INCLUDES MEASURES TO PREVENT PRE-CONVICTION TRANSFERS OF
ASSETS IN CRIMINAL FORFEITURE CASES, ALLOWS FORFEITURE OF SUBSTITUTE
ASSETS WHERE TRANSFER OR CONCEALMENT OF ASSETS DOES OCCUR, ALLOWS THE USE OF CRIMINAL FORFEITURE AS AN ALTERNATIVE TO CIVIL FORFEITURE
IN ALL DRUG FELONY CASES, CLARIFIES THE AUTHORITY FOR STAYING CIVIL
FORFEITURE PROCEEDINGS WHERE A RELATED CRIMINAL CASE IS UNDERWAY,
PROVIDES A FUNDING MECHANISM TO ALLOW USE OF FORFEITURE PROCEEDS TO
DEFRAY THE ESCALATING COSTS TO THE GOVERNMENT IN PURSUING FORFEITURES,
AND INCREASES THE AVAILABILITY OF EFFICIENT ADMINISTRATIVE PROCEDURES IN
UNCONTESTED CIVIL FORFEITURE CASES.

2. PRESENT FEDERAL LAW

THERE ARE PRESENTLY TWO TYPES OF FORFEITURE STATUTES IN FEDERAL LAW. THE
FIRST, CIVIL FORFEITURE OF CRIME-RELATED PROPERTY THROUGH AN IN REM
PROCEEDING, HAS LONG BEEN A PART OF FEDERAL STATUTORY LAW. A VARIETY OF
ASSETS USED IN DRUG VIOLATIONS, SUCH AS BOATS, CARS, AND MANUFACTURING
EQUIPMENT, MAY BE CIVILLY FORFEITED UNDER 21 U.S.C. 881. SINCE 1978, THIS
STATUTE HAS ALSO PROVIDED FOR THE CIVIL FORFEITURE OF THE PROCEEDS OF
ILlicit DRUG TRANSACTIONS. IN ADDITION, ASSETS USED IN DRUG SMUGGLING
OPERATIONS MAY BE CIVILLY FORFEITED UNDER THE CUSTOMS LAWS. [FN561]

A CIVIL FORFEITURE IS COMMENCED BY THE GOVERNMENT'S SEIZURE OF THE ASSET.
[FN562] IF THE VALUE OF THE ASSET EXCEEDS $10,000 A JUDICIAL FORFEITURE IS
ALWAYS REQUIRED. FOR ASSETS OF LESSER VALUE, IF NO PARTY COMES FORWARD TO
CONTEST THE FORFEITURE AND FILE THE BOND REQUIRED FOR A JUDICIAL
PROCEEDING-- PRESENTLY $250-- THE PROPERTY MAY BE FORFEITED IN AN
ADMINISTRATIVE PROCEEDING. SINCE CIVIL FORFEITURE IS AN IN REM PROCEEDING,
THE FORFEITURE CASE MUST BE BROUGHT IN THE JUDICIAL DISTRICT IN WHICH THE
PROPERTY IS LOCATED. THE PROPERTY IS THE DEFENDANT IN THE CASE, BUT PARTIES
WITH AN INTEREST IN THE PROPERTY MAY CONTEST THE FORFEITURE. [FN563] THE
'PREPONDERANCE OF THE EVIDENCE' STANDARD OF PROOF APPLIES IN CIVIL
FORFEITURES AS IN OTHER CIVIL ACTIONS. A PARTY WHO DOES NOT HAVE LEGAL
BASIS FOR DEFEATING THE FORFEITURE, BUT WHO HAS AN EQUITABLE BASIS FOR
RELIEF, MAY PETITION THE ATTORNEY GENERAL FOR REMISSION OR MITIGATION OF
THE FORFEITURE.

THE OTHER TYPE OF FORFEITURE, CRIMINAL FORFEITURE, IS RELATIVELY NEW TO
FEDERAL LAW, ALTHOUGH IT HAS ITS ORIGINS IN ANCIENT ENGLISH COMMON LAW. IT
IS AN IN PERSONAM PROCEEDING AGAINST A DEFENDANT IN A CRIMINAL CASE AND IS
IMPOSED AS A SANCTION AGAINST THE DEFENDANT UPON HIS CONVICTION.
CONGRESS FIRST ACTED TO PROVIDE FOR CRIMINAL FORFEITURE WHEN IT PASSED THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE [FN564] AND THE CONTINUING CRIMINAL ENTERPRISE (CCE) STATUTE. [FN565] THESE STATUTES ADDRESS, RESPECTIVELY, THE CONDUCT, ACQUISITION, AND CONTROL OF ENTERPRISES THROUGH PATTERNS OF RACKETEERING ACTIVITY, AND THE OPERATION OF GROUPS INVOLVED IN PATTERNS OF SERIOUS DRUG OFFENSES. CRIMINAL FORFEITURE MUST BE ALLEGED IN THE INFORMATION OR INDICTMENT. IF THE DEFENDANT IS FOUND GUILTY OF THE UNDERLYING OFFENSE, THEN A SPECIAL VERDICT MUST BE RETURNED WITH RESPECT TO THE FORFEITURE ALLEGATIONS AND A JUDGMENT OF FORFEITURE IS ENTERED AGAINST THE *194 **3377 DEFENDANT. [FN566] ONLY THEN IS THE GOVERNMENT AUTHORIZED TO SEIZE THE PROPERTY. PRIOR TO CONVICTION THE COURT MAY ENTER A RESTRAINING ORDER OR REQUIRE A PERFORMANCE BOND TO GUARD AGAINST IMPROPER DISPOSITION OF FORFEITABLE ASSETS. THIS AUTHORITY ARISES, HOWEVER, ONLY AFTER THE FILING OF AN INDICTMENT OR INFORMATION. NO MECHANISM EXISTS IN CURRENT LAW TO PROTECT AGAINST IMPROPER TRANSFERS OR CONCEALMENT OF ASSETS AT AN EARLIER STAGE. MOREOVER, NO STANDARD FOR ISSUANCE OF RESTRAINING ORDERS IS ARTICULATED IN CURRENT STATUTES. SHOULD A DEFENDANT SUCCEED IN TRANSFERRING OR CONCEALING HIS FORFEITABLE ASSETS PRIOR TO CONVICTION, THERE IS NO PROCEDURE TO ALLOW FORFEITURE OF OTHER ASSETS OF THE DEFENDANT TO SATISFY THE FORFEITURE JUDGMENT.


IT WAS HOPED THAT THROUGH THE USE OF CURRENT CRIMINAL AND CIVIL FORFEITURE PROVISIONS, FORFEITURE WOULD BECOME A POWERFUL WEAPON IN THE FIGHT AGAINST DRUG TRAFFICKING AND RACKETEERING. BUT THE RECORD OF OBTAINING SIGNIFICANT FORFEITURES IN NARCOTICS AND ORGANIZED CRIMES CASES, PARTICULARLY IN CONTRAST WITH THE BURGEONING ILLICIT DRUG TRADE, IS VIEWED WITH SOME DISAPPOINTMENT. [FN568] TO BE SURE, FEDERAL LAW ENFORCEMENT AGENCIES HAVE, IN RECENT YEARS, PLACED AN INCREASED EMPHASIS ON FORFEITURES AND PROGRESS HAS BEEN MADE. FOR EXAMPLE, SEIZURES OF ASSETS IN DRUG CASES NOW RUN INTO THE MILLIONS OF DOLLARS. HOWEVER, IN LIGHT OF THE FACT THAT THE PROFITS PRODUCED BY DRUG TRAFFICKING ARE ESTIMATED TO BE IN THE BILLIONS, IF NOT THE TENS OF BILLIONS OF DOLLARS ANNUALLY, IT IS CLEAR THAT THE FULL LAW ENFORCEMENT POTENTIAL OF FORFEITURE IS NOT BEING REALIZED. SERIOUS IMPEDIMENTS TO REACHING THIS GOAL ARE THE LIMITATIONS AND AMBIGUITIES OF CURRENT FORFEITURE STATUTES. WHILE THERE ARE A VARIETY OF PROBLEMS POSED BY PRESENT FORFEITURE STATUTES, THE MOST SIGNIFICANT ARISE IN THE AREAS DISCUSSED BELOW.

FIRST, THE SCOPE OF PROPERTY SUBJECT TO FORFEITURE IS, IN TWO IMPORTANT RESPECTS, TOO LIMITED. THE RICO STATUTE, WHICH WAS DESIGNED TO DEPRIVE RACKETEERS OF THE ECONOMIC POWER GENERATED BY AND USED TO SUSTAIN ORGANIZED CRIMINAL ACTIVITY HAS BEEN INTERPRETED BY SEVERAL COURTS SO AS TO PREVENT THE CRIMINAL FORFEITURE OF A DEFENDANT'S ILL-GOTTEN PROFITS, EVEN THOUGH OTHER OF HIS INTERESTS USED OR ACQUIRED IN VIOLATION OF THE RICO STATUTE WOULD BE FORFEITABLE. [FN569] THE RESULT *195 **3378 OF EXEMPTING RACKETEERING PROCEEDS FROM RICO'S CRIMINAL FORFEITURE SCHEME
HAS BEEN TO SERIOUSLY UNDERCUT THE STATUTE'S UTILITY AND SIGNIFICANTLY LIMIT THE EXTENT OF RICO FORFEITURES, PARTICULARLY IN CASES INVOLVING WHOLLY CRIMINAL ENTERPRISES WHERE THERE MAY BE LITTLE OTHER THAN PROFITS IN THE WAY OF FORFEITABLE ASSETS.

THE EXTENT OF DRUG-RELATED PROPERTY SUBJECT TO CIVIL FORFEITURE UNDER 21 U.S.C. 881 IS ALSO TOO LIMITED IN ONE RESPECT. UNDER CURRENT LAW, IF A PERSON USES A BOAT OR CAR TO TRANSPORT NARCOTICS OR USES EQUIPMENT TO MANUFACTURE DANGEROUS DRUGS, HIS USE OF THE PROPERTY Renders IT SUBJECT TO CIVIL FORFEITURE. BUT IF HE USES A SECLUDED BARN TO STORE TONS OF MARIHUANA OR USES HIS HOUSE AS A MANUFACTURING LABORATORY FOR AMPHETAMINES, THERE IS NO PROVISION TO SUBJECT HIS REAL PROPERTY TO CIVIL FORFEITURE, EVEN THOUGH ITS USE WAS INDISPENSABLE TO THE COMMISSION OF A MAJOR DRUG OFFENSE AND THE PROSPECT OF THE FORFEITURE OF THE PROPERTY WOULD HAVE BEEN A POWERFUL DETERRENT. [FN570]

A SECOND SERIOUS PROBLEM IN ACHIEVING THE FORFEITURE OF SIGNIFICANT ASSETS IN RACKETEERING AND DRUG CASES IS THAT THE CRIMINAL FORFEITURE PROVISIONS OF THE RICO AND CCE STATUTES FAIL ADEQUATELY TO ADDRESS THE PHENOMENON OF DEFENDANTS DEFEATING FORFEITURE BY REMOVING, TRANSFERRING, OR CONCEALING THEIR ASSETS PRIOR TO CONVICTION. UNLIKE CIVIL FORFEITURES, IN WHICH THE GOVERNMENT'S SEIZURE OF THE ASSET OCCURS AT OR SOON AFTER THE COMMENCEMENT OF THE FORFEITURE ACTION, IN CRIMINAL FORFEITURES, THE ASSETS GENERALLY REMAIN IN THE CUSTODY OF THE DEFENDANT UNTIL THE TIME OF HIS CONVICTION FOR THE OFFENSE UPON WHICH THE FORFEITURE IS BASED. ONLY AFTER CONVICTION DOES THE GOVERNMENT SEIZE THE ASSET. Thus, A PERSON WHO ANTICIPATES THAT SOME OF HIS PROPERTY MAY BE SUBJECT TO CRIMINAL FORFEITURE HAS NOT ONLY AN OBVIOUS INCENTIVE, BUT ALSO AMPLE OPPORTUNITY, TO TRANSFER HIS ASSETS OR REMOVE THEM FROM THE JURISDICTION OF THE COURT PRIOR TO TRIAL AND SO SHIELD THEM FROM ANY POSSIBILITY OF FORFEITURE. CURRENTLY, THE ONLY MECHANISM AVAILABLE TO THE GOVERNMENT TO PREVENT SUCH ACTIONS IS THE AUTHORITY TO OBTAIN A RESTRAINING ORDER AND THIS STATUTORY AUTHORITY IS LIMITED TO THE POST-INDICTMENT PERIOD. Thus, EVEN IF THE GOVERNMENT IS AWARE THAT A PERSON IS DISPOSING OF HIS PROPERTY IN ANTICIPATION OF THE FILING OF CRIMINAL CHARGES AGAINST HIM, IT HAS NO SPECIFIC AUTHORITY UNDER THE RICO OR CCE STATUTES TO OBTAIN AN APPROPRIATE PROTECTIVE ORDER. FURTHERMORE, EVEN IF THE GOVERNMENT IS ABLE TO OBTAIN A RESTRAINING ORDER, SHOULD THE DEFENDANT CHOOSE TO DEFY IT, HE CAN EFFECTIVELY PREVENT THE FORFEITURE OF HIS PROPERTY AND FACE ONLY THE POSSIBILITY OF CONTEMPT SANCTIONS FOR HIS DEFIANCE OF THE COURT'S ORDER. THE IMPORTANT ECONOMIC IMPACT OF IMPOSING THE SANCTION OF FORFEITURE AGAINST THE DEFENDANT IS THUS LOST.

ALTHOUGH CURRENT LAW DOES AUTHORIZE THE ISSUANCE OF RESTRAINING ORDERS IN THE POST-INDICTMENT PERIOD, NEITHER THE RICO NOR CCE STATUTE ARTICULATES ANY STANDARD FOR THE ISSUANCE OF THESE ORDERS. CERTAIN RECENT COURT DECISIONS HAVE REQUIRED THE GOVERNMENT TO MEET ESSENTIALLY THE SAME STRINGENT STANDARD THAT APPLIES TO THE ISSUANCE OF TEMPORARY RESTRAINING ORDERS IN THE CONTEXT OF CIVIL LITIGATION *196 **3379 AND HAVE ALSO HELD THE FEDERAL RULES OF EVIDENCE TO APPLY TO HEARINGS CONCERNING RESTRAINING ORDERS IN CRIMINAL FORFEITURE CASES. [FN571] IN EFFECT, SUCH DECISIONS ALLOW THE COURTS TO ENTERTAIN CHALLENGES TO THE VALIDITY OF THE INDICTMENT, AND REQUIRE THE GOVERNMENT TO PROVE THE MERITS OF THE UNDERLYING CRIMINAL CASE AND FORFEITURE COUNTS AND PUT ON ITS WITNESSES WELL IN ADVANCE OF TRIAL IN ORDER TO OBTAIN AN ORDER RESTRAINING THE DEFENDANT'S TRANSFER OF PROPERTY ALLEGED TO BE FORFEITABLE IN THE INDICTMENT. MEETING SUCH REQUIREMENTS CAN MAKE OBTAINING A RESTRAINING ORDER-- THE SOLE MEANS AVAILABLE TO THE GOVERNMENT TO ASSURE THE AVAILABILITY OF ASSETS AFTER CONVICTION-- QUITE DIFFICULT. IN ADDITION, THESE
REQUIREMENTS MAY MAKE PURSUING A RESTRAINING ORDER INADVISABLE FROM THE PROSECUTOR'S POINT OF VIEW BECAUSE OF THE POTENTIAL FOR DAMAGING PREMATURE DISCLOSURE OF THE GOVERNMENT'S CASE AND TRIAL STRATEGY AND FOR JEOPARDIZING THE SAFETY OF WITNESSES AND VICTIMS IN RACKETEERING AND NARCOTICS TRAFFICKING CASES WHO WOULD BE REQUIRED TO TESTIFY AT THE RESTRAINING ORDER HEARING.

THE PROBLEM OF PRE-CONVICTION DISPOSITIONS OF PROPERTY SUBJECT TO CRIMINAL FORFEITURE IS FURTHER COMPLICATED BY THE QUESTION OF WHETHER, SIMPLY BY TRANSFERRING AN ASSET TO A THIRD PARTY, A DEFENDANT MAY SHIELD IT FROM FORFEITURE. IN CIVIL FORFEITURES, SUCH TRANSFERS ARE VOIDABLE, FOR THE PROPERTY IS CONSIDERED 'TAINTED' FROM THE TIME OF ITS PROHIBITED USE OR ACQUISITION. BUT IT IS UNCLEAR WHETHER, IN THE CONTEXT OF CRIMINAL FORFEITURES, THE SAME PRINCIPLE IS APPLICABLE SO THAT IMPROPER PRE-CONVICTION TRANSFERS MAY BE VOIDED.

IN SUM, PRESENT CRIMINAL FORFEITURE STATUTES DO NOT ADEQUATELY ADDRESS THE SERIOUS PROBLEM OF A DEFENDANT'S PRETRIAL DISPOSITION OF HIS ASSETS. CHANGES ARE NECESSARY BOTH TO PRESERVE THE AVAILABILITY OF A DEFENDANT'S ASSETS FOR CRIMINAL FORFEITURE, AND, IN THOSE CASES IN WHICH HE DOES TRANSFER, DEplete, OR CONCEAL HIS PROPERTY, TO ASSURE THAT HE CANNOT AS A RESULT AVOID THE ECONOMIC IMPACT OF FORFEITURE.

A THIRD MAJOR PROBLEM WITH CURRENT FORFEITURE STATUTES ARISES FROM THE NEED TO PURSUE VIRTUALLY ALL FORFEITURES OF DRUG-RELATED PROPERTY THROUGH CIVIL PROCEEDINGS. UNTIL RECENTLY, CIVIL FORFEITURE PROCEEDINGS UNDER TITLE 21 WERE NOT PERCEIVED AS PARTICULARLY PROBLEMATIC. INDEED, IN CERTAIN RESPECTS, CIVIL FORFEITURE HAS ADVANTAGES OVER CRIMINAL FORFEITURE. AS NOTED ABOVE, PROPERTY IS GENERALLY SEIZED EARLY ON IN A CIVIL FORFEITURE CASE, THUS LIMITING THE PROBLEM OF TRANSFERS AND CONCEALMENT OF ASSETS. ALSO THE GOVERNMENT'S BURDEN OF PROOF IS LOWER IN THESE CASES. HOWEVER, AS DRUG TRAFFICKING HAS INCREASED AND THE GOVERNMENT HAS STEPPED UP ITS ENFORCEMENT AND FORFEITURE EFFORTS, THE BACKLOG OF CIVIL FORFEITURE CASES IN SOME PARTS OF THE COUNTRY HAS BECOME UNMANAGEABLE. A WAY OF RELIEVING THIS PROBLEM WOULD BE TO ALLOW FEDERAL PROSECUTORS, IN APPROPRIATE CIRCUMSTANCES, TO PURSUE CRIMINAL, RATHER THAN CIVIL, FORFEITURES IN DRUG CASES. THE PROBLEM WITH CIVIL FORFEITURE IS THAT EVEN IF THE SAME FACTS THAT ARE AT ISSUE IN A CRIMINAL TRIAL ARE ALSO DISPOSITIVE OF THE FORFEITURE ISSUE, IT IS STILL NECESSARY FOR THE GOVERNMENT, IN ADDITION TO THE CRIMINAL CASE, TO FILE A SEPARATE CIVIL SUIT. AND WHERE THE PROPERTY OF A DEFENDANT, OR DEFENDANTS, IN THE CRIMINAL CASE IS LOCATED IN MORE THAN ONE JUDICIAL DISTRICT, A SEPARATE CIVIL FORFEITURE SUIT MUST BE FILED IN EACH OF THESE DISTRICTS.

A MORE EFFICIENT METHOD OF OBTAINING THE FORFEITURE OF ASSETS OF DRUG DEFENDANTS WOULD BE TO PERMIT PROSECUTORS THE OPTION OF PURSUING A CRIMINAL FORFEITURE IN WHICH THE FORFEITURE ACTION CAN BE CONSOLIDATED WITH THE PROSECUTION OF THE OFFENSE GIVING RISE TO FORFEITURE. IN CASES WHERE THIS ALTERNATIVE COULD BE PURSUED, VALUABLE JUDICIAL AND LAW ENFORCEMENT RESOURCES COULD BE SAVED.

A FOURTH SIGNIFICANT PROBLEM IS THE FINANCIAL BURDEN AGGRESSIVE PURSUIT OF FORFEITURE CASES PLACES ON OUR LAW ENFORCEMENT AGENCIES. AS NOTED ABOVE, WHERE THE SALE OF FORFEITED PROPERTY REALIZES LESS THAN THE EXPENSES INCURRED BY THE GOVERNMENT IN STORING, MAINTAINING, AND SELLING THE PROPERTY, THE NET LOSS MUST BE CARRIED BY THE AGENCY'S BUDGET. THIS OCCURS EVEN THOUGH PROFITS FROM OTHER SALES WOULD BE SUFFICIENT TO OFFSET THESE EXPENSES. THUS, THE FINANCIAL RESOURCES OF OUR LAW ENFORCEMENT AGENCIES ARE NOT AUGMENTED BY PROFITABLE FORFEITURES, BUT THEY ARE DEPLETED BY THOSE THAT ARE NOT PROFIT PRODUCING.

DELAYS IN OBTAINING CIVIL FORFEITURES ARE A PRIMARY CAUSE OF THE
BURGEONING EXPENSES ASSOCIATED WITH FORFEITURE ACTIONS. BECAUSE OF THE BACKLOG OF CIVIL CASES IN CERTAIN DISTRICTS, OBTAINING A JUDICIAL FORFEITURE MAY TAKE A SIGNIFICANT AMOUNT OF TIME. DURING THIS TIME THE PROPERTY IS SUBJECT TO DETERIORATION AND MAINTENANCE AND STORAGE COSTS MOUNT. UNDER PRESENT LAW, SUCH DELAYS ARE FREQUENTLY UNAVOIDABLE EVEN IN UNCONTESTED CASES, BECAUSE THE ALTERNATIVE OF MORE EFFICIENT ADMINISTRATIVE FORFEITURE PROCEEDINGS IS NOT AVAILABLE IF THE VALUE OF THE ASSET IS $10,000 OR MORE, A DOLLAR CEILING THAT EXCLUDES MANY ASSETS IN DRUG FORFEITURE CASES INCLUDING VIRTUALLY ALL BOATS AND AIRCRAFT USED IN DRUG SMUGGLING.

3. PROVISIONS OF THE BILL, AS REPORTED


PART C OF THIS TITLE, WHICH IS MADE UP OF SECTIONS 309 AND 310, ESTABLISHES A FOUR-YEAR TRIAL PROGRAM UNDER WHICH AMOUNTS REALIZED BY THE UNITED STATES FROM THE FORFEITURE OF DRUG PROFITS AND OTHER DRUG-RELATED ASSETS ARE TO BE PLACED IN A SPECIAL FUND WHICH IS TO BE AVAILABLE FOR APPROPRIATIONS TO DEFRAY EXPENSES INCURRED BY THE GOVERNMENT IN CIVIL AND CRIMINAL FORFEITURE ACTIONS UNDER TITLE 21, UNITED STATES CODE. PART D OF TITLE III, WHICH IS COMPRISSED OF SECTIONS 311 THROUGH 323, AMENDS VARIOUS SECTIONS OF THE TARIFF ACT OF 1930 (19 U.S.C. 1202 ET SEQ.). THESE AMENDMENTS ARE DESIGNED PRIMARILY TO ACHIEVE TWO PURPOSES. FIRST, THEY IMPROVE THE CIVIL FORFEITURE PROVISIONS OF THE CUSTOMS LAWS, WHICH, BY VIRTUE OF 21 U.S.C. 881(D), ARE ALSO APPLICABLE TO CIVIL FORFEITURES OF DRUG-
RELATED ASSETS. MOST NOTABLE OF THESE AMENDMENTS IS THE EXPANSION OF THE AVAILABILITY OF EFFICIENT ADMINISTRATIVE FORFEITURE PROCEEDINGS IN UNCONTESTED CASES. SECOND, PART D CREATES A CUSTOMS FORFEITURE FUND, LIKE THAT ESTABLISHED FOR DRUG FORFEITURES IN PART C, THAT IS TO BE AVAILABLE TO MEET EXPENSES ASSOCIATED WITH SEIZURES AND FORFEITURES UNDER CUSTOMS LAWS.

SECTION-BY-SECTION ANALYSIS

SECTION 301

SECTION 301 PROVIDES THAT TITLE III OF THE BILL MAY BE CITED AS THE 'COMPREHENSIVE FORFEITURE ACT OF 1983.'

PART A

SECTION 302


*199 **3382 18 U.S.C. 1963(A)

SECTION 1963(A), AS AMENDED, SETS OUT THE PENALTIES FOR RACKETEERING OFFENSES IN VIOLATION OF 18 U.S.C. 1962. CURRENT FINE AND IMPRISONMENT LEVELS ARE UNCHANGED. PARAGRAPHS (1), (2), AND (3) DESCRIBE PROPERTY OF THE DEFENDANT WHICH IS TO BE SUBJECT TO CRIMINAL FORFEITURE. PARAGRAPHS (1) AND (2) CARRY FORWARD (BUT IN CLEARER FORMAT) THE DESCRIPTION OF FORFEITABLE PROPERTY APPEARING IN CURRENT 18 U.S.C. 1963(A)(1) AND (2). PARAGRAPH (3) IS NEW, AND SPECIFICALLY PROVIDES FOR THE FORFEITURE OF PROCEEDS DERIVED FROM PROHIBITED RACKETEERING ACTIVITY OR UNLAWFUL DEBT COLLECTION. BOTH DIRECT AND DERIVATIVE PROCEEDS ARE FORFEITABLE. AS NOTED ABOVE, SEVERAL COURTS HAVE HELD THAT RACKETEERING PROCEEDS ARE NOT ENCOMPASSED WITHIN CURRENT RICO FORFEITURE PROVISIONS AND SUPREME COURT REVIEW OF THIS ISSUE IS NOW PENDING. THIS LIMITING INTERPRETATION HAS SIGNIFICANTLY DIMINISHED THE UTILITY OF THE RICO CRIMINAL FORFEITURE SANCTION AND IS AT ODDS WITH THE OVERALL PURPOSE OF THIS STATUTE. CLARIFICATION OF THE FORFEITABILITY OF RACKETEERING PROCEEDS HAS BEEN INCLUDED IN PAST FORFEITURE LEGISLATION AND CRIMINAL CODE REVISION LEGISLATION. [FN573]

TO COME WITHIN THE SCOPE OF PARAGRAPH (3), PROPERTY MUST CONSTITUTE, OR BE DERIVED FROM, PROCEEDS THE DEFENDANT OBTAINED THROUGH THE RACKETEERING ACTIVITY INVOLVED IN THE RICO VIOLATION. THUS, PROCEEDS ACCRUING TO AN ENTERPRISE OR ASSOCIATION INVOLVED IN A RICO VIOLATION WILL BE FORFEITABLE ONLY TO THE EXTENT THAT THEY ARE DERIVED FROM RACKETEERING ACTIVITY OR UNLAWFUL DEBT COLLECTION. [FN574] FOR EXAMPLE, IF ONLY PART OF A CORPORATION'S AFFAIRS WERE CONDUCTED THROUGH A PATTERN OF RACKETEERING ACTIVITY, THE GAIN PRODUCED THROUGH THIS ACTIVITY WOULD BE SUBJECT TO FORFEITURE BUT THE LEGITIMATELY PRODUCED PROFITS OF THE CORPORATION WOULD NOT.

IN PARAGRAPH (3), THE TERM 'PROCEEDS' HAS BEEN USED IN LIEU OF THE TERM 'PROFITS' IN ORDER TO ALLEVIATE THE UNREASONABLE BURDEN ON THE GOVERNMENT

18 U.S.C. 1963(B)

AS AMENDED, SECTION 1963(B) EMPHASIZES THAT PROPERTY SUBJECT TO FORFEITURE UNDER THE RICO STATUTE MAY BE EITHER REAL PROPERTY OR TANGIBLE OR INTANGIBLE PERSONAL PROPERTY, AND UNDERSCORES AN INTENT, CONSISTENT WITH CURRENT LAW, [FN577] THAT THE CONCEPT OF 'PROPERTY' AS USED IN SECTION 1963 IS TO BE BROADLY CONSTRUED. FORFEITURE LEGISLATION SUBMITTED BY THE ADMINISTRATION IN THE LAST CONGRESS (S. 2320), AND PASSED WITH AMENDMENTS BY THE SENATE AS PART OF S. 2527, INCLUDED IN THIS PROVISION A LENGTHY RECITATION OF EXAMPLES OF TYPES OF PROPERTY AND INTERESTS THAT COULD BE SUBJECT TO A RICO FORFEITURE. IN MATERIALS ACCOMPANYING THE SUBMISSION OF THIS BILL, THE ADMINISTRATION EXPLAINED THAT THIS LANGUAGE HAD BEEN DROPPED BECAUSE IT WOULD BE MORE APPROPRIATE TO INCLUDE SUCH A DISCUSSION AS PART OF THE BILL'S LEGISLATIVE HISTORY. IN ESSENCE, THIS LANGUAGE FROM THE FORMER FORFEITURE LEGISLATION EMPHASIZED THE FORFEITABILITY OF POSITIONS, OFFICES, AND EMPLOYMENT CONTRACTS ACQUIRED OR SUED IN RACKETEERING, OF COMPENSATION OR OTHER BENEFITS DERIVED FROM SUCH POSITIONS, AND OF AMOUNTS PAYABLE UNDER CONTRACTS AWARDED OR PERFORMED THROUGH RACKETEERING. THE COMMITTEE AGREES THAT FORFEITURE OF THE RIGHT TO EXERCISE OR BENEFIT FROM SUCH INTERESTS IS FULLY CONSISTENT WITH THE PURPOSES OF THE RICO FORFEITURE SANCTION.

18 U.S.C. 1963(C)

SUBSECTION (C) OF 18 U.S.C. 1963, AS AMENDED BY THE BILL, IS A CODIFICATION OF THE 'TAINT' THEORY WHICH HAS LONG BEEN RECOGNIZED IN FORFEITURE CASES. [FN578] UNDER THIS THEORY, FORFEITURE RELATES BACK TO THE TIME OF THE ACTS WHICH GIVE RISE TO THE FORFEITURE. THE INTEREST OF THE UNITED STATES IN THE PROPERTY IS TO VEST AT THAT TIME, AND IS NOT NECESSARILY EXTINQUISHED SIMPLY BECAUSE THE DEFENDANT SUBSEQUENTLY TRANSFERS HIS INTEREST TO ANOTHER. ABSENT APPLICATION OF THIS PRINCIPLE A DEFENDANT COULD ATTEMPT TO AVOID CRIMINAL FORFEITURE BY TRANSFERRING HIS PROPERTY TO ANOTHER PERSON
PRIOR TO CONVICTION. [FN579]

THE PURPOSE OF THIS PROVISION IS TO PERMIT THE VOIDING OF CERTAIN PRE-CONVICTION TRANSFERS AND SO CLOSE A POTENTIAL LOOPHOLE IN CURRENT **201

**3384 LAW WHEREBY THE CRIMINAL FORFEITURE SANCTION COULD BE AVOIDED BY TRANSFERS THAT WERE NOT 'ARMS' LENGTH' TRANSACTIONS. ON THE OTHER HAND, THIS PROVISION SHOULD NOT OPERATE TO THE DETRIMENT OF INNOCENT BONA FIDE PURCHASERS OF THE DEFENDANT'S PROPERTY. THEREFORE, SECTION 1963(C), AS AMENDED BY THE BILL, MAKES IT CLEAR THAT THIS PROVISION MAY NOT RESULT IN THE FORFEITURE OF PROPERTY ACQUIRED BY AN INNOCENT BONA FIDE PURCHASER. SUCH PURCHASERS ARE ENTITLED TO RELIEF UNDER THE NEW ANCILLARY HEARING PROCEDURE IN SECTION 1963(M) WHICH WAS ADOPTED BY AMENDMENT BY THE COMMITTEE.


18 U.S.C. 1963(D)

THIS PROVISION IS NEW TO THE LAW. IT PROVIDES THAT WHERE PROPERTY FOUND TO BE SUBJECT TO FORFEITURE IS NO LONGER AVAILABLE AT THE TIME OF CONVICTION, THE COURT IS AUTHORIZED TO ORDER THE DEFENDANT TO FORFEIT SUBSTITUTE ASSETS OF EQUIVALENT VALUE. THIS SUBSECTION ADDRESSES ONE OF THE MOST SERIOUS IMPEDIMENTS TO SIGNIFICANT CRIMINAL FORFEITURES. PRESENTLY, A DEFENDANT MAY SUCCEED IN AVOIDING THE FORFEITURE SANCTION SIMPLY BY TRANSFERRING HIS ASSETS TO ANOTHER, PLACING THEM BEYOND THE JURISDICTION OF THE COURT, OR TAKING OTHER ACTIONS TO RENDER HIS FORFEITABLE PROPERTY UNAVAILABLE AT THE TIME OF CONVICTION. UNDER THIS NEW PROVISION, FORFEITURE OF SUBSTITUTE ASSETS WOULD BE AUTHORIZED IN FIVE CIRCUMSTANCES: AS AMENDED, (1) CANNOT BE LOCATED; (2) HAS BEEN TRANSFERRED TO, SOLD TO, OR DEPOSITED WITH, A THIRD PARTY; [FN581] (3) HAS BEEN PLACED BEYOND THE JURISDICTION OF THE COURT; [FN582] (4) HAS BEEN SUBSTANTIALLY DIMINISHED IN VALUE BY ANY ACT OR OMISSION **202 **3385 OF THE DEFENDANT; [FN583] OR (5) HAS BEEN COMMINGLED WITH OTHER PROPERTY THAT CANNOT BE DIVIDED WITHOUT DIFFICULTY.

18 U.S.C. 1963(E)

THIS PROVISION SETS FORTH THE AUTHORITY OF THE COURTS TO ENTER RESTRAINING ORDERS TO PRESERVE THE AVAILABILITY OF FORFEITABLE ASSETS UNTIL THE CONCLUSION OF TRIAL. LIKE CURRENT 18 U.S.C. 1963(B), THIS AUTHORITY ALLOWS THE COURT TO ENTER A RESTRAINING ORDER, REQUIRE THE EXECUTION OF A
SATISFACTORY PERFORMANCE BOND, OR TAKE OTHER ACTION TO PRESERVE THE GOVERNMENT'S ABILITY TO REACH THE DEFENDANT'S FORFEITABLE ASSETS AFTER CONVICTION. THIS PROVISION EXPANDS CURRENT RESTRAINING ORDER AUTHORITY, HOWEVER, BY ALLOWING, IN CERTAIN LIMITED CIRCUMSTANCES, THE ENTRY OF A PRE-INDICTMENT RESTRAINING ORDER. AS NOTED ABOVE, THE COURTS PRESENTLY HAVE AUTHORITY TO ENTER RESTRAINING ORDERS ONLY AFTER THE FILING OF AN INDICTMENT OR INFORMATION. [FN584]

IT IS NOT INFREQUENT THAT A DEFENDANT BECOMES AWARE THAT HE IS THE TARGET OF A CRIMINAL INVESTIGATION BEFORE THE TIME HE IS FORMALLY CHARGED. INDEED, MOST COMPLEX CRIMINAL CASES, SUCH AS RICO CASES AND DRUG TRAFFICKING CONSPIRACIES, ARE PRECEDED BY A GRAND JURY INVESTIGATION, AND IT IS CURRENT DEPARTMENT OF JUSTICE POLICY GENERALLY TO NOTIFY THE SUBJECTS OF A GRAND JURY INVESTIGATION SO THAT THEY MAY HAVE AN OPPORTUNITY TO APPEAR BEFORE THE GRAND JURY. THUS, WHETHER THROUGH FORMAL NOTICE OF AN ONGOING GRAND JURY INVESTIGATION OR THROUGH OTHER MEANS, IT IS OFTEN THE CASE THAT DEFENDANTS BECOME AWARE OF THE GOVERNMENT'S DEVELOPMENT OF A CASE AGAINST THEM AND AS A CONSEQUENCE HAVE BOTH THE INCENTIVE AND OPPORTUNITY TO MOVE TO TRANSFER OR CONCEAL FORFEITABLE ASSETS BEFORE THE CURRENT JURISDICTION OF THE COURTS TO ENTER APPROPRIATE RESTRAINING ORDERS MAY BE INVOKED.

THE NEW PRE-INDICTMENT RESTRAINING ORDER AUTHORITY PROVIDED IN SECTION 1963(E), AS AMENDED, PROVIDES A MECHANISM TO ADDRESS THIS SITUATION. HOWEVER, SINCE IN SUCH CASES THE GOVERNMENT WILL BE SEEKING TO RESTRAIN THE TRANSFER OR MOVEMENT OF PROPERTY PRIOR TO THE FILING OF FORMAL CHARGES, IT IS APPROPRIATE THAT THIS REMEDY BE AVAILABLE ONLY UPON A STRONG SHOWING BY THE GOVERNMENT.

PARAGRAPH (1)(A) PROVIDES THAT A RESTRAINING ORDER MAY ISSUE 'UPON THE FILING OF AN INDICTMENT OR INFORMATION CHARGING A VIOLATION OF SECTION 1962 OF THIS CHAPTER (18 U.S.C. 1962) AND ALLEGING THAT THE PROPERTY WITH RESPECT TO WHICH THE ORDER IS SOUGHT WOULD, IN THE EVENT OF CONVICTION, BE SUBJECT TO FORFEITURE UNDER THIS SECTION.' THUS, THE PROBABLE CAUSE ESTABLISHED IN THE INDICTMENT OR INFORMATION IS, IN ITSELF, TO BE A SUFFICIENT BASIS FOR ISSUANCE OF A RESTRAINING ORDER. WHILE THE COURT MAY CONSIDER FACTORS BEARING ON THE REASONABLENESS OF THE ORDER SOUGHT, IT IS NOT TO 'LOOK BEHIND' THE INDICTMENT OR REQUIRE THE GOVERNMENT TO PRODUCE ADDITIONAL EVIDENCE REGARDING THE MERITS OF THE CASE AS A PREREQUISITE TO ISSUING A POST-INDICTMENT RESTRAINING ORDER. SINCE A WARRANT FOR THE ARREST OF THE DEFENDANT MAY ISSUE UPON THE FILING OF AN INDICTMENT *203 **3386 OR INFORMATION, AND SO THE INDICTMENT OR INFORMATION IS SUFFICIENT TO SUPPORT A RESTRAINT ON THE DEFENDANT'S LIBERTY, IT IS CLEAR THAT THE SAME BASIS IS SUFFICIENT TO SUPPORT A RESTRAINT ON THE DEFENDANT'S ABILITY TO TRANSFER OR REMOVE PROPERTY ALLEGED TO BE SUBJECT TO CRIMINAL FORFEITURE IN THE INDICTMENT.

IS NOT TO ENTERTAIN CHALLENGES TO THE VALIDITY OF THE INDICTMENT. FOR THE
PURPOSES OF ISSUING A RESTRAINING ORDER, THE PROBABLE CAUSE ESTABLISHED
IN THE INDICTMENT OR INFORMATION IS TO BE DETERMINATIVE OF ANY ISSUE
REGARDING THE MERITS OF THE GOVERNMENT'S CASE ON WHICH THE FORFEITURE IS
TO BE BASED.

PARAGRAPH (1)(B) PERMITS THE COURT TO ENTER A RESTRAINING ORDER PRIOR TO
INDICTMENT IF, AFTER NOTICE AND AN OPPORTUNITY FOR A HEARING, THE COURT
DETERMINES THAT 'THERE IS A SUBSTANTIAL PROBABILITY THAT THE UNITED STATES
WILL PREVAIL ON THE ISSUE OF FORFEITURE AND THAT FAILURE TO ENTER THE ORDER
WILL RESULT IN THE PROPERTY BEING DESTROYED, REMOVED FROM THE
JURISDICTION OF THE COURT, OR OTHERWISE MADE UNAVAILABLE FOR FORFEITURE'
AND ALSO DETERMINES THAT 'THAT THE NEED TO PRESERVE THE AVAILABILITY OF THE
PROPERTY THROUGH THE ENTRY OF THE REQUESTED ORDER OUTWEIGHS THE
HARDSHIP ON ANY PARTY AGAINST WHOM THE ORDER IS TO BE ENTERED.' THUS, THE
STANDARD FOR ISSUANCE OF A RESTRAINING ORDER PRIOR TO THE FILING OF AN
INDICTMENT OR INFORMATION IS A STRINGENT ONE. IT IS STRESSED, HOWEVER,
THAT THIS STRINGENT STANDARD APPLIES ONLY IN THIS CONTEXT; IT IS NOT TO BE
EXTENDED TO RESTRAINING ORDERS SOUGHT AFTER INDICTMENT. A PRE-INDICTMENT
RESTRAINING ORDER IS TO EXTEND FOR NO MORE THAN NINETY DAYS, UNLESS
EXTENDED BY THE COURT FOR GOOD CAUSE SHOWN OR UNLESS AN INDICTMENT OR
INFORMATION HAS BEEN FILED IN THE INTERIM.

PARAGRAPH (2) DESCRIBES THOSE SITUATIONS IN WHICH A PRE-INDICTMENT
RESTRAINING ORDER MAY ISSUE, ON A TEMPORARY BASIS, WITHOUT PRIOR NOTICE
OR OPPORTUNITY FOR A HEARING. IN ORDER TO OBTAIN SUCH AN EX PARTE ORDER
THE GOVERNMENT MUST ESTABLISH PROBABLE CAUSE TO BELIEVE THAT THE
PROPERTY IS SUBJECT TO FORFEITURE AND THAT PROVISION OF NOTICE WOULD
JEOPARDIZE THE AVAILABILITY OF THE PROPERTY. CERTAIN TYPES OF PROPERTY,
PARTICULARLY HIGHLY LIQUID ASSETS FORFEITABLE AS PROCEEDS OF DRUG
TRAFFICKING OR CASH PRODUCING RACKETEERING SCHEMES, MAY BE EASILY MOVED,
CONCEALED OR DISPOSED OF EVEN IN THE RELATIVELY SHORT PERIOD OF TIME THAT
MAY ELAPSE BETWEEN THE GIVING OF NOTICE AND THE HOLDING OF AN ADVERSARY
HEARING CONCERNING THE ENTRY OF A RESTRAINING ORDER. IN SUCH CASES, THERE
MAY BE A COMPELLING NEED FOR A TEMPORARY EX PARTE ORDER.

*204 **3387* THE PERMISSIBILITY OF THE POSTPONEMENT OF NOTICE AND HEARING
UNTIL AFTER THE INITIAL ENTRY OF A RESTRAINING ORDER IN A CRIMINAL
FORFEITURE CASE HAS NOT BEEN SQUARELY ADDRESSED BY THE SUPREME COURT.
[FN585] THE COURT HAS, HOWEVER, ADDRESSED THIS ISSUE WITH RESPECT TO THE
MORE INTRUSIVE ACTION OF SEIZURE IN THE CONTEXT OF A CIVIL FORFEITURE. IN
CALERO-TOLEDO V. PEARSON YACHT LEASING CO., [FN586] A YACHT ON WHICH
MARIJUANA WAS FOUND WAS SEIZED, PURSUANT TO A CIVIL FORFEITURE STATUTE,
WITHOUT PRIOR NOTICE OR ADVERSARY HEARING. A THREE-JUDGE DISTRICT COURT,
RELYING PRIMARILY ON A 1972 SUPREME COURT CASE, [FN587] HELD THAT THE
FAILURE OF THE FORFEITURE STATUTE TO PROVIDE FOR PRESEIZURE NOTICE AND
HEARING RENDERED IT UNCONSTITUTIONAL. THE SUPREME COURT REVERSED,
HOLDING THAT IMMEDIATE SEIZURE OF A PROPERTY INTEREST, WITHOUT AN
OPPORTUNITY FOR A PRIOR HEARING, WAS PERMITTED IN THESE LIMITED
CIRCUMSTANCES, BECAUSE, FIRST, THE SEIZURE STATUTE SERVED A SIGNIFICANT
GOVERNMENTAL PURPOSE, I.E., PREVENTING CONTINUED CRIMINAL USE OF THE
PROPERTY AND ENFORCING CRIMINAL SANCTIONS; SECOND, PRIOR NOTICE MIGHT
FRUSTRATE THE PURPOSE OF THE STATUTE, SINCE THE PROPERTY COULD BE
REMOVED, CONCEALED, OR DESTROYED IF ADVANCE WARNING OF THE SEIZURE WERE
GIVEN; AND THIRD, UNLIKE THE SITUATION IN FUENTES, THE SEIZURE WAS NOT
INITIATED BY SELF-INTERESTED PRIVATE PARTIES, BUT RATHER BY GOVERNMENT
OFFICIALS. SINCE THESE CONSIDERATIONS ARE ALSO PRESENT WHERE THE
GOVERNMENT SEEKS SIMPLY TO RESTRAIN THE TRANSFER OR DISPOSITION OF
PROPERTY THAT MAY BE SUBJECT TO CRIMINAL FORFEITURE, IT SEEMS CLEAR THAT

THE COMMITTEE ADOPTED AN AMENDMENT TO THE RICO RESTRAINING ORDER PROVISION ADDING A NEW PARAGRAPH (3). THIS AMENDMENT PROVIDES THAT INFORMATION AND EVIDENCE RECEIVED AT A HEARING CONCERNING A RESTRAINING ORDER NEED NOT CONFORM TO THE STANDARDS OF ADMISSIBILITY SET OUT IN THE FEDERAL RULES OF EVIDENCE. IF THE RULES OF ADMISSIBILITY WERE TO APPLY AT SUCH HEARINGS, AS HAS BEEN HELD BY THE NINTH CIRCUIT, [FN589] THIS WOULD MEAN THAT THE GOVERNMENT COULD NOT RELY ON HEARSAY OR PROFFER, AND THUS MIGHT BE REQUIRED TO EXPOSE ITS WITNESSES PREMATURELY. IN CERTAIN CASES, THIS MAY JEOPARDIZE THE SAFETY OF WITNESSES OR SUBJECT THEM TO PRESSURES THAT MAY DISSUADE THEM FROM TESTIFYING AT TRIAL. THE CASES TO WHICH CRIMINAL FORFEITURE ARE TO APPLY UNDER THIS BILL, RACKETEERING AND DRUG TRAFFICKING CASES, ARE THE VERY SORTS OF CASES IN WHICH THE POTENTIAL FOR INTIMIDATION OF AND DANGER TO WITNESSES IS OF GREATEST CONCERN. GENERALLY, THE FEDERAL RULES OF EVIDENCE DO NOT APPLY TO 'PRELIMINARY EXAMINATIONS IN CRIMINAL CASES.' [FN590] IN THE COMMITTEE'S VIEW, THERE ARE COMPELLING REASONS FOR ASSURING THAT THIS PRINCIPLE EXTENDS TO HEARINGS CONCERNING THE ENTRY OF RESTRAINING ORDERS IN CRIMINAL FORFEITURE CASES.

18 U.S.C. 1963(F)


18 U.S.C. 1963(G)
SUBSECTION (G) CONCERNS MATTERS REGARDING THE DISPOSITION OF PROPERTY. FOLLOWING THE SEIZURE OF THE PROPERTY, THE ATTORNEY GENERAL IS AUTHORIZED TO DIRECT ITS DISPOSAL BY SALE OR OTHER COMMERCIAL FEASIBLE MEANS, MAKING DUE PROVISION FOR THE RIGHTS OF ANY INNOCENT PERSONS. AS IN CURRENT LAW, THIS SUBSECTION PROVIDES THAT AN INTEREST THAT IS NOT EXERCISABLE BY, OR TRANSFERABLE FOR VALUE TO, THE UNITED STATES SHALL EXPIRE AND SHALL NOT REVERT TO THE DEFENDANT. HOWEVER, UNLIKE CURRENT LAW, SUBSECTION (G) SPECIFICALLY PROHIBITS REACQUISITION BY THE DEFENDANT OF PROPERTY HE HAS FORFEITED. 

SINCE, UNDER CURRENT PRACTICE, THIRD PARTIES WHO ASSERT AND INTEREST IN PROPERTY WHICH IS THE SUBJECT OF CRIMINAL FORFEITURE MAY NOT INTERVENE IN THE CRIMINAL CASE--A PRINCIPLE SET OUT IN SUBSECTION (J)--SUBSECTION (G) AUTHORIZES THE COURT TO STAY DISPOSITION OF THE PROPERTY PENDING AN APPEAL OF THE CRIMINAL CASE, IF THE THIRD PARTY DEMONSTRATES THAT THE DISPOSITION OF THE PROPERTY WILL RESULT IN IRREPARABLE INJURY, HARM, OR LOSS TO HIM.

ONCE THE PROPERTY HAS BEEN DISPOSED OF, THE PROCEEDS ARE TO BE USED TO PAY THE EXPENSES OF THE FORFEITURE AND SALE, INCLUDING COSTS ARISING FROM THE SEIZURE, MAINTENANCE, AND CUSTODY OF THE PROPERTY. THE REMAINING AMOUNTS ARE TO BE DEPOSITED IN THE GENERAL FUND OF THE TREASURY.

18 U.S.C. 1963(H)

SUBSECTION (H) OF 18 U.S.C. 1963, AS SET FORTH IN SECTION 302 OF THE BILL, DESCRIBES SEVERAL ASPECTS OF THE AUTHORITY OF THE ATTORNEY GENERAL WITH respect to PROPERTY THAT HAS BEEN ORDERED FORFEITED. THIS AUTHORITY IS IN ESSENCE CARRIED FORWARD FROM EXISTING LAW, ALTHOUGH IN A MORE STRAIGHTFORWARD MANNER. UNDER 18 U.S.C. 1961, THE ATTORNEY GENERAL MAY DESIGNATE OTHER OFFICIALS TO EXERCISE THIS AUTHORITY OR ANY OTHER POWERS CONFERRED UPON HIM BY THE RICO STATUTE. THE AUTHORITY DESCRIBED IN SUBSECTION (H) INCLUDES: (1) GRANTING PETITIONS FOR REMISSION OR MITIGATION OF FORFEITURE, RESTORING FORFEITED PROPERTY TO VICTIMS, AND TAKING OTHER ACTIONS TO PROTECT THE RIGHTS OF INNOCENT PERSONS; (2) COMPROMISING CLAIMS; (3) AWARDING COMPENSATION TO PERSONS PROVIDING INFORMATION THAT LED TO A FORFEITURE; (4) DIRECTING THE DISPOSITION, BY THE UNITED STATES, OF THE PROPERTY; AND (5) TAKING MEASURES TO PROTECT AND MAINTAIN THE PROPERTY PENDING ITS DISPOSITION.

18 U.S.C. 1963(I)


18 U.S.C. 1963(J)

IN S. 829 AS INTRODUCED, THIS PROVISION OF THE BILL REQUIRED THIRD PARTIES TO EXHAUST THE ADMINISTRATIVE REMEDY OF PETITIONING THE ATTORNEY GENERAL FOR REMISSION OR MITIGATION OF FORFEITURE BEFORE SEEKING JUDICIAL RESOLUTION OF THEIR CLAIMS. IN LIGHT OF THE COMMITTEE'S ADDITION OF THE NEW ANCILLARY HEARING PROCEDURE IN SECTION 1963(M), WHICH IS BASED ON THE RECOGNITION THAT THIRD PARTIES ASSERTING LEGAL CLAIMS INCONSISTENT WITH THE ORDER OF FORFEITURE ARE ENTITLED TO A JUDICIAL RESOLUTION OF THEIR CLAIMS, THE LANGUAGE OF SUBSECTION (J) WAS AMENDED TO REFLECT THE PURPOSE AND SCOPE OF THE NEW HEARING PROCEDURE.

18 U.S.C. 1963(K)


18 U.S.C. 1963(L)


18 U.S.C. 1963(M)

THIS NEW SUBSECTION ADDED TO 18 U.S.C. 1963 WAS NOT INCLUDED IN S. 829 AS INTRODUCED. IT PROVIDES FOR AN ANCILLARY HEARING TO BE HELD AFTER CONVICTION OF THE DEFENDANT AT WHICH THIRD PARTIES ASSERTING A LEGAL INTEREST IN PROPERTY THAT HAS BEEN ORDERED FORFEITED MAY OBTAIN A JUDICIAL RESOLUTION OF THEIR CLAIMS. UNTIL RECENTLY, THE DEPARTMENT OF JUSTICE HAD ADHERED TO THE POSITION THAT ALL THIRD PARTIES, WHETHER ASSERTING A LEGAL OR EQUITABLE BASIS FOR RELIEF FROM AN ORDER OF CRIMINAL FORFEITURE, SHOULD, AT LEAST IN THE FIRST INSTANCE, PURSUE THE REMEDY OF PETITIONING THE ATTORNEY GENERAL FOR REMISSION OR MITIGATION OF FORFEITURE. [FN595] TRADITIONALLY, THE ATTORNEY GENERAL'S DECISION WITH RESPECT TO SUCH PETITIONS, PETITIONS WHICH ARE MOST FREQUENTLY FILED AS THE RESULT OF CIVIL FORFEITURE ACTIONS, HAS BEEN VIEWED ENTIRELY AS A MATTER OF DISCRETION AND NOT SUBJECT TO JUDICIAL
REVIEW. SINCE THIRD PARTIES WITH INTERESTS IN CRIMINALLY FORFEITABLE PROPERTY MAY NOT PARTICIPATE IN THE CRIMINAL TRIAL, WHILE ALL PARTIES WITH AN INTEREST IN CIVILLY FORFEITABLE PROPERTY MAY PARTICIPATE IN JUDICIAL FORFEITURE PROCEEDINGS, STRICT APPLICATION OF THE PRINCIPLE OF DISCRETIONARY, NONREVIEWABLE ADMINISTRATIVE DECISIONS ON THIRD PARTY CLAIMS IN THE CRIMINAL FORFEITURE CONTEXT HAD BEEN OF CONCERN TO THE COMMITTEE.

AFTER INTRODUCTION OF S. 829, THE DEPARTMENT OF JUSTICE INFORMED THE COMMITTEE THAT THEIR POSITION WITH RESPECT TO THIRD PARTY CLAIMS IN THE CRIMINAL FORFEITURE CONTEXT HAD CHANGED. THE DEPARTMENT'S NEW POSITION IS THAT THIRD PARTIES WHO ASSERT CLAIMS TO CRIMINALLY FORFEITED PROPERTY WHICH, IN ESSENCE, ARE CHALLENGES TO THE VALIDITY OF THE ORDER OF FORFEITURE ARE ENTITLED TO A JUDICIAL DETERMINATION OF THEIR CLAIMS. Thus, IT WOULD BE IMPROPER TO REQUIRE SUCH PARTIES TO SEEK RELIEF IN THE REMISSION AND MITIGATION PROCESS (AS MAY HAVE BEEN IMPLICIT IN THE BILL AS INTRODUCED), SINCE THE GRANTING OF SUCH PETITIONS IS SOLELY A MATTER OF EXECUTIVE DISCRETION. HOWEVER, THE REMISSION AND MITIGATION PROCESS WOULD REMAIN THE APPROPRIATE EXCLUSIVE REMEDY FOR THIRD PARTIES WHO ASSERT NOT A LEGAL BASIS FOR RELIEF, BUT RATHER MERE EQUITABLE GROUNDS.

CRIMINAL FORFEITURE IS AN IN PERSONAM PROCEEDING. THUS, AN ORDER OF FORFEITURE MAY REACH ONLY PROPERTY OF THE DEFENDANT, SAVE IN THOSE INSTANCES WHERE A TRANSFER TO A THIRD PARTY IS VOIDABLE. Thus, IF A THIRD PARTY CAN DEMONSTRATE THAT HIS INTEREST IN THE FORFEITED PROPERTY IS EXCLUSIVE OF OR SUPERIOR TO THE INTEREST OF THE DEFENDANT, THE THIRD PARTY'S CLAIM RENDERS THAT PORTION OF THE ORDER OF FORFEITURE REACHING HIS INTEREST INVALID. THE COMMITTEE STRONGLY AGREES WITH THE DEPARTMENT OF JUSTICE THAT SUCH THIRD PARTIES ARE ENTITLED TO JUDICIAL RESOLUTION OF THEIR CLAIMS.


UNDER THE NEW ANCILLARY HEARING PROCEDURE, THE GOVERNMENT, FOLLOWING THE ENTRY OF AN ORDER OF FORFEITURE IS TO PUBLISH NOTICE OF THE ORDER OF FORFEITURE AND ITS INTENT TO DISPOSE OF THE PROPERTY. DIRECT WRITTEN NOTICE TO INTERESTED THIRD PARTIES MAY SERVE AS A SUBSTITUTE FOR PUBLISHED NOTICE. WITHIN THIRTY DAYS AFTER PUBLICATION OF NOTICE OR THE RECEIPT OF DIRECT NOTICE, ANY THIRD PARTY ASSERTING A LEGAL INTEREST IN THE PROPERTY ORDERED FORFEITED MAY PETITION THE COURT (THE COURT HAVING HEARD THE CRIMINAL CASE) FOR A HEARING TO ADJUDICATE THE VALIDITY OF HIS ALLEGED INTEREST. THE HEARING IS TO BE HELD BEFORE THE COURT ALONE.


IN ADDITION TO EVIDENCE AND TESTIMONY PRESENTED AT THE HEARING, THE COURT MAY CONSIDER RELEVANT PORTIONS OF THE RECORD OF THE CRIMINAL CASE. THIS WILL ALLOW THE COURT TO QUICKLY DISPENSE WITH CLAIMS THAT HAVE ALREADY BEEN CONSIDERED AT TRIAL, AS FOR EXAMPLE, WHERE THE JURY HAS ALREADY DETERMINED THAT THE THIRD PARTY HELD THE PROPERTY ONLY AS A NOMINEE OF THE DEFENDANT OR THAT A TRANSFER TO THE THIRD PARTY WAS A SHAM TRANSACTION.
Paragraph (6) provides that a third party will prevail if his claim falls into one of two categories: first, where the petitioner had a legal interest in the property that, at the time of the commission of the acts giving rise to the forfeiture, was vested in him rather than the defendant or was superior to the interest of the defendant; or second, where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a bona fide purchase for value and had no reason to believe that the property was subject to forfeiture. [FN598] Since the United States will have already proven its forfeiture allegations in the criminal case beyond a reasonable doubt, the burden of proof at the hearing will be on the third party. However, the petitioner is held only to a preponderance of the evidence standard. Following the court's disposition of all third party petitions, or if no third party filed a petition within the time allowed, the United States would then have clear title to the property. This final provision attempts to address the problems increasingly encountered by the government in selling criminally forfeited property because of concerns about the government's ability to convey clear title to such property in the absence of a judicial resolution of third party claims.

A third party who fails to obtain relief under the new ancillary hearing provision or who does not file a petition for a hearing may seek equitable relief from the Attorney General by filing a petition for remission or mitigation of forfeiture. The Attorney General's decision on such petition shall not be subject to judicial review, as is the case under current law.

Part B

Section 303

Section 303 of Title III amends the Comprehensive Drug Abuse Prevention and Control Act of 1970 [FN599] by adding a new section which sets forth a criminal forfeiture statute that is to be applicable to all felony offenses under the act. This statute is, in nearly all respects, identical to the RICO criminal forfeiture statute as amended in section 302 of the bill. Currently, the CCE statute, [FN600] which punishes those who control a group of five or more persons who are engaged in continuing drug-related crimes, is the sole provision of Title 21, U.S.C. which provides for the sanction of criminal forfeiture. However, the civil forfeiture provisions *210 **3393 of Title 21 [FN601] are quite broad and permit the forfeiture of a variety of property used in drug offenses, including the proceeds of drug transactions. Civil forfeiture has certain advantages over criminal forfeiture. For example, the standard of proof is lower, the government commences its case with seizure of the property, thus reducing the opportunities for improper disposition of forfeitable assets, and civil forfeiture may be used when prosecution is not possible as where the defendant owner is a fugitive. On the other hand, there are certain drawbacks to civil forfeiture that could be avoided if prosecutors had the option of seeking criminal forfeiture in all major drug cases.

Civil forfeiture is an in rem proceeding against the property itself, and thus a separate civil action must be filed in each district in which the property is located. In cases of large drug trafficking operations, forfeitable property may be located in several districts. Thus, separate but parallel civil actions must be filed in each district in which such property is located. Criminal forfeiture, on the other hand, is an in personam action, and therefore the jurisdiction of the court to enter
ORDERS AFFECTING PROPERTY SUBJECT TO CRIMINAL FORFEITURE IS NOT LIMITED TO PROPERTY WITHIN THE DISTRICT IN WHICH THE CRIMINAL CASE IS TRIED. WHERE THE ISSUES RELATING TO CIVIL FORFEITURE ARE THE SAME AS OR CLOSELY RELATED TO THOSE THAT WILL ARISE IN THE PROSECUTION OF A DRUG OFFENSE, IT IS A WASTE OF VALUABLE JUDICIAL AND PROSECUTIVE RESOURCES TO REQUIRE SEPARATE CIVIL FORFEITURE PROCEEDINGS AGAINST PROPERTY OF THE DEFENDANT EVEN THOUGH THE EVIDENCE PRESENTED IN THE CRIMINAL CASE WILL BE LARGELY DISPOSITIVE OF THE CIVIL FORFEITURE ACTION. THE FORFEITURE OF MORE SIGNIFICANT AMOUNTS OF DRUG-RELATED PROPERTY WOULD LIKELY BE ACHIEVED IF THE JUDGE AND JURY CONSIDERING THE CRIMINAL CASE WERE ALSO PERMITTED TO DETERMINE THE FORFEITURE ISSUE, AND THE PROSECUTOR AND INVESTIGATORS WHO HAVE PREPARED THE CRIMINAL CASE CAN MORE READILY APPLY THEIR ENERGY AND EXPERTISE TO AN AGGRESSIVE PURSUIT OF CRIMINAL FORFEITURE.


THE NEW CRIMINAL FORFEITURE STATUTE CREATED IN SECTION 303 OF THE BILL IS TO APPEAR AS SECTION 413 OF THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT. THIS STATUTE IS DIVIDED INTO THE FOLLOWING SUBSECTIONS:

SUBSECTION (A)-- PROPERTY SUBJECT TO CRIMINAL FORFEITURE

SUBSECTION (A) PROVIDES THAT THE CRIMINAL FORFEITURE SANCTION CREATED IN SECTION 303 OF THE BILL IS TO APPLY TO ALL DRUG FELONIES IN TITLES II AND III OF THE COMPREHENSIVE DRUG ABUSE PREVENTION AND *211 **3394 CONTROL ACT. [FN602] THE TYPES OF PROPERTY WHICH ARE TO BE SUBJECT TO AN ORDER OF CRIMINAL FORFEITURE ARE DESCRIBED IN PARAGRAPHS (1), (2), AND (3) OF SUBSECTION (A). THE FIRST CATEGORY OF PROPERTY IS THAT WHICH CONSTITUTES OR IS DERIVED FROM THE PROCEEDS THE DEFENDANT OBTAINED AS A RESULT OF THE VIOLATION FOR WHICH HE WAS CONVICTED. THE SAME TYPE OF PROPERTY IS NOW SUBJECT TO CIVIL FORFEITURE UNDER 21 U.S.C. 881(A)(6). THE REASONS FOR USING THE TERM 'PROCEEDS' TO DEFINE THIS TYPE OF PROPERTY WERE DISCUSSED SUPRA IN THE CONTEXT OF THE AMENDMENTS TO THE RICO CRIMINAL FORFEITURE PROVISIONS. THE TYPE OF PROPERTY WHICH IS SUBJECT TO CRIMINAL FORFEITURE UNDER PARAGRAPH (2) IS THAT WHICH IS 'USED, OR INTENDED TO BE USED * * * TO COMMIT, OR TO FACILITATE THE COMMISSION OF' THE OFFENSE FOR WHICH THE DEFENDANT WAS CONVICTED. THIS IS GENERALLY THE MANNER IN WHICH PROPERTY SUBJECT TO CIVIL FORFEITURE IS DEFINED IN 21 U.S.C. 881, ALTHOUGH SECTION 881 REFERS TO SPECIFIC TYPES OF PROPERTY SUCH AS VEHICLES, RECORDS, CONTAINERS, AND EQUIPMENT. SUBSECTION (A)(2) OF THE BILL'S CRIMINAL FORFEITURE STATUTE, ON THE OTHER HAND, REFERS SIMPLY TO 'PROPERTY' USED IN THE VIOLATION. THE DESCRIPTION OF PROPERTY SUBJECT TO CRIMINAL FORFEITURE WHICH IS SET OUT IN SUBSECTION (A)(3) CARRIES FORWARD THAT PORTION OF THE PRESENT CCE STATUTE WHICH AUTHORIZES THE FORFEITURE OF INTERESTS IN, OR WHICH AFFORD A SOURCE OF CONTROL OVER, A CONTINUING CRIMINAL ENTERPRISE. [FN603] SUBSECTION (A) ALSO EMPHASIZES THAT THE ENTRY OF AN ORDER OF FORFEITURE IS MANDATORY FOLLOWING CONVICTION. THE MANDATORY NATURE OF CRIMINAL FORFEITURE WAS DISCUSSED SUPRA IN THE CONTEXT OF THE RICO FORFEITURE AMENDMENTS.

SUBSECTION (B)-- MEANING OF TERM 'PROPERTY'

LIKE 18 U.S.C. 1963(B), AS AMENDED IN SECTION 302 OF THE BILL, THIS SUBSECTION
OF THE NARCOTICS CRIMINAL FORFEITURE STATUTE MAKES IT CLEAR THAT PROPERTY SUBJECT TO CRIMINAL FORFEITURE MAY BE REAL PROPERTY OR TANGIBLE OR INTANGIBLE PERSONAL PROPERTY.

SUBSECTION (C)-- THIRD PARTY TRANSFERS

THIS SUBSECTION SETS FORTH THE SAME PRINCIPLES ALLOWING THE VOIDING OF CERTAIN PRE-CONVICTION TRANSFERS OF FORFEITABLE ASSETS. IT IS IDENTICAL TO SUBSECTION (C) OF THE RICO FORFEITURE PROVISIONS AS AMENDED IN SECTION 302 OF THE BILL. FOR FURTHER DISCUSSION OF THIS *212 **3395 PROVISION, SEE THE ANALYSIS CONCERNING 18 U.S.C. 1963(C), AS AMENDED, SUPRA.

SUBSECTION (D)-- SUBSTITUTE ASSETS


SUBSECTION (E)-- PRESUMPTION OF FORFEITABILITY

THE EXTREMELY LUCRATIVE NATURE OF DRUG TRAFFICKING IS WELL ESTABLISHED, AND INDEED IS A PRIMARY REASON WHY THE FORFEITURE OF THE PROCEEDS OF DRUG TRANSACTIONS IS NECESSARY TO EFFECTIVELY DETER AND PUNISH SUCH CONDUCT. HOWEVER, IT IS OFTEN DIFFICULT TO PRODUCE DIRECT EVIDENCE THAT PARTICULAR PROPERTY OF A DEFENDANT CONSTITUTES, OR WAS PURCHASED WITH, SUCH PROCEEDS. THERE ARE CERTAIN CIRCUMSTANCES WHICH ARE INDICATIVE OF THE FACT THAT PARTICULAR PROPERTY DOES REPRESENT SUCH PROCEEDS. THE PURPOSE OF SUBSECTION (E) IS TO ESTABLISH A PERMISSIVE INFERENCE THAT PROPERTY IS SUBJECT TO FORFEITURE WHEN SUCH CIRCUMSTANCES ARE ESTABLISHED. AS INTRODUCED, S. 829 DID NOT CONTAIN THIS PROVISION. HOWEVER, THE EXPLANATORY MATERIALS WHICH ACCOMPANIED THE PRESIDENT'S TRANSMITTAL OF THIS LEGISLATION TO THE CONGRESS REFERRED TO SUCH A PROVISION. THUS ITS OMISSION MAY HAVE BEEN INADVERTENT. SINCE THE COMMITTEE DETERMINED THAT SUCH A PRESUMPTION WOULD BE EXTREMELY USEFUL IN OBTAINING THE FORFEITURE OF THE HUGE PROFITS PRODUCED BY ILLICIT DRUG TRAFFICKING, IT ADOPTED AN AMENDMENT INSERTING THIS PROVISION. THIS PRESUMPTION IS DRAWN FROM AN ANALOGOUS SECTION OF THE FORFEITURE PROVISIONS OF H.R. 3963, AS PASSED BY THE HOUSE AND SENATE AT THE CLOSE OF THE 97TH CONGRESS. [FN604]

IN ORDER TO INVOKE THE INFERENCE SET OUT IN SUBSECTION (E) THAT PARTICULAR PROPERTY IS SUBJECT TO CRIMINAL FORFEITURE UNDER THE NARCOTICS FORFEITURE STATUTE OF SECTION 303 OF THE BILL, TWO ELEMENTS MUST BE ESTABLISHED BY THE GOVERNMENT. FIRST, THE DEFENDANT MUST HAVE ACQUIRED THE PROPERTY DURING, OR WITHIN A REASONABLY RELATED TIME AFTER, THE PERIOD DURING WHICH HE COMMITTED THE VIOLATION FOR WHICH HE WAS CONVICTED. SECOND, THERE MUST BE NO LIKELY SOURCE FOR THE PROPERTY OTHER THAN THE VIOLATION. THIS SECOND ELEMENT IS AKIN TO THE FAMILIAR 'NET WORTH' METHOD OF PROOF COMMONLY USED IN TAX CASES. ONCE THESE FACTORS ARE ESTABLISHED, THE TRIER OF FACT MAY REJECT APPLICATION OF THE PRESUMPTION, OR MORE ACCURATELY, THE INFERENCE SET OUT IN SUBSECTION (E) IF IT IS NOT MERITED UNDER THE FACTS OF THE CASE OR IN LIGHT OF EVIDENCE PRODUCED BY THE DEFENDANT WHICH WOULD BRING INTO QUESTION ITS VALIDITY IF IT WERE APPLIED.

FRAMED AS A PERMISSIVE AND REBUTTABLE INFERANCE RATHER THAN A MANDATORY PRESUMPTION, THE PRESUMPTION IN SUBSECTION (E) WOULD APPEAR TO MEET CONSTITUTIONAL REQUIREMENTS. [FN605]
SUBSECTION (F)-- PROTECTIVE ORDERS

SUBSECTION (F) AUTHORIZES THE COURTS TO ENTER APPROPRIATE RESTRAINING ORDERS AND INJUNCTIONS, REQUIRE THE EXECUTION OF PERFORMANCE BONDS, AND TAKES OTHER ACTIONS TO PROTECT THE AVAILABILITY OF PROPERTY THAT MAY BE SUBJECT TO CRIMINAL FORFEITURE. THIS AUTHORITY IS THE SAME AS THAT PROVIDED IN THE ANALOGOUS PROVISION OF THE AMENDMENTS TO THE RICO CRIMINAL FORFEITURE STATUTE IN SECTION 302. FOR A DISCUSSION OF THIS PROTECTIVE ORDER PROVISION, SEE THE ANALYSIS SUPRA OF THAT PART OF SECTION 302 RELATING TO 18 U.S.C. 1963(E).

SUBSECTION (F)-- PROTECTIVE ORDERS

THIS SUBSECTION OF THE NEW CRIMINAL FORFEITURE STATUTE SET OUT IN SECTION 303 AUTHORIZES THE COURT TO ISSUE A WARRANT OF SEIZURE, BASED UPON A PROBABLE CAUSE SHOWING, IF IT FURTHER DETERMINES THAT A PROTECTIVE ORDER ISSUED UNDER SUBSECTION (F) WOULD NOT BE SUFFICIENT TO ASSURE THE AVAILABILITY OF THE PROPERTY FOR FORFEITURE. THE TYPES OF PROPERTY SUBJECT TO FORFEITURE IN NARCOTICS CASES ARE OFTEN IN FORMS THAT ARE EASILY MOVED OR CONCEALED, OR ARE HIGHLY LIQUID. WITH RESPECT TO THIS TYPE OF PROPERTY, ENTRY OF A RESTRAINING ORDER MAY NOT BE ADEQUATE TO ASSURE THAT THE PROPERTY WILL BE AVAILABLE IN THE EVENT THE DEFENDANT IS CONVICTED. IN SUCH CASES, IT MAY BE NECESSARY FOR THE GOVERNMENT TO SEIZE THE PROPERTY AND EITHER TAKE CUSTODY OF IT OR TRANSFER CUSTODY TO THE COURT.

SUBSECTION (H)-- EXECUTION

THIS SUBSECTION, WHICH DEALS WITH MATTERS AFTER THE ENTRY OF THE ORDER OF FORFEITURE UP TO THE TIME THAT THE PROPERTY IS TO BE DISPOSED OF, CORRESPONDS TO PROPOSED 18 U.S.C. 1963(F) AS SET OUT IN SECTION 302 OF THE BILL. THEREFORE, THE ANALYSIS OF THAT PROVISION SHOULD BE REFERRED TO WITH RESPECT TO THIS SUBSECTION.

SUBSECTION (I)-- DISPOSITION OF PROPERTY

SUBSECTION (I), WHICH DEALS WITH MATTERS CONCERNING THE DISPOSITION OF PROPERTY THAT HAS BEEN ORDERED FORFEITED, CORRESPONDS TO PROPOSED 18 U.S.C. 1963(G) AS SET OUT IN SECTION 302 OF THE BILL. AGAIN, THE ANALYSIS OF THAT PORTION OF THE AMENDED RICO FORFEITURE PROVISION APPLIES TO THIS SUBSECTION.

SUBSECTION (J)-- AUTHORITY OF THE ATTORNEY GENERAL

THIS SUBSECTION, LIKE THE ANALOGOUS PROVISION OF THE AMENDED RICO FORFEITURE PROVISION SET OUT IN SECTION 302 OF THE BILL, ENUMERATES THE AUTHORITY OF THE ATTORNEY GENERAL [FN606] WITH RESPECT TO CERTAIN MATTERS CONCERNING FORFEITED PROPERTY. THESE POWERS INCLUDE GRANTING PETITIONS FOR REMISSION OR MITIGATION OF FORFEITURE AND TAKING OTHER ACTIONS TO PROTECT THE INTERESTS OF INNOCENT PERSONS, COMPROMISING CLAIMS CONCERNING FORFEITED PROPERTY, MAKING AWARDS OF COMPENSATION, DIRECTING DISPOSITION OF FORFEITED PROPERTY BY THE UNITED STATES, [FN607] AND TAKING APPROPRIATE MEASURES TO MAINTAIN AND SAFEGUARD FORFEITED PROPERTY PENDING ITS DISPOSITION.

SUBSECTION (K)-- APPLICABILITY OF CIVIL FORFEITURE

*214 **3397 SUBSECTION (K)-- APPLICABILITY OF CIVIL FORFEITURE
PROVISIONS


SUBSECTION (L)-- BAR ON INTERVENTION

LIKE SUBSECTION (J) OF THE RICO FORFEITURE STATUTE AS AMENDED IN SECTION 302 OF THE BILL, THIS SUBSECTION BARS INTERVENTION BY THIRD PARTIES IN THE CRIMINAL CASE AND PROVIDES THAT ONCE THE CRIMINAL CASE IS COMMENCED, ANY THIRD PARTY WITH A CLAIM ARISING OUT OF THE FORFEITURE ACTION SHOULD SEEK RELIEF UNDER THE ANCILLARY HEARING PROCEDURE SET FORTH IN SUBSECTION (O) RATHER THAN FILE ANY SEPARATE CIVIL SUIT AGAINST THE UNITED STATES. FOR FURTHER DISCUSSION OF THIS PROVISION SEE THE ANALYSIS SUPRA OF THE ANALOGOUS RICO PROVISION SET FORTH IN SECTION 302 OF THE BILL.

SUBSECTION (M)-- JURISDICTION TO ENTER ORDERS

LIKE SUBSECTION (K) OF THE BILL'S AMENDMENT OF THE RICO FORFEITURE PROVISIONS, THIS SUBSECTION SIMPLY EMPHASIZES THAT THE COURT MAY ENTER ORDERS IN A CRIMINAL FORFEITURE CASE WITHOUT REGARD TO THE LOCATION OF THE PROPERTY THAT MAY BE SUBJECT TO CRIMINAL FORFEITURE OR THAT HAS BEEN ORDERED CRIMINALLY FORFEITED.

SUBSECTION (N)-- DEPOSITIONS


SUBSECTION (O)-- ANCILLARY HEARING TO RESOLVE THIRD PARTY CLAIMS

THIS SUBSECTION SETS FORTH THE SAME ANCILLARY HEARING PROVISION FOR JUDICIAL RESOLUTION OF THIRD PARTY CLAIMS AS THAT WHICH APPEARS AS 18 U.S.C. 1963(M) SECTION 302 OF THE BILL. THE ANALYSIS OF THAT PART OF SECTION 302 SHOULD BE REFERRED TO FOR EXPLANATION OF THIS PROVISION.

SECTION 304
21 U.S.C. 824(F) PROVIDES FOR THE FORFEITURE OF CONTROLLED SUBSTANCES THAT ARE HELD BY A DISTRIBUTOR, DISPENSER, OR MANUFACTURER OF CONTROLLED SUBSTANCES WHOSE REGISTRATION HAS BEEN REVOKED. THIS AMENDMENT TO 21 U.S.C. 824(F) SIMPLY CODIFIES THE 'TAINT' THEORY DISCUSSED SUPRA. THE PRINCIPLE THAT THE INTEREST OF THE UNITED STATES IN FORFEITED PROPERTY VESTS AT THE TIME OF THE ACTS GIVING RISE TO THE FORFEITURE IS WELL ESTABLISHED IN THE CONTEXT OF CIVIL FORFEITURES.

SECTION 305


SECTION 306

SECTION 306 OF THE BILL AMENDS CERTAIN PROVISIONS OF 21 U.S.C. 881, WHICH PROVIDES FOR THE CIVIL FORFEITURE OF A VARIETY OF DRUG-RELATED PROPERTY, AND WHICH ALSO GOVERS CERTAIN PROCEDURAL MATTERS BOTH IN CIVIL FORFEITURES AND IN CRIMINAL FORFEITURES UNDER THE CCE STATUTE. THE FIRST AMENDMENT WOULD ADD TO THE LIST OF PROPERTY SUBJECT TO CIVIL FORFEITURE SET OUT IN SECTION 881(A) REAL PROPERTY WHICH IS USED OR INTENDED TO BE USED IN A FELONY VIOLATION OF THE DRUG ABUSE PREVENTION AND CONTROL ACT. THIS PROVISION WOULD ALSO INCLUDE AN 'INNOCENT OWNER' EXCEPTION LIKE THAT NOW INCLUDED IN THOSE PROVISIONS PERMITTING THE CIVIL FORFEITURE OF CERTAIN VEHICLES AND MONEYS OR SECURITIES. THE AMENDMENTS TO SUBSECTIONS (B), (C), (D), AND (E) OF SECTION 881 ARE ESSENTIALLY TECHNICAL OR CONFORMING AMENDMENTS. AS NOTED ABOVE, CERTAIN OF THESE PROVISIONS APPLY NOT ONLY TO CIVIL FORFEITURES BUT ALSO TO CRIMINAL FORFEITURES UNDER THE CURRENT CCE STATUTE, SINCE THESE PROVISIONS OF SECTION 881 REFER SIMPLY TO FORFEITURES 'UNDER THIS SUBCHAPTER.' TO CLARIFY THE APPLICABILITY OF THESE PROVISIONS TO BOTH CIVIL AND CRIMINAL FORFEITURES, APPROPRIATE CLARIFYING LANGUAGE HAS BEEN INSERTED. SECTION 306 ALSO ADDS TWO NEW SUBSECTIONS AT THE END OF SECTION 881. THE FIRST PROVIDES THAT ALL RIGHT, TITLE, AND INTEREST IN PROPERTY WHICH IS SUBJECT TO CIVIL FORFEITURE UNDER SECTION 881(A) VESTS IN THE UNITED STATES UPON THE COMMISSION OF THE ACTS GIVING RISE TO THE FORFEITURE. AS DISCUSSED ABOVE, THIS PRINCIPLE IS WELL ESTABLISHED IN CURRENT LAW. THE SECOND NEW SUBSECTION TO BE ADDED TO SECTION 881 PROVIDES FOR A STAY OF CIVIL FORFEITURE PROCEEDINGS WHEN THE GOVERNMENT HAS COMMENCED A CRIMINAL CASE THAT INVOLVES ISSUES THE SAME AS OR RELATED TO THOSE ON WHICH THE FORFEITURE ACTION IS BASED. GENERALLY, THE COURTS HAVE BEEN WILLING TO GRANT SUCH STAYS OF CIVIL FORFEITURE PROCEEDINGS WHEN THE GOVERNMENT HAS COMMENCED A CRIMINAL ACTION CONCERNING THE SAME ACTS THAT HAVE GIVEN RISE TO THE FORFEITURE. [FN608] ABSENT SUCH A STAY, THE GOVERNMENT MAY BE COMPELLED IN THE CONTEXT OF THE CIVIL FORFEITURE ACTION TO DISCLOSE PREMATURELY ASPECTS OF ITS CRIMINAL CASE.

SECTION 307

SECTION 307 SIMPLY ADDS A NEW SECTION AT THE END OF TITLE III OF THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT TO MAKE IT CLEAR
THAT THE CRIMINAL FORFEITURE STATUTE PROPOSED IN SECTION 303 OF THE BILL, WHICH IS TO BE LOCATED IN TITLE II OF THE ACT, APPLIES TO FELONY VIOLATIONS OF TITLE III OF THE ACT AS WELL. TITLE III OF THE ACT GOVERNS OFFENSES CONCERNING THE IMPORTATION AND EXPORTATION OF CONTROLLED SUBSTANCES.

SECTION 308


PART C

SECTION 309

SECTION 309 AMENDS U.S.C. 881(E) TO ACHIEVE TWO PURPOSES. FIRST, IT PROVIDES THAT THE ATTORNEY GENERAL MAY TRANSFER DRUG-RELATED PROPERTY FORFEITED UNDER TITLE 21, U.S.C. TO ANOTHER FEDERAL AGENCY, OR TO AN ASSISTING STATE OR LOCAL AGENCY, PURSUANT TO SECTION 616 OF THE TARIFF ACT (19 U.S.C. 1616), AS AMENDED IN SECTION 318 OF THE BILL. OFTEN, STATE AND LOCAL LAW ENFORCEMENT AGENCIES GIVE SIGNIFICANT ASSISTANCE IN DRUG INVESTIGATIONS THAT RESULT IN FORFEITURES TO THE UNITED STATES. HOWEVER, THERE IS PRESENTLY NO MECHANISM WHEREBY THE FORFEITED PROPERTY MAY BE DIRECTLY TRANSFERRED TO THESE AGENCIES FOR THEIR OFFICIAL USE. THIS AMENDMENT, IN CONJUNCTION WITH THE TARIFF ACT AMENDMENT CITED ABOVE, WILL PERMIT SUCH TRANSFERS AND THEREBY SHOULD ENHANCE IMPORTANT COOPERATION BETWEEN FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AGENCIES IN DRUG INVESTIGATIONS. THE SECOND AMENDMENT TO 21 U.S.C. 881(E) PROVIDES FOR THE DEPOSIT OF MONEYS REALIZED BY THE UNITED STATES IN DRUG FORFEITURES INTO THE DRUG ASSETS FORFEITURE FUND CREATED BY SECTION 310.

SECTION 310

SECTION 310 AMENDS 21 U.S.C. 881(J) BY ADDING A NEW SUBSECTION (J) THAT WOULD CREATE, FOR A TRIAL FOUR-YEAR PERIOD, A DRUG ASSETS FORFEITURE FUND FROM WHICH MONEYS COULD BE APPROPRIATED TO DEFRAY THE MOUNTING COSTS ASSOCIATED WITH FORFEITURE ACTIONS. (A SIMILAR FUND FOR CUSTOMS FORFEITURES IS CREATED IN SECTION 317 OF THE BILL.) PRESENTLY, WHEN ANY AMOUNTS ARE REALIZED BY THE UNITED STATES FROM THE FORFEITURE OF DRUG-RELATED ASSETS, THESE AMOUNTS MUST BE DEPOSITED IN THE GENERAL FUND OF THE TREASURY. THEREFORE, THEY ARE NOT AVAILABLE TO DEFRAY THE EXPENSES OF FORFEITURE IN THOSE CASES WHERE THE EXPENSES ASSOCIATED WITH THE FORFEITURE OF A PARTICULAR PIECE OF PROPERTY EXCEED THE AMOUNT REALIZED BY THE SALE OF THE PROPERTY.

UNDER NEW SUBSECTION (J), THE AMOUNTS REALIZED IN PROFITABLE FORFEITURES WOULD BE DEPOSITED IN A DRUG ASSETS FORFEITURE FUND WHICH WOULD BE AVAILABLE, THROUGH THE APPROPRIATIONS PROCESS, FOR PAYMENTS, AT THE DISCRETION OF THE ATTORNEY GENERAL, FOR FOUR SPECIFIED PURPOSES. THESE PURPOSES ARE: (1) THE PAYMENT OF EXPENSES NECESSARY TO INVENTORY, SAFEGUARD, MAINTAIN, ADVERTISE OR SELL THE PROPERTY, INCLUDING PAYMENTS FOR CONTRACT SERVICES OR PAYMENTS TO STATE AND LOCAL AGENCIES WHICH MAY PROVIDE THESE SERVICES; (2) PAYMENTS FOR INFORMATION OR ASSISTANCE RELATING TO A DRUG INVESTIGATION OR LEADING TO A FORFEITURE OF DRUG ASSETS; (3) THE COMPROMISE AND PAYMENT OF VALID LIENS AGAINST FORFEITED PROPERTY; AND (4) DISBURSEMENTS TO INNOCENT PERSONS IN CONNECTION WITH THE REMISSION AND MITIGATION OF FORFEITURE. REWARD PAYMENTS FROM THE
FUND IN EXCESS OF $10,000 MUST BE AUTHORIZED BY EITHER THE ATTORNEY GENERAL, DEPUTY OR ASSOCIATE ATTORNEY GENERAL, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, OR THE ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION. THESE REWARDS ALSO MAY NOT EXCEED A MAXIMUM OF $150,000, OR, IN THE CASE OF A REWARD IN A FORFEITURE CASE, THE LESSER OF $150,000 OR ONE QUARTER THE AMOUNT REALIZED BY THE UNITED STATES IN THE FORFEITURE ACTION.

THE AUTHORIZED LEVEL OF APPROPRIATIONS FROM THE FUND FOR FISCAL YEARS 1984 THROUGH 1988 RANGES FROM $10,000,000 IN THE FIRST YEAR TO $20,000,000 IN THE LAST TWO YEARS, BUT IS NOT TO EXCEED THE TOTAL AMOUNT DEPOSITED IN THE FUND IN THE PRIOR FISCAL YEAR. THIS APPROPRIATION CEILING APPLIES TO MONEY FOR THE FIRST THREE PURPOSES OF THE FUND SPECIFIED IN SUBSECTION (J)(1). FOR THE FOURTH PURPOSE—DISBURSEMENTS TO INNOCENT PERSONS GRANTED REMISSION OR MITIGATION OF FORFEITURE—MONEYS MAY BE APPROPRIATED FROM THE FUND AS MAY BE NECESSARY. NOT LESS THAN FOUR MONTHS AFTER THE END OF EACH FISCAL YEAR, THE ATTORNEY GENERAL IS TO SUBMIT TO THE CONGRESS A DETAILED REPORT ON THE AMOUNTS DEPOSITED IN THE FUND AND EXPENDITURES MADE OUT OF MONEYS APPROPRIATED FROM THE FUND.

PART D

PART D OF TITLE III OF THE BILL SETS FORTH SEVERAL AMENDMENTS TO THE TARIFF ACT OF 1930. THESE PROVISIONS GOVERN THE SEIZURE AND CIVIL FORFEITURE OF PROPERTY UNDER THE CUSTOMS LAWS, AND ARE ALSO APPLICABLE, BY VIRTUE OF 21 U.S.C. 881, TO SEIZURE AND FORFEITURE OF DRUG-RELATED PROPERTY. BRIEFLY, THESE AMENDMENTS PROVIDE FOR: (1) THE EXPANDED USE OF EFFICIENT ADMINISTRATIVE FORFEITURE PROCEEDINGS IN CASES IN WHICH NO PARTY COMES FORWARD TO CONTEST A CIVIL FORFEITURE ACTION; (2) ENHANCED COOPERATION BETWEEN FEDERAL AND STATE AND LOCAL LAW ENFORCEMENT AGENCIES BY PERMITTING THE TRANSFER OF FEDERALLY FORFEITED PROPERTY TO ASSISTING STATE AND LOCAL AGENCIES AND BY PROVIDING CLEAR AUTHORITY FOR THE DISCONTINUANCE OF FEDERAL FORFEITURE ACTIONS IN FAVOR OF FORFEITURES UNDER STATE LAW; AND (3) THE CREATION OF A CUSTOMS FORFEITURE FUND TO BE AVAILABLE TO DEFRAY EXPENSES ASSOCIATED WITH FORFEITURE ACTIONS UNDER THE CUSTOMS LAWS.

SECTION 311

DETERIORATION AND THE COSTS TO THE GOVERNMENT IN MAINTAINING AND SAFEGUARDING THE PROPERTY ESCALATE. TO ADDRESS THIS PROBLEM, SECTION 311 AND OTHER OF THE AMENDMENTS SET OUT IN PART D AMEND CURRENT LAW TO MAKE ADMINISTRATIVE FORFEITURE PROCEEDINGS AVAILABLE IN UNCONTESTED CASES INVOLVING: (1) PROPERTY OF A VALUE OF UP $100,000; (2) ANY PROPERTY THE IMPORTATION OF WHICH IS PROHIBITED (AS UNDER CURRENT LAW); AND (3) ANY CONVEYANCES USED TO TRANSPORT ILLICIT DRUGS.

SECTION 312

SECTION 312 AMENDS 19 U.S.C. 1608 TO INCREASE THE AMOUNT OF BOND WHICH IS TO BE FILED BY A PARTY WISHING TO CONTEST THE FORFEITURE OF PROPERTY SUBJECT TO THE PROVISIONS OF 19 U.S.C. 1607 (I.E., PROPERTY VALUED AT $100,000 OR LESS, OR CONVEYANCES OF ILLICIT DRUGS) IN A JUDICIAL PROCEEDING. UNDER CURRENT LAW, THIS BOND IS SET AT $250, AN AMOUNT SO LOW THAT IT NEITHER ACTS TO DISCOURAGE THE FILING OF CLEARLY FRIVOLOUS SUITS NOR REFLECTS THE SUBSTANTIAL COSTS TO THE GOVERNMENT IN PURSUING A JUDICIAL FORFEITURE. [FN609] AS AMENDED BY SECTION 312, THE BOND WOULD BE SET AT THE LESSER OF $5,000 OR 10 PERCENT OF THE VALUE OF THE PROPERTY, BUT IN NO EVENT LESS THAN $250. THIS INCREASED BOND IS ALSO A REFLECTION OF THE FACT THAT IN LIGHT OF SECTION 311'S AMENDMENT TO 19 U.S.C. 1607, THE BOND PROVISION WILL APPLY TO CASES INVOLVING PROPERTY OF SIGNIFICANTLY GREATER VALUE THAN UNDER PRESENT LAW. OF COURSE, THE BOND REQUIREMENT IS SUBJECT TO THE ESTABLISHED AUTHORITY OF THE COURTS TO REDUCE OR DISPENSE WITH A REQUIRED BOND WHERE A CLAIMANT IS UNABLE TO POST IT.

SECTION 313


*219 **3402 SECTION 314


SECTION 315

SECTION 315 SETS FORTH AN AMENDMENT TO 19 U.S.C. 1612, WHICH PERMITS, IN CERTAIN CIRCUMSTANCES, THE SUMMARY SALE OF A WASTING ASSET, TO CONFORM WITH THE AMENDMENT TO 19 U.S.C. 1607, DISCUSSED ABOVE IN RELATION TO SECTION 311 TO THE BILL.

SECTION 316

SECTION 316 SETS FORTH CONFORMING AMENDMENTS TO 19 U.S.C. 1613 TO PROVIDE FOR THE DEPOSIT OF CUSTOMS FORFEITURE PROCEEDS INTO THE CUSTOMS FORFEITURE FUND ESTABLISHED IN SECTION 317 OF THE BILL.
SECTION 317

SECTION 317 AMENDS THE TARIFF ACT BY CREATING A NEW SECTION THAT WILL PROVIDE FOR THE DEPOSIT OF THE PROCEEDS OF FORFEITURES UNDER THE CUSTOMS LAWS INTO A CUSTOMS FORFEITURE FUND WHICH IS TO BE AVAILABLE FOR THE PAYMENT OF EXPENSES ASSOCIATED WITH FORFEITURE ACTIONS. IT PARALLELS THE DRUG ASSETS FORFEITURE FUND ESTABLISHED IN SECTION 310. [FN610]

SECTION 318

SECTION 318 CREATES A NEW SECTION 616 OF THE TARIFF ACT (19 U.S.C. 1616) TO GOVERN CERTAIN DISPOSITIONS OF FORFEITED PROPERTY. SUBSECTION (A) OF THIS NEW SECTION PERMITS THE TRANSFER OF FORFEITED PROPERTY TO ANOTHER FEDERAL AGENCY, OR TO A STATE OR LOCAL AGENCY WHICH PARTICIPATED IN THE CASE WHICH LED TO THE FORFEITURE. SUBSECTION (B) PROVIDES FOR THE DISCONTINUANCE OF A FEDERAL FORFEITURE ACTION IN FAVOR OF STATE OR LOCAL FORFEITURE PROCEEDINGS. SUBSECTION (C) MAKES CLEAR THE AUTHORITY OF THE UNITED STATES TO TRANSFER THE SEIZED PROPERTY DIRECTLY TO STATE OR LOCAL AUTHORITIES WHERE A FORFEITURE ACTION IS DISCONTINUED UNDER SUBSECTION (B), AND SUBSECTION (D) PROVIDES FOR NOTICE TO BE GIVEN TO ALL INTERESTED PARTIES TO ADVISE THEM OF SUCH A DISCONTINUANCE OF FEDERAL PROCEEDINGS.

SECTION 319

SECTION 319 AMENDS 19 U.S.C. 1619 TO INCREASE FROM $50,000 TO $150,000 THE MAXIMUM AMOUNT OF A REWARD THAT MAY BE PAID FOR INFORMATION LEADING TO A FORFEITURE. AS UNDER CURRENT LAW, HOWEVER, THE AMOUNT OF SUCH AN AWARD MAY NOT EXCEED ONE-FOURTH OF THE AMOUNT REALIZED BY THE UNITED STATES FROM THE FORFEITURE.

SECTION 320

SECTION 320 ADDS A NEW SECTION 589 TO THE TARIFF ACT WHICH DESCRIBES THE LAW ENFORCEMENT AUTHORITIES OF CUSTOMS OFFICERS. IN PARTICULAR, THIS NEW PROVISION WILL CURE CERTAIN GAPS IN THE CURRENT ARREST AUTHORITY OF CUSTOMS OFFICERS. STATUTORY ARREST AUTHORITY OF CUSTOMS OFFICERS IS NOW CONFINED TO VIOLATIONS INVOLVING A LIMITED NUMBER OF STATUTES. CUSTOMS OFFICERS MAKING ARRESTS FOR EXPORT VIOLATIONS, ASSAULTS ON CUSTOMS OFFICERS, AND OTHER FEDERAL FELONY VIOLATIONS MUST RELY ON VARIOUS STATE LAWS CONFERRING ARREST AUTHORITY ON PRIVATE PERSONS ('CITIZEN'S ARREST' AUTHORITY) UNLESS STATE LAW CONFERED PEACE OFFICER STATUS ON THEM. CUSTOMS OFFICERS HAVE BEEN CHARGED WITH THE RESPONSIBILITY OF PROTECTING FEDERAL PROPERTY AND EMPLOYEES, IT HAS BEEN NECESSARY THAT THEY BE SWORN IN AS DEPUTY UNITED STATES MARSHALS TO ASSURE THAT THEY HAVE ADEQUATE LAW ENFORCEMENT POWERS. THIS PROCEDURE HAS PROVEN TO BE INEFFICIENT, CUMBERSOME, AND INADEQUATE.

THE NEW SECTION OF THE TARIFF ACT ADDED BY SECTION 320 OF THE BILL WOULD AUTHORIZE CUSTOMS OFFICERS TO MAKE AN ARREST WITHOUT A WARRANT FOR ANY OFFENSE AGAINST THE UNITED STATES COMMITTED IN THE OFFICER'S PRESENCE OR FOR ANY FEDERAL FELONY COMMITTED OUTSIDE THE OFFICER'S PRESENCE IF THE OFFICER HAS REASONABLE GROUNDS TO BELIEVE THE PERSON TO BE ARRESTED HAS COMMITTED OR IS COMMITTING THE FELONY. IN ADDITION, THIS NEW PROVISION CARRIES FORWARD THE EXISTING AUTHORITY SET OUT IN SECTION 7607 OF THE
INTERNAL REVENUE CODE [FN614] FOR CUSTOMS OFFICERS TO CARRY FIREARMS, EXECUTE AND SERVE ARREST AND SEARCH WARRANTS, SUBPOENAS, SUMMONS, AND COURT ORDERS.

SECTION 321

SECTION 321 AMENDS SEVERAL SECTIONS OF THE TARIFF ACT TO PROVIDE THAT THE SEIZURE AND FORFEITURE OF AIRCRAFT IS TREATED IN THE SAME MANNER AS THE SEIZURE AND FORFEITURE OF OTHER CONVEYANCES. OTHER AMENDMENTS TO THE TARIFF ACT IN PRECEDING SECTIONS OF PART D OF TITLE III PROVIDED FOR THE SAME CHANGE.

SECTION 322

SECTION 322 AMENDS 19 U.S.C. 1644 TO CORRECT AN OUTDATED REFERENCE TO 49 U.S.C. 177 BY SUBSTITUTING A REFERENCE TO THE CURRENTLY APPLICABLE PROVISION OF THE FEDERAL AVIATION ACT.

**SECTION 323**

SECTION 323 ADDS A NEW SECTION 600 TO THE TARIFF ACT TO MAKE IT CLEAR THAT ALL SEIZURES EFFECTED BY CUSTOMS OFFICERS ARE TO BE GOVERNED BY SECTIONS 602 THROUGH 609 OF THE TARIFF ACT UNLESS OTHER PROCEDURES FOR SEIZURE ARE PROVIDED.

**INTRODUCTION**


SINCE THE EXPERTS THEMSELVES ARE IN DISAGREEMENT ABOUT BOTH THE MEANING OF THE TERMS USED TO DEFINE THE DEFENDANT'S MENTAL STATE AND THE EFFECT OF A PARTICULAR STATE ON THE DEFENDANT'S ACTIONS-- BUT STILL FREELY ALLOWED TO STATE THEIR OPINION TO THE JURY ON THE ULTIMATE QUESTION OF THE DEFENDANT'S SANITY-- IT IS SMALL WONDER THAT TRIALS INVOLVING AN INSANITY DEFENSE ARE ARDUIOUS, EXPENSIVE, AND WORST OF ALL, THOROUGHLY CONFUSING TO THE JURY. INDEED THE DISAGREEMENT OF THE EXPERTS IS SO BASIC THAT IT MAKES RATIONAL DELIBERATION BY THE JURY VIRTUALLY IMPOSSIBLE. THUS, IT IS NOT SURPRISING THAT THE JURY'S DECISION CAN BE STRONGLY INFLUENCED BY THE PROCEDURAL QUESTION OF WHICH SIDE MUST CARRY THE BURDEN OF PROOF ON THE QUESTION OF INSANITY.

THE INSANITY DEFENSE AND RELATED ISSUES

1. PRESENT FEDERAL LAW

A. THE DEFENSE

CONGRESS HAS NEVER ENACTED LEGISLATION ON THE INSANITY DEFENSE. THE SUPREME COURT HAS GENERALLY LEFT DEVELOPMENT OF STANDARDS TO THE COURTS OF APPEALS AND THOSE COURTS, OVER MANY YEARS, HAVE GRADUALLY BROADENED THE DEFENSE.


THE NEXT STEP WAS THE WIDESPREAD ADOPTION OF AN ADDITIONAL VOLITITION TEST, EXCULPATING A DEFENDANT WHO KNEW WHAT HE WAS DOING AND THAT IT WAS WRONG, BUT WHOSE ACTIONS WERE DEEMED, BECAUSE OF *224 **3406 MENTAL DISEASE, TO BE BEYOND HIS CONTROL. [FN619] THIS IS SOMETIMES CALLED THE 'IRRESISTIBLE IMPULSE' ADDITION TO THE M'NAGHTEN TEST. HOWEVER, BECAUSE ITS FORMULATION FREQUENTLY DOES NOT REQUIRE THAT THE ABNORMALITY BE CHARACTERIZED BY SUDDEN IMPULSE AS OPPOSED TO BROODING AND REFLECTION,

B. BURDEN OF PROOF


C. THE SCOPE OF EXPERT TESTIMONY

UNDER CURRENT LAW, THE SCOPE OF EXPERT TESTIMONY BY PSYCHIATRISTS OR OTHER MENTAL HEALTH EXPERTS IS GOVERNED BY THE CRYPTIC DISCLAIMER THAT 'TESTIMONY IN THE FORM OF AN OPINION OR INFEERENCE OTHERWISE ADMISSIBLE IS NOT OBJECTIONABLE BECAUSE IT EMBRACES AN ULTIMATE ISSUE TO BE DECIDED BY THE TRIER OF FACT.' [FN629] THUS, THE EXPERT WITNESS MAY TESTIFY ABOUT SO-CALLED 'ULTIMATE' ISSUES, SUCH AS WHETHER OR NOT THE DEFENDANT WAS IN HIS OPINION 'INSANE,' 'SANE,' LACKED THE CAPACITY TO DISTINGUISH 'RIGHT FROM
WRONG,' OR LACKED THE CAPACITY TO 'CONFORM HIS BEHAVIOR TO THE REQUIREMENT OF LAW,' AS WELL AS ABOUT THE DEFENDANT'S MENTAL ILLNESS, PSYCHIATRIC DIAGNOSIS, AND RELATED CLINICAL CONDITIONS.

2. PROVISIONS OF THE BILL, AS REPORTED

SECTION 401 OF THE BILL PROVIDE THAT TITLE IV MAY BE CITED AS THE 'INSANITY DEFENSE REFORM ACT OF 1983.' SECTION 402 ADDS A NEW SECTION 20 TO TITLE 18 OF THE U.S.C. TO DEFINE THE SCOPE OF THE INSANITY DEFENSE FOR FEDERAL OFFENSES AND TO SHIFT THE BURDEN OF PROOF TO THE DEFENDANT. IN ITS ENTIRETY THE NEW SECTION WOULD PROVIDE:

SEC. 20. INSANITY DEFENSE

(A) AFFIRMATIVE DEFENSE.-- IT IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION UNDER ANY FEDERAL STATUTE THAT, AT THE TIME OF THE COMMISSION OF THE ACTS CONSTITUTING THE OFFENSE, THE DEFENDANT, AS A RESULT OF A SEVERE MENTAL DISEASE OR DEFECT, WAS UNABLE TO APPRECIATE THE NATURE AND QUALITY OR THE WRONGFULNESS OF HIS ACTS. MENTAL DISEASE OR DEFECT DOES NOT OTHERWISE CONSTITUTE A DEFENSE.

(B) BURDEN OF PROOF.-- THE DEFENDANT HAS THE BURDEN OF PROVING THE DEFENSE OF INSANITY BY CLEAR AND CONVINCING EVIDENCE.


[FN631] CONCEPTUALLY, THERE IS SOME APPEAL TO A DEFENSE PREDICATED ON LACK OF POWER TO AVOID CRIMINAL CONDUCT. IF ONE CONCEIVES THE MAJOR PURPOSE OF THE INSANITY DEFENSE TO BE THE EXCLUSION OF THE NONDETERRABLES FROM CRIMINAL RESPONSIBILITY, A CONTROL TEST SEEMS DESIGNED TO MEET THAT OBJECTIVE. FURTHERMORE, NOTIONS OF RETRIBUTIVE PUNISHMENT SEEM PARTICULARLY INAPPROPRIATE WITH RESPECT TO ONE POWERLESS TO DO OTHERWISE THAN HE DID.

A STRONG CRITICISM OF THE CONTROL TEST, HOWEVER, IS ASSOCIATED WITH A DETERMINISM WHICH SEEMS DOMINANT IN THE THINKING OF MANY EXPERT WITNESSES. AS NOTED BY DAVID ROBINSON OF GEORGE WASHINGTON UNIVERSITY, '(M)ODERN PSYCHIATRY HAS TENDED TO VIEW MAN AS CONTROLLED BY ANTECEDENT HEREDITARY AND ENVIRONMENTAL FACTORS,' [FN632] FREUD ONCE WROTE, FOR EXAMPLE: [FN633]

I HAVE ALREADY TAKEN THE LIBERTY OF POINTING OUT TO YOU THAT THERE IS WITHIN YOU A DEEPLY ROOTED BELIEF IN PSYCHIC FREEDOM AND CHOICE, THAT THIS BELIEF IS QUITE UNSCIENTIFIC, AND THAT IT MUST GIVE GROUND BEFORE THE CLAIMS OF DETERMINISM WHICH GOVERNS EVEN MENTAL LIFE.

IN THEIR WIDELY RECOGNIZED TEST, [FN634] DOCTORS FREDERICK C. REDLICH AND DANIEL X. FREEDMAN, THE DEAN OF THE YALE MEDICAL SCHOOL AND CHAIRMAN OF THE PSYCHIATRY DEPARTMENT, UNIVERSITY OF CHICAGO, RESPECTIVELY, STATED: AS A TECHNOLOGY BASED ON THE BEHAVIORAL AND BIOLOGICAL SCIENCES, PSYCHIATRY TAKES A DETERMINISTIC POINT OF VIEW. THIS DOES NOT MEAN THAT ALL PHENOMENA, IN OUR FIELD CAN BE EXPLAINED, OR THAT THERE IS NO UNCERTAINTY. IT MERELY CommITS US TO A SCIENTIFIC SEARCH FOR RELIABLE AND SIGNIFICANT RELATIONSHIPS. WE ASSUME CAUSATION-- BY WHICH WE MEAN THAT A RANGE OF SIMILAR ANTECEDENTS IN BOTH THE ORGANISM AND ENVIRONMENT PRODUCES A
SIMILAR SET OF CONSEQUENCES.

SUCH A VIEW IS CONSISTENT WITH A CONCLUSION THAT ALL CRIMINAL CONDUCT IS EVIDENCE OF LACK OF POWER TO CONFORM BEHAVIOR TO THE REQUIREMENTS OF LAW. THE CONTROL TESTS AND VOLITIONAL STANDARDS THUS ACUTELY RAISE THE PROBLEM OF WHAT IS MEANT BY LACK OF POWER TO AVOID CONDUCT OR TO CONFORM TO THE REQUIREMENTS OF LAW WHICH LEADS TO THE MOST FUNDAMENTAL OBJECTION TO THE CONTROL TESTS-- THEIR LACK OF DETERMINATE MEANING.

RICHARD J. BONNIE, PROFESSOR OF LAW AND DIRECTOR OF THE INSTITUTE OF LAW, PSYCHIATRY AND PUBLIC POLICY AT THE UNIVERSITY OF VIRGINIA, WHILE ACCEPTING THE MORAL PREDICATE FOR A CONTROL TEST, EXPLAINED THE FUNDAMENTAL DIFFICULTY INVOLVED: [FN635]

UNFORTUNATELY, HOWEVER, THERE IS NO SCIENTIFIC BASIS FOR MEASURING A PERSONS' CAPACITY FOR SELF-CONTROL OR FOR CALIBRATING THE IMPAIRMENT OF SUCH CAPACITY. THERE IS, IN *227 **3409 SHORT, NO OBJECTIVE BASIS FOR DISTINGUISHING BETWEEN OFFENDERS WHO WERE UNDETERRED AND THOSE WHO WERE MERELY UNDETERRED, BETWEEN THE IMPULSE THAT WAS IRRESISTIBLE AND THE IMPULSE NOT RESISTED, OR BETWEEN SUBSTANTIAL IMPAIRMENT OF CAPACITY AND SOME LESSER IMPAIRMENT. WHATEVER THE PRECISE TERMS OF THE VOLITIONAL TEST, THE QUESTION IS UNANSWERABLE-- OR CAN BE ANSWERED ONLY BY 'MORAL GUESSES.' TO ASK IT AT ALL, IN MY OPINION, INVITES FABRICATED CLAIMS, UNDERMINES EQUAL ADMINISTRATION OF THE PENAL LAW, AND COMPROMISES ITS DETERRENT EFFECT.

PROFESSOR ROBINSON STATES THE SAME IDEA AS FOLLOWS: [FN636]

NO TEST IS AVAILABLE TO DISTINGUISH BETWEEN THOSE WHO CANNOT AND THOSE WHO WILL NOT CONFORM TO LEGAL REQUIREMENTS. THE RESULT IS AN INVITATION TO SEMANTIC JOUSTING, METAPHYSICAL SPECULATION AND INTUITIVE MORAL JUDGMENTS MASKED AS FACTUAL DETERMINATIONS.

SIMILARLY, THE ROYAL COMMISSION ON CAPITAL PUNISHMENT STATED: [FN637]

MOST LAWYERS HAVE CONSISTENTLY MAINTAINED THAT THE CONCEPT OF AN 'IRRESISTIBLE' OR 'UNCONTROLLABLE' IMPULSE IS A DANGEROUS ONE, SINCE IT IS IMPRACTICABLE TO DISTINGUISH BETWEEN THOSE IMPULSES WHICH ARE THE PRODUCT OF MENTAL DISEASE AND THOSE WHICH ARE THE PRODUCT OF ORDINARY PASSION, OR, WHERE MENTAL DISEASE EXISTS, BETWEEN IMPELSES THAT MAY BE GENUINELY IRRESISTIBLE AND THOSE WHICH ARE MERELY NOT RESISTED.

A BRIEF BUT PERCEPTIVE DISCUSSION OF THE PROBLEM IS CONTAINED IN THE CONCURRING OPINION OF MR. JUSTICE BLACK, JOINED BY MR. JUSTICE HARLAN, IN POWELL V. TEXAS, [FN638] UPHOLDING THE CONSTITUTIONALITY OF CRIMINAL PENALTIES APPLIED TO ALCOHOLICS WHOSE PUBLIC DRUNKENNESS IS ALLEGED TO BE BEYOND VOLITIONAL CONTROL:

WHEN WE SAY THAT APPELLANT'S APPEARANCE IN PUBLIC IS CAUSED NOT BY 'HIS OWN ' VOLITION BUT RATHER BY SOME OTHER FORCE, WE ARE CLEARLY THINKING OF A FORCE WHICH IS NEVERTHELESS HIS EXCEPT IN SOME SPECIAL SENSE. THE ACCUSED UNDOUBTEDLY COMITS THE PROSCRIBED ACT AND THE ONLY QUESTION IS WHETHER THE ACT CAN BE ATTRIBUTED TO A PART OF 'HIS' PERSONALITY THAT SHOULD NOT BE REGARDED AS CRIMINALLY RESPONSIBLE.

* * * *

(T)HE QUESTION WHETHER AN ACT IS 'INVolUNTARY' IS, AS I HAVE ALREADY INDICATED, AN INHERENTLY ELUSIVE QUESTION, AND ONE WHICH THE STATE MAY, FOR GOOD REASONS WISH TO REGARD AS IRRELEVANT.

*228 **3410 THE AMERICAN PSYCHIATRIC ASSOCIATION ALSO HAS COMMENTED ON THE ABILITY OF EXPERT WITNESSES TO PROVIDE ADEQUATE INFORMATION TO RESOLVE ISSUE INHERENT IN THE CURRENT INSANITY TEST: [FN639] THE ABOVE COMMENTARY (CONCERNING THE LEGAL STANDARDS FOR AN INSANITY DEFENSE) DOES NOT MEAN THAT GIVEN THE PRESENT STATE OF PSYCHIATRIC
KNOWLEDGE PSYCHIATRISTS CANNOT PRESENT MEANINGFUL TESTIMONY RELEVANT TO DETERMINING A DEFENDANT'S UNDERSTANDING OR APPRECIATION OF HIS ACT. MANY PSYCHIATRISTS, HOWEVER, BELIEVE THAT PSYCHIATRIC INFORMATION RELEVANT TO DETERMINING WHETHER A DEFENDANT UNDERSTOOD THE NATURE OF HIS ACT, AND WHETHER HE APPRECIATED ITS WRONGFULNESS, IS MORE RELIABLE AND HAS A STRONGER SCIENTIFIC BASIS THAN, FOR EXAMPLE, DOES PSYCHIATRIC INFORMATION RELEVANT TO WHETHER A DEFENDANT WAS ABLE TO CONTROL HIS BEHAVIOR. THE LINE BETWEEN AN IRRESISTIBLE IMPULSE AND AN IMPULSE NOT RESISTED IS PROBABLY NO SHARPER THAN THAT BETWEEN TWILIGHT AND DUSK.


THE INDETERMINACY PROBLEM OF CONTROL TESTS IS NOT SUFFICIENTLY MITIGATED BY THE REQUIREMENTS OF MENTAL DISEASE OR DEFECT. THE DISEASE OR DEFECT REQUIREMENT IS PRESENT IN ALL OF THE STATEMENTS OF INSANITY DEFENSES. IT IS ALMOST NEVER DEFINED, HOWEVER. PRIMARY RELIANCE IS CONVENIENTLY PLACED ON EXPERT TESTIMONY, APPARENTLY BECAUSE IT IS WIDELY ASSUMED, FIRST, THAT THERE IS A MEDICAL CONSENSUS ON THE MEANING OF THESE TERMS, AND SECOND, THAT THIS MEANING IF RELEVANT TO THE LEGAL PURPOSES AT HAND. NEITHER ASSUMPTION IS ENTIRELY ACCURATE.

AS DOCTORS REDLICH AND FREEDMAN POINT OUT: [FN643]

IN OLDER TEXTS AND IN CURRENT LAY PARLANCE, PSYCHIATRY IS OFTEN DEFINED AS THE SCIENCE DEALING WITH MENTAL DISEASES AND ILLNESSES OF THE MIND OR PSYCHE. SINCE THESE ARE TERMS REMINISCENT OF THE METAPHYSICAL CONCEPTS OF SOUL AND SPIRIT, WE PREFER TO SPEAK OF BEHAVIOR DISORDER. * * * MEDICALLY RECOGNIZABLE DISEASES OF THE BRAIN CANNOT, FOR THE MOST PART, BE DEMONSTRATED IN BEHAVIOR DISORDERS.

WHAT, THEN, ARE THESE DIFFICULTIES PSYCHIATRISTS ARE SUPPOSED TO TREAT, THE SO-CALLED BEHAVIOR DISORDERS? DEFYING EASY DEFINITION, THE TERM REFERS TO THE PRESENCE OF CERTAIN *229 **3411 BEHAVIOR PATTERNS * * * VARIOUSLY DESCRIBED AS ABNORMAL, SUBNORMAL, UNDESIRABLE, INADEQUATE, INAPPROPRIATE, MALADAPTIVE OR MALADJUSTED-- THAT ARE NOT COMPATIBLE WITH THE NORMS AND EXPECTATIONS OF THE PATIENT'S SOCIAL AND CULTURAL SYSTEM.

THE COMMITTEE ALSO INCLUDED LANGUAGE IN SECTION 20 EXPLICITLY PROVIDING THAT MENTAL DISEASE OR DEFECT OTHER THAN THAT WHICH RENDERS THE DEFENDANT UNABLE TO APPRECIATE THE NATURE AND QUALITY OR WRONGFULNESS OF HIS ACTS DOES NOT CONSTITUTE A DEFENSE. THIS IS INTENDED TO INSURE THAT THE INSANITY DEFENSE IS NOT IMPROPERLY RESURRECTED IN THE GUISE OF SHOWING SOME OTHER AFFIRMATIVE DEFENSE, SUCH AS THAT THE DEFENDANT HAD A 'DIMINISHED RESPONSIBILITY' OR SOME SIMILARLY ASSERTED STATE OF MIND WHICH WOULD SERVE TO EXCUSE THE OFFENSE AND OPEN THE DOOR, ONCE AGAIN, TO NEEDLESSLY CONFUSING PSYCHIATRIC TESTIMONY.

THE PROVISION THAT THE MENTAL DISEASE OR DEFECT MUST BE 'SEVER' WAS ADDED TO SECTION 20 AS A COMMITTEE AMENDMENT. AS INTRODUCED IN S. 829, THE PROVISION REFERRED ONLY TO A 'MENTAL DISEASE OR DEFECT.' THE CONCEPT OF SEVERITY WAS ADDED TO EMPHASIZE THAT NON-PSYCHOTIC BEHAVIOR DISORDERS OR NEUROSIS SUCH AS AN 'INADEQUATE PERSONALITY,' 'IMMATURE PERSONALITY,' OR A PATTERN OF 'ANTISOCIAL TENDENCIES' DO NOT CONSTITUTE THE DEFENSE. THE COMMITTEE ALSO INTENDS THAT, AS HAS BEEN HELD UNDER PRESENT CASE LAW INTERPRETATION, THE VOLUNTARY USE OF ALCOHOL OR DRUGS, EVEN IF THEY RENDER THE DEFENDANT UNABLE TO APPRECIATE THE NATURE AND QUALITY OF HIS ACTS, DOES NOT CONSTITUTE INSANITY OR ANY OTHER SPECIES OF LEGALLY VALID AFFIRMATIVE DEFENSE. [FN644]

SIGNIFICANTLY, THE BILL AS REPORTED SHIFTS THE BURDEN OF PROOF OF THE
INSANITY DEFENSE TO THE DEFENDANT, WHO MUST DEMONSTRATE, BY CLEAR AND
CONVINCING EVIDENCE, THAT HIS SEVERE MENTAL DISEASE OR DEFECT CAUSED HIM
NOT TO APPRECIATE THE NATURE AND QUALITY OR WRONGFULNESS OF HIS ACTS.
MORE THAN HALF OF THE STATES NOW PLACE THE BURDEN OF PROVING INSANITY ON
THE DEFENDANT, ALBEIT OFTEN BY A PREPONDERANCE OF THE EVIDENCE STANDARD.
AS PREVIOUSLY NOTED, THE SUPREME COURT IN JONES V. UNITED STATES HAS MADE
IT CLEAR THAT PLACING THIS BURDEN OF PROOF ON THE DEFENDANT UNDER A
STANDARD OF CLEAR AND CONVINCING EVIDENCE IS CONSTITUTIONALLY
PERMISSIBLE. THE COMMITTEE AGREES COMPLETELY WITH THE OBSERVATIONS OF
EDWIN MILLER ON BEHALF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION:
[FN645]
A MOST VITAL FEATURE OF THIS ACT IS THE ALLOCATION OF THE BURDEN OF PROOF
OF INSANITY TO THE DEFENDANT. THE MOST WIDELY CRITICIZED ASPECT OF THE
INSANITY LAW IN SOME JURISDICTIONS IS THE IMPOSSIBLE BURDEN SOMETIMES
PLACED ON THE GOVERNMENT OF PROVING SOMEONE'S SANITY BEYOND A
REASONABLE DOUBT.

* * * *

*230 **3412 *(T)HE OVERWHELMING MAJORITY OF AMERICAN JURISDICTIONS
RECOGNIZE THAT THE EVIDENCE OF THE DEFENSE OF INSANITY SHOULD BE PRODUCED
BY THE DEFENDANT. * * * IT IS AN AFFIRMATIVE DEFENSE TO LEGAL AND MORAL
RESPONSIBILITY. IT SAYS, 'EVEN IF I DID IT, I'M NOT RESPONSIBLE.' AS SUCH, IT IS
ENTIRELY PROPER THAT THE DEFENDANT HAVE THE BURDEN OF ESTABLISHING NON-
RESPONSIBILITY. A DEFENDANT IS REQUIRED TO PRESENT THE EVIDENCE IN ALL
OTHER AFFIRMATIVE DEFENSES AND THIS IS PARTICULARLY FITTING IN THE CASE OF
INSANITY. SUCH EVIDENCE IS PECULIARLY AVAILABLE, IF AT ALL, TO THE DEFENDANT.
ON THE OTHER HAND, EVIDENCE TO ESTABLISH SANITY-- BEYOND ANY REASONABLE
DOUBT-- IS FREQUENTLY UNAVAILABLE TO THE PROSECUTION.
I HAVE HEARD JUDGES, PROSECUTORS AND DEFENSE COUNSEL ROUNDLY DENOUNCE
THE HERCULEAN TASK OF REQUIRING THE GOVERNMENT TO PROVE ANYONE IS NOT
INSANE BEYOND A REASONABLE DOUBT. THE SINGLE MOST ATTRACTIVE PROVISION OF
THIS ACT IS TO FAIRLY REQUIRE THE ACCUSED TO PROVE HIS SANITY BY THE LESSER
STANDARD OF CLEAR AND CONVINCING EVIDENCE.
THE STANDARD OF PROOF-- CLEAR AND CONVINCING EVIDENCE-- IS, OF COURSE, A
HIGHER STANDARD THAN A MERELY PREPONDERANCE OF THE EVIDENCE. [FN646] THE
COMMITTEE IS OF THE VIEW THAT A MORE RIGOROUS REQUIREMENT THAN PROOF BY A
PREPONDERANCE OF THE EVIDENCE IS NECESSARY TO ASSURE THAT ONLY THOSE
DEFENDANTS WHO PLAINLY SATISFY THE REQUIREMENTS OF THE DEFENSE ARE
EXONERATED FROM WHAT IS OTHERWISE CULPABLE CRIMINAL BEHAVIOR.
WITH RESPECT TO LIMITATIONS ON THE SCOPE OF EXPERT TESTIMONY BY
PSYCHIATRISTS AND OTHER MENTAL HEALTH EXPERTS, SECTION 406 OF TITLE IV OF
THE BILL AMENDS RULE 704 OF THE FEDERAL RULES OF EVIDENCE TO PROVIDE:
NO EXPERT WITNESS TESTIFYING WITH RESPECT TO THE MENTAL STATE OR
CONDITION OF A DEFENDANT IN A CRIMINAL CASE MAY STATE AN OPINION OR
INFERENCE AS TO WHETHER THE DEFENDANT DID OR DID NOT HAVE THE MENTAL
STATE OR CONDITION CONSTITUTING AN ELEMENT OF THE CRIME OR OF A DEFENSE
THERETO. SUCH ULTIMATE ISSUES ARE MATTERS FOR THE TRIER OF FACT ALONE.
THE PURPOSE OF THIS AMENDMENT IS TO ELIMINATE THE CONFUSING SPECTACLE OF
COMPETING EXPERT WITNESSES TESTIFYING TO DIRECTLY CONTRADICTORY
CONCLUSIONS AS TO THE ULTIMATE LEGAL ISSUE TO BE FOUND BY THE TRIER OF
FACT. UNDER THIS PROPOSAL, EXPERT PSYCHIATRIC TESTIMONY WOULD BE LIMITED
TO PRESENTING AND EXPLAINING THEIR DIAGNOSES, SUCH AS WHETHER THE
DEFENDANT HAD A SEVERE MENTAL DISEASE OR DEFECT AND WHAT THE
CHARACTERISTICS OF SUCH A DISEASE OR DEFECT, IF ANY, MAY HAVE BEEN. THE
BASIS FOR THIS LIMITATION ON EXPERT TESTIMONY IN INSANITY CASES IS ABLY
STATED BY THE AMERICAN PSYCHIATRIC ASSOCIATION: [FN647]  

(231) **3413** (I)T IS CLEAR THAT PSYCHIATRISTS ARE EXPERTS IN MEDICINE, NOT THE LAW. AS SUCH, IT IS CLEAR THAT THE PSYCHIATRIST'S FIRST OBLIGATION AND EXPERTISE IN THE COURTROOM IS TO 'DO PSYCHIATRY,' I.E., TO PRESENT MEDICAL INFORMATION AND OPINION ABOUT THE DEFENDANT'S MENTAL STATE AND MOTIVATION AND TO EXPLAIN IN DETAIL THE REASON FOR HIS MEDICAL-PSYCHIATRIC CONCLUSIONS. WHEN, HOWEVER, 'ULTIMATE ISSUE' QUESTIONS ARE FORMULATED BY THE LAW AND PUT TO THE EXPERT WITNESS WHO MUST THEN SAY 'YE'A' OR 'NAY,' THEN THE EXPERT WITNESS IS REQUIRED TO MAKE A LEAP IN LOGIC. HE NO LONGER ADDRESSES HIMSELF TO MEDICAL CONCEPTS BUT INSTEAD MUST INFERENCE OR INTUIT WHAT IS IN FACT UNSPEAKABLE, NAMELY, THE PROBABLE RELATIONSHIP BETWEEN MEDICAL CONCEPTS AND LEGAL OR MORAL CONSTRUCTS SUCH AS FREE WILL. THESE IMPERMISSIBLE LEAPS IN LOGIC MADE BY EXPERT WITNESSES CONFUSE THE JURY. (FOOTNOTE OMITTED.) JURIES THUS FIND THEMSELVES LISTENING TO CONCLUSORY AND SEEMINGLY CONTRADICTORY PSYCHIATRIC TESTIMONY THAT DEFENDANTS ARE EITHER 'SANE' OR 'INSANE' OR THAT THEY DO OR DO NOT MEET THE RELEVANT LEGAL TEST FOR INSANITY. THIS STATE OF AFFAIRS DOES CONSIDERABLE INJUSTICE TO PSYCHIATRY AND, WE BELIEVE, POSSIBLY TO CRIMINAL DEFENDANTS. IN FACT, IN MANY CRIMINAL INSANITY TRIALS BOTH PROSECUTION AND DEFENSE PSYCHIATRISTS DO AGREE ABOUT THE NATURE AND EVEN THE EXTENT OF MENTAL DISORDER EXHIBITED BY THE DEFENDANT AT THE TIME OF THE ACT. PSYCHIATRISTS, OF COURSE, MUST BE PERMITTED TO TESTIFY FULLY ABOUT THE DEFENDANT'S DIAGNOSIS, MENTAL STATE AND MOTIVATION (IN CLINICAL AND COMMONSENSE TERMS) AT THE TIME OF THE ALLEGED ACT SO AS TO PERMIT THE JURY OR JUDGE TO REACH THE ULTIMATE CONCLUSION ABOUT WHICH THEY AND ONLY THEY ARE EXPERT. DETERMINING WHETHER A CRIMINAL DEFENDANT WAS LEGALLY INSANE IS A MATTER FOR LEGAL FACT-FINDERS, NOT FOR EXPERTS. MOREOVER, THE RATIONALE FOR PRECLUDING ULTIMATE OPINION PSYCHIATRIC TESTIMONY EXTENDS BEYOND THE INSANITY DEFENSE TO ANY ULTIMATE MENTAL STATE OF THE DEFENDANT THAT IS RELEVANT TO THE LEGAL CONCLUSION SOUGHT TO BE PROVEN. THE COMMITTEE HAS FASHIONED ITS RULE 704 PROVISION TO REACH ALL SUCH 'ULTIMATE' ISSUES, E.G., PREMEDITATION IN A HOMICIDE CASE, OR LACK OF PREDISPOSITION IN ENTRAPMENT.

COMMITMENT PROCEDURES, PROCEDURES TO DETERMINE COMPETENCY AND RELATED MATTERS

INTRODUCTION


SECTION 4241. DETERMINATION OF MENTAL COMPETENCY TO STAND TRIAL

1. IN GENERAL

SECTION 4241 FOLLOWS PRESENT FEDERAL LAW IN THAT IT PROVIDES FOR A DETERMINATION BY THE COURT OF A DEFENDANT'S COMPETENCY TO STAND TRIAL.

2. PRESENT FEDERAL LAW


THE STATUTE DOES NOT STATE AN EXPLICIT TEST FOR THE PRESENCE OR ABSENCE OF MENTAL COMPETENCY TO STAND TRIAL, ALTHOUGH THE STATUTE DOES STATE THAT THE QUESTION AT ISSUE IN HAVING THE DEFENDANT EXAMINED BY A PSYCHIATRIST IS TO DETERMINE WHETHER THE ACCUSED IS 'PRESENTLY INSANE OR OTHERWISE SO MENTALLY INCOMPETENT AS TO BE UNABLE TO UNDERSTAND THE PROCEEDINGS AGAINST HIM OR PROPERLY TO ASSIST IN HIS OWN DEFENSE.' THE LEADING DECISION ON THE QUESTION OF THE TEST TO BE APPLIED IS DUSKY V. UNITED STATES. [FN652] THERE THE COURT REVERSED A CONVICTION AFTER THE GOVERNMENT ADMITTED THAT THE TRIAL COURT HAD ERRED IN FINDING COMPETENCY ON THE BASIS OF THE RECORD BEFORE IT. IN A VERY BRIEF, PER CURIAM OPINION, THE SUPREME COURT STATED: [FN653]

*233 **3415 WE ALSO AGREE WITH THE SUGGESTION OF THE SOLICITOR GENERAL THAT IT IS NOT ENOUGH FOR THE DISTRICT JUDGE TO FIND THAT 'THE DEFENDANT (IS) ORIENTED TO TIME AND PLACE AND (HAS) SOME RECOLLECTION OF EVENTS,' BUT THAT THE 'TEST MUST BE WHETHER HE HAS SUFFICIENT PRESENT ABILITY TO CONSULT WITH HIS LAWYER WITH A REASONABLE DEGREE OF RATIONAL UNDERSTANDING-- AND WHETHER HE HAS A RATIONAL AS WELL AS A FACTUAL UNDERSTANDING OF THE PROCEEDINGS AGAINST HIM.'


18 U.S.C. 4246 PROVIDES FOR THE COMMITMENT OF A DEFENDANT FOUND MENTALLY INCOMPETENT UNDER SECTION 4244 OR 4245. THE COMMITMENT IS TO THE CUSTODY OF THE ATTORNEY GENERAL UNTIL THE DEFENDANT IS COMPETENT TO STAND TRIAL OR UNTIL THE PENDING CHARGES AGAINST HIM ARE DISPOSED OF ACCORDING TO LAW.
3. PROVISIONS OF THE BILL, AS REPORTED

SECTION 4241 CONTAINS SIX SUBSECTIONS WHICH DEAL EXCLUSIVELY WITH THE DETERMINATION OF THE MENTAL COMPETENCY OF THE DEFENDANT TO STAND TRIAL. THIS SECTION TRACKS, WITH SOME MODIFICATIONS, SECTIONS 4244, 4245, AND 4246 OF TITLE 18 AS THEY NOW EXIST. IT IS INTENDED THAT THE PROCEDURES FOR DETERMINING THE MENTAL COMPETENCY OF THE DEFENDANT TO STAND TRIAL ARE ALSO TO APPLY TO THE ISSUE OF THE DEFENDANT'S COMPETENCY TO ENTER A PLEA.

SECTION 4241 (A) PERMITS A MOTION TO DETERMINE THE MENTAL COMPETENCY OF THE DEFENDANT AFTER THE DEFENDANT HAS BEEN ARRESTED OR CHARGED AND BEFORE THE IMPOSITION OF SENTENCE ON THE DEFENDANT. THE COURT MUST ORDER A HEARING UPON ITS OWN MOTION, OR ON THE MOTION OF THE GOVERNMENT OR THE DEFENSE, IF THERE IS REASONABLE CAUSE TO BELIEVE THAT THE DEFENDANT IS PRESENTLY INCOMPETENT TO STAND TRIAL. SUCH REASONABLE CAUSE EXISTS IF THE COURT BELIEVES THAT THE DEFENDANT MAY PRESENTLY BE SUFFERING FROM A MENTAL DISEASE OR DEFECT RENDERING HIM MENTALLY INCOMPETENT TO THE EXTENT THAT HE IS UNABLE TO UNDERSTAND THE NATURE AND CONSEQUENCES OF THE PROCEEDINGS AGAINST HIM OR ASSIST PROPERLY IN HIS DEFENSE. [FN654]

SECTION 4241(A) SUBSTANTIALLY FOLLOWS 18 U.S.C. 4244 IN THAT THE MOTION FOR A COMPETENCY HEARING MAY BE FILED BY THE GOVERNMENT OR BY THE DEFENDANT; IN ADDITION THE COURT MAY ACT SUA SPONTE. UNDER SECTION 4241(A) THERE IS NO SPECIFIC REQUIREMENT, AS IN 18 U.S.C. 4244, THAT THE MOTION SET FORTH THE GROUNDS FOR THE BELIEF THAT THE DEFENDANT IS INCOMPETENT TO STAND TRIAL; HOWEVER, THIS REQUIREMENT IS INCORPORATED INTO THE STATUTE BY RULE 47 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE WHICH PROVIDES THAT ALL MOTIONS TO THE COURT MUST STATE THE GROUNDS UPON WHICH THEY ARE MADE. [FN655] OF COURSE, PURSUANT TO THAT RULE, THE MOTION MAY BE MADE ORALLY, [FN656] BUT GROUNDS FOR THE MOTION MUST STILL BE STATED.


COMPETENCY HEARING TO DETERMINE THE MENTAL COMPETENCY OF THE DEFENDANT ON ITS OWN MOTION OR ON THE MOTION OF THE GOVERNMENT OR THE DEFENSE. 
MOREOVER, IT IS MANDATORY THAT THE COURT ORDER A HEARING IF THERE IS REASONABLE CAUSE TO BELIEVE THAT THE DEFENDANT MAY PRESENTLY BE SUFFERING FROM A MENTAL DISEASE OR DEFECT RENDERING HIM MENTALLY INCOMPETENT TO THE EXTENT THAT HE IS UNABLE TO UNDERSTAND THE NATURE AND CONSEQUENCES OF THE PROCEEDINGS AGAINST HIM OR TO ASSIST PROPERLY IN HIS DEFENSE. 
THEREFORE, UNLIKE PRESENT FEDERAL LAW, SECTION 4241(A) PERMITS THE COURT TO ORDER A HEARING BE HELD PRIOR TO A PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION IF THE REQUISITE FINDING CAN BE MADE. HOWEVER, THE COMMITTEE CONTEMPLATES THAT A PSYCHIATRIC EXAMINATION WILL BE ROUTINE IN VIRTUALLY ALL CASES IN WHICH THE COURT IS REQUIRED TO HOLD A HEARING, AND ALTHOUGH DISCRETION TO HOLD THE HEARING WITHOUT A PSYCHIATRIC EXAMINATION IS PROVIDED, THE COURT MAY NOT ABUSE THIS DISCRETION AND REFUSE TO ORDER AN EXAMINATION WHERE THE FACTS WARRANT AN EXAMINATION. [FN659]

SUBSECTION (B) OF SECTION 4241 PROVIDES THAT THE COURT MAY ORDER THAT A PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION BE CONDUCTED AND THAT A PSYCHIATRIC OR PSYCHOLOGICAL REPORT BE FILED, PURSUANT TO SECTION 4247(B) AND (C). UNDER SECTION 4247(B), THE COURT MAY ORDER THAT AN EXAMINATION BE CONDUCTED BY A LICENSED OR CERTIFIED PSYCHIATRIST OR BY A CLINICAL PSYCHOLOGIST, OR BY ADDITIONAL EXAMINERS IF THE COURT FINDS IT WOULD BE APPROPRIATE IN A PARTICULAR CASE.


SECTION 4247(C) REQUIRES THE PSYCHIATRIC OR PSYCHOLOGICAL EXAMINER TO FILE WITH THE COURT A REPORT THAT INCLUDES (1) THE DEFENDANT'S HISTORY AND PRESENT SYMPTOMS; (2) A DESCRIPTION OF THE TESTS EMPLOYED AND THEIR RESULTS; (3) THE EXAMINER'S FINDINGS; AND (4) THE EXAMINER'S OPINIONS AS TO DIAGNOSIS AND PROGNOSIS, AND WHETHER THE PERSON IS SUFFERING FROM A MENTAL DISEASE OR DEFECT RENDERING HIM MENTALLY INCOMPETENT TO THE EXTENT THAT HE IS UNABLE TO UNDERSTAND THE NATURE AND CONSEQUENCES OF THE PROCEEDINGS AGAINST HIM OR TO ASSIST PROPERLY IN HIS DEFENSE. COPIES OF THIS REPORT MUST ALSO BE SENT TO THE COUNSEL FOR THE DEFENDANT AND THE ATTORNEY FOR THE GOVERNMENT. [FN661]

ALTHOUGH THE EXAMINER IS REQUIRED PURSUANT TO SECTION 4247(B) TO EXAMINE THE DEFENDANT, THE COMMITTEE IS AWARE THAT THE EXAMINER MAY DECIDE THAT IT IS UNNECESSARY TO ADMINISTER TESTS TO THE DEFENDANT IN A PARTICULAR CASE. THE ABSENCE OF TESTS WILL NOT INVALIDATE THE EXAMINER'S REPORT TO THE COURT AND IS NOT A BASIS FOR AN OBJECTION TO THE REPORT THAT IS FILED IF THE REPORTING EXAMINER HAS INDEED EXAMINED THE DEFENDANT AND STUDIED THE DATA, IF ANY, GATHERED FROM TESTS AND THE REPORTS MADE BY OTHERS.
SECTION 4241(C) PROVIDES THAT THE HEARING SHALL BE CONDUCTED PURSUANT TO SECTION 4247(D), WHICH REQUIRES THAT THE HEARING FULLY COMPORT WITH THE REQUIREMENTS OF DUE PROCESS. INCLUDED IN THE PROTECTIONS AFFORDED BY THE SUBSECTION FOR THE HEARING ARE THE RIGHT TO COUNSEL (COURT APPOINTED IF THE DEFENDANT IS INDIGENT), THE RIGHT TO TESTIFY AND TO PRESENT EVIDENCE, THE OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE WITNESSES AS WELL AS THE RIGHT TO PRESENT WITNESSES IN HIS OWN BEHALF.

SUBSECTION (D) OF SECTION 4241 PROVIDES THAT THE COURT MUST MAKE A DETERMINATION WITH RESPECT TO THE DEFENDANT'S COMPETENCY BASED UPON A PREponderANCE OF THE EVIDENCE. IT SHOULD BE NOTED THAT THE QUESTION OF COMPETENCY OF A DEFENDANT IS FOR THE COURT TO DETERMINE AND IS NOT TO BE TRIED BEFORE A JURY. THIS IS IN ACCORD WITH PRESENT FEDERAL LAW. [FN662] THE FINDING THAT THE COURT MUST MAKE IS WHETHER THE DEFENDANT IS PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT RENDERING HIM MENTALLY INCAPABLE TO THE EXTENT THAT HE IS UNABLE TO UNDERSTAND THE NATURE AND CONSEQUENCES OF THE PROCEEDINGS AGAINST HIM OR TO ASSIST PROPERLY IN HIS DEFENSE. THIS TEST OF COMPETENCY, IN ESSENCE,ADOPTS THE STANDARDS SET FORTH BY THE SUPREME COURT IN DUSKY V. UNITED STATES. [FN663]


IF THE COURT FINDS BY A PREponderANCE OF THE EVIDENCE ADDUCED AT THE
HEARING THAT THE DEFENDANT HAS RECOVERED TO THE EXTENT THAT HE IS COMPETENT TO STAND TRIAL, THE COURT MUST ORDER THE RELEASE OF THE DEFENDANT FROM THE FACILITY IN WHICH HE IS HOSPITALIZED AND SET A DATE FOR THE TRIAL OF THE DEFENDANT OR FOR THE NEXT STAGE IN THE CRIMINAL PROCEEDING AGAINST THE DEFENDANT. A DEFENDANT ORDERED RELEASED AFTER A HEARING PURSUANT TO THIS SUBSECTION IS SUBJECT TO THE PRETRIAL RELEASE PROVISIONS OF CHAPTER 207.

SECTION 4247(E)(1) REQUIRES THE DIRECTOR OF THE FACILITY IN WHICH THE DEFENDANT IS HOSPITALIZED TO SUBMIT SEMIANNUAL REPORTS TO THE COMMITTING COURT CONCERNING THE MENTAL CONDITION OF THE DEFENDANT AND RECOMMENDATIONS CONCERNING HIS CONTINUED HOSPITALIZATION. THE HEAD OF THE FACILITY MUST ALSO SEND COPIES OF THE REPORT TO SUCH OTHER PERSONS AS THE COURT MAY DIRECT.

THIS PROCEDURE REQUIRING SEMIANNUAL REPORTS IS CONSISTENT WITH FEDERAL CASE LAW. IN IN RE HARMON, [FN670] THE FIRST CIRCUIT STATED THAT IF A DEFENDANT IS COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL PURSUANT TO 18 U.S.C. 4246, THE DISTRICT COURT SHOULD REQUIRE FREQUENT REPORTS ON THE ACCUSED'S MENTAL CONDITION AT STATED INTERVALS.


SECTION 4247(G) CODIFIES THE PROVISION IN 18 U.S.C. 4244 BY MAKING ANY STATEMENT MADE BY THE DEFENDANT DURING THE COURSE OF A PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION PURSUANT TO SECTION 4241 (OR 4242 DEALING WITH EXAMINATIONS CONCERNING SANITY AT THE TIME OF THE OFFENSE), INADMISSIBLE ON THE ISSUE OF WHETHER THE DEFENDANT ENGAGED IN THE CONDUCT THAT CONSTITUTES THE OFFENSE CHARGED. [FN671] IT ALSO MAKES ANY SUCH STATEMENT INADMISSIBLE ON THE QUESTION OF PUNISHMENT IN ACCORDANCE WITH ESTELLE V. SMITH, [FN672] WHICH HELD THAT SELF-INCrimINATION PROTECTION CAN EXTEND TO THE SENTENCING PHASE OF TRIAL. SECTION 4247(G) IS INTENDED TO BE CONSISTENT WITH RULE 12.2(C) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE WHICH TOOK EFFECT ON AUGUST 1, 1983, AND PROVIDES IN RELEVANT PART: 'NO STATEMENT MADE BY THE DEFENDANT IN THE COURSE OF ANY EXAMINATION PROVIDED FOR BY THIS RULE, WHETHER THE EXAMINATION BE WITH OR WITHOUT THE CONSENT OF THE DEFENDANT, NO TESTIMONY BY THE EXPERT BASED UPON SUCH STATEMENT, AND NO OTHER FRUITS OF THE STATEMENT SHALL BE ADMITTED IN EVIDENCE AGAINST THE DEFENDANT IN ANY CRIMINAL PROCEEDINGS EXCEPT ON AN ISSUE RESPECTING MENTAL CONDITION ON WHICH THE DEFENDANT HAS INTRODUCED TESTIMONY.' SECTION 4241(F) MAKES IT CLEAR THAT A FINDING BY THE COURT AS TO THE COMPETENCY OF THE DEFENDANT TO STAND TRIAL IS NOT TO PREJUDICE THE DEFENDANT ON THE SEPARATE ISSUE OF WHETHER HE WAS INSANE AT THE TIME OF THE OFFENSE. HOWEVER, THE FINDING ITSELF AS TO THE DEFENDANT'S COMPETENCY IS SPECIFICALLY MADE INADMISSIBLE AT THE TRIAL FOR THE UNDERLYING OFFENSE CHARGED. THIS RULE OF EVIDENCE IS SIMILAR TO THE LIMITATIONS PRESENT IN 18 U.S.C. 4244.
SECTION 4242. DETERMINATION OF THE EXISTENCE OF INSANITY AT THE TIME OF THE OFFENSE

1. IN GENERAL

SECTION 4242 PROVIDES FOR PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION OF THE DEFENDANT WHEN A DEFENDANT FILES A NOTICE OF INTENT TO RELY UPON THE DEFENSE OF INSANITY AT THE TIME OF THE OFFENSE. THE SECTION ALSO PROVIDES FOR THE SPECIAL VERDICT OF NOT GUILTY ONLY BY REASON OF INSANITY REQUIRED IF THE DEFENDANT USES SUCH NOTICE.

2. PRESENT LAW

PRESENT FEDERAL LAW, OTHER THAN THE DISTRICT OF COLUMBIA CODE, CONTAINS NO PROVISION FOR A VERDICT OR FINDING OF NOT GUILTY BY REASON OF INSANITY. [FN673] THE CONCEPT OF A NOTICE OF AN INTENT TO RAISE AN INSANITY DEFENSE WAS FIRST SUGGESTED BY A 1974 AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE. [FN674] FURTHERMORE, THERE IS NO PROCEDURE FOR COMMITMENT TO A MENTAL INSTITUTION OF A PERSON WHO OBTAINS AN ACQUITTAL ON THE BASIS OF THE INSANITY DEFENSE--IF THE BASIS OF THE ACQUITTAL CAN EVEN BE DETERMINED WITH CERTAINTY. [FN675] FEDERAL OFFICIALS MUST ATTEMPT CIVIL COMMITMENT OF SUCH PERSONS BY URGING LOCAL AUTHORITIES TO INSTITUTE COMMITMENT PROCEEDINGS. FREQUENTLY SUCH EFFORTS ARE UNSUCCESSFUL; NOT UNCOMMONLY THIS IS DUE TO LACK OF SUFFICIENT CONTACTS BETWEEN THE ACQUITTED DEFENDANT AND A PARTICULAR STATE FOR THE LATTER TO BE WILLING TO UNDERTAKE CARE AND TREATMENT RESPONSIBILITY FOR HIM. [FN676] THE ABSENCE OF POST-ACQUITTAL ARRANGEMENTS FOR COMMITMENT IS IN MARKED CONTRAST WITH PROCEDURES PRESENTLY PROVIDED BY CHAPTER 313 OF TITLE 18, UNITED STATES CODE, FOR FEDERAL COMMITMENT OF A PERSON FOUND INCOMPETENT TO STAND TRIAL AND CONVICTED PRISONERS WHO SUBSEQUENTLY BECOME MENTALLY ILL. [FN677]

3. PROVISIONS OF THE BILL, AS REPORTED

SECTION 4247(C) REQUIRES THE EXAMINER OR EXAMINERS IN CONDUCTING AN EXAMINATION PURSUANT TO SECTION 4242 TO FILE A REPORT WITH THE COURT AND TO SEND COPIES OF THE REPORT TO THE COUNSEL FOR THE DEFENDANT AND THE ATTORNEY FOR THE GOVERNMENT, AS IS REQUIRED FOR EXAMINATIONS PURSUANT TO SECTION 4241. SECTION 4247(C) REQUIRES THE SAME FIRST THREE ITEMS IN THE REPORT FOR AN EXAMINATION PURSUANT TO SECTION 4242 AS ARE REQUIRED FOR SECTION 4241. THE FOURTH REQUIRED ITEM IS DIFFERENT, REFLECTING THE DIFFERENT PROCEDURE INVOLVED IN SECTION 4242. HERE THE EXAMINERS MUST PRESENT THEIR OPINIONS AS TO DIAGNOSIS AND PROGNOSIS, AND AS TO WHETHER THE DEFENDANT WAS INSANE AT THE TIME OF THE OFFENSE CHARGED. [FN680]

AS HERETOFORE STATED, THE FEDERAL LAW GENERALLY CONTAINS NO PROVISION FOR A VERDICT OF NOT GUILTY BY REASON OF INSANITY. [FN681] TO CURE THE PROBLEMS THAT THIS LACK CREATES, SECTION 4242(B) PROVIDES THAT WHERE THE ISSUE OF INSANITY IS RAISED, THE JURY IS TO BE INSTRUCTED TO FIND, OR, IN THE EVENT OF A NON-JURY TRIAL, THE COURT IS TO FIND, THE DEFENDANT EITHER (1) GUILTY; (2) NOT GUILTY; OR (3) NOT GUILTY ONLY BY REASON OF INSANITY. THE COMMITTEE ENDORSES THE PROCEDURE USED IN THE DISTRICT OF COLUMBIA WHEREBY THE JURY, IN A CASE IN WHICH THE INSANITY DEFENSE HAS BEEN RAISED, MAY BE INSTRUCTED ON THE EFFECT OF A VERDICT OF NOT GUILTY BY REASON OF INSANITY. [FN682] IF THE DEFENDANT REQUESTS THAT THE INSTRUCTION NOT BE GIVEN, IT IS WITHIN THE DISCRETION OF THE COURT WHETHER TO GIVE IT OR NOT. [FN683]

IN AUGMENTATION OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCrimination AND IN ACCORDANCE WITH PRESENT FEDERAL PRACTICE, [FN684] SECTION 4247(G) PROHIBITS THE ADMISSION INTO EVIDENCE ON THE ISSUE OF GUILT OF STATEMENTS MADE BY THE DEFENDANT DURING THE COURSE OF A PSYCHIATRIC EXAMINATION PURSUANT TO SECTION 4242 ON THE ISSUE OF GUILT. OF COURSE, SINCE THE EXCLUSION IS FOR THE DEFENDANT’S BENEFIT, HE MAY WAIVE IT. [FN685] THE PROVISION ALSO MAKES THE DEFENDANT’S STATEMENTS INADMISSIBLE ON ISSUES OF PUNISHMENT. [FN686]

SECTION 4242. HOSPITALIZATION OF A PERSON FOUND NOT GUILTY ONLY BY REASON OF INSANITY

1. IN GENERAL

SECTION 4243 SETS OUT THE PROCEDURE TO BE FOLLOWED WHEN A PERSON IS FOUND NOT GUILTY SOLELY BY REASON OF INSANITY AT THE TIME OF THE OFFENSE. INCLUDED IS A COMMITMENT PROVISION WHEREBY A PERSON ACQUITTED ONLY BY REASON OF INSANITY, WHO IS PRESENTLY SUFFERING FROM MENTAL DISEASE OR DEFECT AS A RESULT OF WHICH HIS RELEASE WOULD CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO PROPERTY OF ANOTHER, WILL BE COMMITTED FOR TREATMENT TO THE CUSTODY OF THE ATTORNEY GENERAL.

*241 **3423 2. PRESENT FEDERAL LAW

AT PRESENT, THERE IS NO FEDERAL PROCEDURE FOR COMMITMENT TO MENTAL INSTITUTIONS OF PERSONS WHO ARE ACQUITTED SOLELY BY REASON OF INSANITY AND WHO ARE PRESENTLY DANGEROUS. [FN687] FEDERAL OFFICIALS CAN OBTAIN CIVIL COMMITMENT OF SUCH PERSONS ONLY BY URGING LOCAL AUTHORITIES TO INSTITUTE SUCH PROCEEDINGS. AS NOTED ABOVE, SUCH EFFORTS ARE RARELY SUCCESSFUL LARGELY DUE TO A LACK OF SUFFICIENT CONTACTS BETWEEN THE ACQUITTED DEFENDANT AND THE INDIVIDUAL STATE FOR THE LATTER TO BE WILLING
TO UNDERTAKE RESPONSIBILITY FOR HIM. THE ABSENCE OF POST-ACQUITTAL ARRANGEMENTS FOR COMMITMENT IS IN MARKED CONTRAST WITH PROCEDURES PRESENTLY PROVIDED BY CHAPTER 313 OF TITLE 18, U.S.C. FOR FEDERAL COMMITMENT OF PERSONS FOUND INCOMPETENT TO STAND TRIAL AND CONVICTED PRISONERS WHO SUBSEQUENTLY BECOME MENTALLY ILL. [FN688]

3. PROVISIONS OF THE BILL, AS REPORTED

SECTION 4243 CONTAINS SEVEN SUBSECTIONS WHICH DEAL WITH THE HOSPITALIZATION OF A PERSON ACQUITTED BY REASON OF INSANITY. SUBSECTION 4243(A) PROVIDES THAT WHEN A PERSON IS FOUND NOT GUILTY ONLY BY REASON OF INSANITY AT THE TIME OF THE OFFENSE CHARGED, HE MUST BE COMMITTED TO A SUITABLE FACILITY UNTIL HE IS ELIGIBLE FOR RELEASE PURSUANT TO SUBSECTION (E).

SUBSECTION (B) OF SECTION 4243 PROVIDES THAT, IN CONNECTION WITH A HEARING HELD PURSUANT TO SUBSECTION (C), THE COURT SHALL ORDER THAT THE ACQUITTED PERSON BE EXAMINED IN ACCORDANCE WITH SECTIONS 4247(B) AND (C) WHICH PROVIDE FOR EXAMINATION BY A QUALIFIED PSYCHIATRIST OR PSYCHOLOGIST DESIGNATED BY THE COURT. THE PROCEDURE TO BE FOLLOWED IS ESSENTIALLY THE SAME AS THAT FOR EXAMINATIONS PURSUANT TO SECTIONS 4241 AND 4242.

SUBSECTION (C) PROVIDES THAT, WITHIN FORTY DAYS OF THE SPECIAL VERDICT, A HEARING IS TO BE CONDUCTED PURSUANT TO THE PROVISIONS OF SECTION 4247(D). IT WILL FREQUENTLY BE DESIRABLE TO APPOINT THE SAME INDIVIDUAL OR INDIVIDUALS WHO EXAMINED THE ACQUITTED PERSON FOR PURPOSES OF THE INSANITY DEFENSE TO EXAMINE THE PERSON UNDER THIS SUBSECTION. NEVERTHELESS, THERE MAY BE SITUATIONS WHERE A VALID REASON WILL EXIST FOR NOT APPOINTING THE SAME PSYCHIATRIST OR CLINICAL PSYCHOLOGIST. THIS IS LEFT TO THE DISCRETION OF THE COURT.

THE REQUIREMENTS OF SUBSECTIONS (A) THROUGH (C) ARE SIMILAR TO THE MOST RECENT PRONOUNCEMENT OF CONGRESS IN THIS AREA, THE PASSAGE OF THE DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970. [FN689] UNDER THIS ACT, A PERSON ACQUITTED BY REASON OF INSANITY IN THE DISTRICT OF COLUMBIA IS SUBJECT TO MANDATORY COMMITMENT TO A MENTAL HOSPITAL WITH A HEARING TO BE HELD WITHIN FIFTY DAYS OF THE CONFINEMENT TO DETERMINE WHETHER THE PERSON IS ENTITLED TO RELEASE FROM CUSTODY. THE DECISION OF THE COURT MUST BE MADE WITHIN TEN DAYS OF THE BEGINNING OF THE HEARING. [FN690]

FOR THE PURPOSE OF THE EXAMINATION UNDER SECTION 4247(C), COMMITMENT WITH AN OPPORTUNITY FOR A THIRTY-DAY EXTENSION FOR GOOD *242 **3424 CAUSE SHOWN, MAY BE ORDERED AS IS THE CASE UNDER THE PRECEDING SECTION. OF COURSE, IF THE COURT BELIEVES THAT THE EXAMINATION CAN BE CONDUCTED ON AN OUTPATIENT BASIS, IT NEED NOT ORDER COMMITMENT FOR THE EXAMINATION. IN ADDITION, THE COURT MAY MAKE ANY ORDER REASONABLY NECESSARY TO SECURE THE APPEARANCE OF THE PERSON AT THE HEARING. THIS MAY INCLUDE INCARCERATION OR CONTINUED HOSPITALIZATION AFTER COMPLETION OF THE PSYCHIATRIC EXAMINATION.

SECTION 4247(C) REQUIRES THE EXAMINING PSYCHIATRIST OR CLINICAL PSYCHOLOGIST TO FILE A REPORT WITH THE COURT AND TO SEND COPIES OF THE REPORT TO COUNSEL FOR THE DEFENDANT AND TO THE ATTORNEY FOR THE GOVERNMENT. SINCE IN THIS CASE THE PERSON HAS ALREADY BEEN ACQUITTED AND SINCE THE HEARING MUST BE HELD WITHIN FORTY DAYS OF THE SPECIAL VERDICT, THE COURT WILL NEED THE REPORT IN A RELATIVELY SHORT PERIOD OF TIME. IN ADDITION, THE COMMITTEE CONTEMPLATES THAT THE HEARING PROVIDED FOR IN SECTION 4247(C) SHOULD BE HELD PROMPTLY AFTER THE REPORTS ARE FILED. THE REPORT OF THE EXAMINER OF TEAM MUST INCLUDE (1) THE ACQUITTED PERSON’S HISTORY AND PRESENT SYMPTOMS; (2) A DESCRIPTION OF THE PSYCHOLOGICAL AND
MEDICAL TESTS EMPLOYED AND THEIR RESULTS; (3) THE EXAMINER’S FINDINGS; AND
(4) THE EXAMINER’S OPINION AS TO DIAGNOSIS, PROGNOSIS, AND WHETHER THE
PERSON IS SUFFERING FROM A MENTAL DISEASE OR DEFECT AS A RESULT OF WHICH
HIS RELEASE WOULD CREATE A SUBSTANTIAL RISK OF BODILY INJURY OR SERIOUS
DAMAGE TO THE PROPERTY OF ANOTHER. [FN691] THE FIRST THREE ITEMS ARE
IDENTICAL TO THOSE REQUIRED FOR AN EXAMINATION ORDERED UNDER SECTION
4241 OR 4242. THE FOURTH IS IS SOMewhat DIFFERENT, REFLECTING THE
DIFFERENCE IN THE PROCEDURE INVOLVED.

SUBSECTION (D) OF SECTION 4243 SETS OUT THE BURDEN OF PROOF AT THE
COMMITMENT HEARING CALLED FOR IN SUBSECTION 4243(C). IF THE PERSON HAS
BEEN FOUND NOT GUILTY ONLY BY REASON OF INSANITY OF AN OFFENSE INVOLVING
BODILY INJURY TO, OR SERIOUS DAMAGE TO THE PROPERTY OF ANOTHER PERSON, OR
INVOLVING A SUBSTANTIAL RISK OF SUCH INJURY OR DAMAGE [FN692] HE HAS THE
BURDEN OF PROVING BY CLEAR AND CONVINCING EVIDENCE THAT HIS RELEASE
WOULd NOT CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR
SERIOUS DAMAGE TO THE PROPERTY OF ANOTHER. FOR LESS SERIOUS OFFENSES NOT
INVOLVING BODILY INJURY, SERIOUS PROPERTY DAMAGE, OR THE SUBSTANTIAL RISK
THEREOF, THE ACQUITTED PERSON STILL HAS THE BURDEN OF PROOF THAT HIS
RELEASE WILL NOT CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER
PERSON OR PROPERTY DAMAGE, BUT THE STANDARD OF PROOF IS ONLY BY A
PREPONDERANCE OF THE EVIDENCE.

PLACING THE BURDEN OF PROOF ON THE ACQUITTED PERSON IS THE PROCEDURE IN
EFFECT IN THE DISTRICT OF COLUMBIA AND WAS RECENTLY UPHELD BY THE SUPREME
COURT IN JONES V. UNITED STATES. [FN693] IN JONES THE DEFENDANT WAS
ACQUITTED BY REASON OF INSANITY OF THE OFFENSE OF ATTEMPTED SHOPLIFTING
AND THE COURT Upheld THE D.C. CODE PROVISION WHICH REQUIRED THE
DEFENDANT TO DEMONSTRATE BY A PREPONDERANCE **243 **3425 OF THE EVIDENCE
AT THE COMMITMENT HEARING THAT HE WAS NO LONGER MENTALLY ILL OR
DANGEROUS. THE COURT NOTED THAT THE AUTOMATIC COMMITMENT PROCEDURE IN
THE DISTRICT OF COLUMBIA AND THE RESULTANT SHIFTING OF THE BURDEN OF
PROOF TO THE DEFENDANT TO SHOW THAT HE IS NO LONGER INSANE OR DANGEROUS
AS A PREREQUISITE FOR OBTAINING HIS RELEASE AROSE ONLY AFTER THE INSANITY
ACQUITTEE HIMSELF SUCCESSFULLY RAISED AN INSANITY DEFENSE AND PROVED BY A
PREPONDERANCE OF THE EVIDENCE THAT HE WAS INSANE. THE COURT THEREFORE
DISTINGUISHED ADDINGTON V. TEXAS, [FN694] WHICH HELD THAT FOR THE
INvolUNTARY CIVIL COMMITMENT OF A PERSON THE GOVERNMENT MUST SHOW
INSANITY AND DANGEROUSNESS BY CLEAR AND CONVINCING EVIDENCE, AND HELD
THAT AN INSANITY ACQUITTEE COULD BE REQUIRED TO SHOULDER THE BURDEN OF
PROOF AT THE COMMITMENT HEARING. [FN695] MOREOVER, THE COURT IN JONES
NOTED THAT THE DEFENDANT COULD BE REQUIRED TO PROVE HIS INSANITY AT THE
TRIAL BY A HIGHER STANDARD THAN A MERE PREPONDERANCE OF THE EVIDENCE.
[FN696] FOR EXAMPLE, HE COULD BE REQUIRED TO PROVE HIS INSANITY BY CLEAR
AND CONVINCING EVIDENCE, WHICH IN TURN WOULD JUSTIFY REQUIRING HIM AT THE
COMMITMENT HEARING TO PROVE HIS PRESENT SANITY OR LACK OF DANGEROUSNESS
BY SUCH A HIGHER STANDARD. SINCE THIS BILL REQUIRES THE DEFENDANT TO PROVE
HIS INSANITY AS A DEFENSE TO THE CRIMINAL CHARGE BY CLEAR AND CONVINCING
EVIDENCE, IT IS CLEARLY CONSTITUTIONAL TO REQUIRE THOSE DEFENDANTS
ACQUITTED OF VIOLENT CRIMES TO PROVE THAT THEY ARE NO LONGER DANGEROUS
OR INSANE BY A SIMILAR STANDARD.

SUBSECTION (E) PROVIDES THAT IF, AFTER THE HEARING, THE COURT MAKES THE
NECESSARY FINDING OF PRESENT INSANITY AND SUBSTANTIAL RISK, IT MUST COMMIT
THE PERSON TO THE CUSTODY OF THE ATTORNEY GENERAL, WHO IN TURN MUST
RELEASE THE PERSON TO THE APPROPRIATE STATE OFFICIAL IN THE PERSON’S STATE
OF DOMICILE OR THE STATE IN WHICH THE PERSON WAS TRIED IF THE STATE WILL
ASSUME RESPONSIBILITY FOR THE PERSON’S CUSTODY, CARE, AND TREATMENT. THE ATTORNEY GENERAL MUST MAKE ALL REASONABLE EFFORTS TO CAUSE SUCH A STATE TO ASSUME SUCH RESPONSIBILITY. IF, NEVERTHELESS, NEITHER STATE WILL DO SO, THE ATTORNEY GENERAL MUST HOSPITALIZE THE PERSON IN A SUITABLE FACILITY. THE COMMITMENT WILL BE UNTIL EITHER THE STATE ASSUMES RESPONSIBILITY OR UNTIL THE PERSON’S MENTAL CONDITION IS SUCH THAT HIS RELEASE, OR HIS CONDITIONAL RELEASE UNDER A PRESCRIBED REGIMEN OF MEDICAL CARE OR TREATMENT, WOULD NOT CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO THE PROPERTY OF ANOTHER, [FN697] WHICHEVER IS EARLIER. THE ATTORNEY GENERAL IS DIRECTED TO CONTINUE PERIODICALLY TO EXERT ALL REASONABLE EFFORTS TO CAUSE AN APPROPRIATE STATE TO ASSUME RESPONSIBILITY FOR THE PERSON'S CUSTODY, CARE, AND TREATMENT. THIS COMMITMENT PROCEDURE NOT ONLY AFFORDS ASSISTANCE TO THOSE REQUIRING THE BENEFIT OF TREATMENT, BUT ALSO AFFORDS THE PUBLIC PROTECTION FROM THOSE WHO, DUE TO MENTAL DISEASE OR DEFECT, POSE A DANGER TO THE REST OF SOCIETY. [FN698]

UNDER SUBSECTION (F), WHEN THE DIRECTOR OF THE FACILITY IN WHICH AN ACQUITTED PERSON IS HOSPITALIZED DETERMINES THAT THE PERSON HAS **244 **3426 RECOVERED TO THE EXTENT THAT HIS RELEASE, OR HIS CONDITIONAL RELEASE UNDER A PRESCRIBED REGIMEN OF MEDICAL CARE OR TREATMENT, WOULD NOT CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO THE PROPERTY OF ANOTHER, HE SHALL PROMPTLY FILE A CERTIFICATE SO STATING WITH THE CLERK OF THE COMMITTING COURT. THE CLERK SHALL SEND A COPY OF THE CERTIFICATE TO THE ATTORNEY FOR THE GOVERNMENT AND THE ATTORNEY FOR THE COMMITTED PERSON. UPON RECEIPT OF THE CERTIFICATE, THE COURT MUST EITHER ORDER THE RELEASE OF THE PERSON, OR UPON MOTION OF THE GOVERNMENT, OR UPON ITS OWN MOTION, HOLD A HEARING TO DETERMINE WHETHER THE PERSON SHOULD BE RELEASED. THE HEARING MUST FOLLOW THE PROCEDURAL REQUIREMENTS OF SECTION 4247(D). AFTER THE HEARING, IF THE COURT FINDS BY THE STANDARD SPECIFIED IN SUBSECTION (D) THAT THE PERSON HAS RECOVERED FROM HIS MENTAL DISEASE OR DEFECT TO SUCH AN EXTENT THAT HIS RELEASE WOULD NO LONGER CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO THE PROPERTY OF ANOTHER, THE COURT MUST ORDER THE IMMEDIATE RELEASE OF THE PERSON. IF THE PERSON DOES NOT MEET THE CRITERIA FOR UNCONDITIONAL RELEASE BUT THE COURT FINDS THAT THE PERSON HAS RECOVERED FROM HIS MENTAL DISEASE OR DEFECT TO SUCH AN EXTENT THAT HIS CONDITIONAL RELEASE UNDER A PRESCRIBED REGIMEN OF MEDICAL CARE OR TREATMENT WOULD NOT CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO PROPERTY OF ANOTHER, THE COURT SHALL ORDER THAT HE BE DISCHARGED UNDER AN APPROPRIATE PRESCRIBED REGIMEN OF MEDICAL CARE OR TREATMENT ON THE EXPLICIT CONDITION THAT HE COMPLY WITH THE PRESCRIBED REGIMEN. THE COURT AT ANY TIME MAY, AFTER A HEARING, MODIFY OR ELIMINATE THE REGIMEN OF MEDICAL CARE OR TREATMENT EMPLOYING THE SAME CRITERIA APPLICABLE TO THE ORIGINAL DETERMINATION. SUBSECTION (G) PROVIDES A PROCEDURE FOR DEALING WITH THE SITUATION IN WHICH THE RELEASED PERSON FAILS TO COMPLY WITH THE PRESCRIBED REGIMEN OF MEDICAL CARE OR TREATMENT. UNDER THIS PROCEDURE THE DIRECTOR OF THE MEDICAL FACILITY RESPONSIBLE FOR ADMINISTERING THE REGIMEN IMPOSED UNDER SUBSECTION (F) SHALL NOTIFY THE ATTORNEY GENERAL AND THE COURT HAVING JURISDICTION OVER THE CASE OF THE FAILURE TO COMPLY WITH THE PRESCRIBED REGIMEN. IN A PROCEDURE SIMILAR TO REVOCATION OF PROBATION, UPON NOTICE BY THE MEDICAL DIRECTOR OR OTHER PROBABLE CAUSE TO BELIEVE THE PERSON HAS FAILED TO COMPLY WITH THE REGIMEN, THE PERSON MAY BE ARRESTED, AND, UPON ARREST, MUST BE BROUGHT WITHOUT UNNECESSARY DELAY BEFORE THE COURT HAVING JURISDICTION. THE COURT MUST, AFTER A HEARING, DETERMINE WHETHER THE PERSON SHOULD BE REMANDED TO A SUITABLE FACILITY ON THE GROUND THAT,
IN LIGHT OF HIS FAILURE TO COMPLY WITH THE PRESCRIBED REGIMEN OF MEDICAL CARE OR TREATMENT, HIS CONTINUED RELEASE WOULD CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO PROPERTY OF ANOTHER.

SECTION 4247(E)(1) REQUIRES THE DIRECTOR OF THE FACILITY IN WHICH AN ACQUITTED PERSON IS HOSPITALIZED TO SUBMIT TO THE COMMITTING COURT ANNUAL REPORTS CONCERNING THE MENTAL CONDITION OF THE PERSON AND RECOMMENDATIONS CONCERNING HIS CONTINUED HOSPITALIZATION. THIS PROVISION IS SIMILAR TO THE REPORTING PROCEDURE FOR COMMITMENTS PURSUANT TO SECTION 4241 AND THE COMMENTS ON THAT SECTION HAVE EQUAL APPLICABILITY HERE.

SECTION 4247 STATES THAT THE ACQUITTED PERSON COMMITTED UNDER THIS SECTION RETAINS THE RIGHT TO HABEAS CORPUS RELIEF. THUS, NOTHING IN SECTION 4243 SHOULD BE CONSTRUED AS PRECLUDING AN ACQUITTED PERSON COMMITTED UNDER THIS SECTION FROM ESTABLISHING BY WRIT OF HABEAS CORPUS HIS ELIGIBILITY FOR RELEASE UNDER THE PROVISIONS OF THIS SECTION.

**SECTION 4244. HOSPITALIZATION OF A CONVICTED PERSON SUFFERING FROM MENTAL DISEASE OR DEFECT**

1. IN GENERAL

SECTION 4244 SETS FORTH THE PROCEDURE TO BE FOLLOWED WHEN THERE IS REASONABLE CAUSE TO BELIEVE THAT A RECENTLY CONVICTED DEFENDANT MAY BE PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT FOR WHICH HE NEEDS CARE OR TREATMENT IN A SUITABLE FACILITY. THIS SECTION IS NEW TO FEDERAL LAW AND IS INSERTED IN ORDER TO ASSIST THE COURT IN DETERMINING THE PROPER FACILITY FOR COMMITMENT OF A CONVICTED DEFENDANT. THIS SECTION IS ALSO FOR THE BENEFIT OF A CONVICTED DEFENDANT WHO IS MENTALLY ILL AND WHO NEEDS HOSPITALIZATION. IN ADDITION, THE HOSPITALIZATION OF SUCH A PERSON BENEFITS SOCIETY NOT ONLY BY PROTECTING THE PUBLIC FROM MENTALLY ILL CONVICTED DEFENDANTS BUT ALSO BY TREATING AND HOPEFULLY CURING SUCH A PERSON.

2. PRESENT FEDERAL LAW

PRESENT FEDERAL LAW CONTAINS NO PROVISION FOR THE HOSPITALIZATION, IN LIEU OF IMPRISONMENT IN A PENAL FACILITY, OF A CONVICTED PERSON SUFFERING FROM MENTAL DISEASE OR DEFECT. [FN699]

3. PROVISIONS OF THE BILL, AS REPORTED

SUBSECTION (A) OF SECTION 4244 PROVIDES THAT, WITHIN TEN DAYS AFTER A DEFENDANT IS FOUND GUILTY OF AN OFFENSE, THE DEFENDANT OR THE GOVERNMENT MAY FILE A MOTION FOR A HEARING ON THE PRESENT MENTAL CONDITION OF THE DEFENDANT. THE COURT MUST GRANT THE MOTION AND ORDER A HEARING IF IT IS OF THE OPINION THAT THERE IS REASONABLE CAUSE TO BELIEVE THAT THE DEFENDANT MAY BE PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT FOR WHICH HE NEEDS CARE OR TREATMENT IN A SUITABLE FACILITY. THE MOTION MUST STATE THE GROUNDS UPON WHICH THE MOTION IS MADE; THIS FOLLOWS THE REQUIREMENT SET OUT IN RULE 47 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

IN ADDITION, THE COURT, ON ITS OWN MOTION, MAY ORDER A HEARING ON THE PRESENT MENTAL CONDITION OF THE DEFENDANT AT ANY TIME PRIOR TO THE IMPOSITION OF SENTENCE, IF FACTS ARE BROUGHT TO THE ATTENTION OF THE COURT WHICH WOULD LEAD THE COURT TO HAVE A REASONABLE BELIEF THAT THE DEFENDANT MAY BE PRESENTLY SUFFERING FROM SUCH A MENTAL DISEASE OR DEFECT. IN SUCH CASES, THE COURT MUST ORDER A HEARING ON THE MENTAL
CONDITION OF THE DEFENDANT. THESE FACTS MIGHT BE BROUGHT TO THE ATTENTION OF THE COURT IF, AS PART OF THE PRESENTENCE PROCEDURE, THE COURT HAD ORDERED THAT THE DEFENDANT BE EXAMINED BY A PSYCHIATRIST OR BY A CLINICAL PSYCHOLOGIST.

SUBSECTION (B) OF SECTION 4244 PROVIDES THAT A CONVICTED DEFENDANT MAY BE EXAMINED BY A PSYCHIATRIST OR BY A CLINICAL PSYCHOLOGIST PURSUANT TO SECTION 4247(B) WHICH PROVIDES THAT THE DEFENDANT MAY BE EXAMINED BY AN EXAMINER OR EXAMINERS DESIGNATED BY THE COURT. THIS PROCEDURE IS SIMILAR TO THAT SET FORTH IN SECTION 4247 FOR EXAMINATIONS PURSUANT TO SECTION 4241. SECTION 4247(C), PROVIDING FOR THE PSYCHIATRIC REPORTS, AND SECTION 4247(D), DEALING WITH THE PROCEDURES FOR THE HEARING, ALSO PROVIDE SIMILAR PROCEDURES TO THOSE PROVIDED FOR OTHER EXAMINATIONS DISCUSSED EARLIER IN RELATION TO THE PRECEDING SECTIONS OF THIS CHAPTER.

ONE DISTINCTION FOR SECTION 4244 IS THAT THE EXAMINER, AMONG HIS OTHER OPINIONS, MUST REPORT ON THE PERSON'S NEED OF CUSTODY FOR CARE OR TREATMENT IN A SUITABLE FACILITY. AT THIS POINT THE DEFENDANT HAS BEEN CONVICTED AND THE ISSUE IS THE BEST DISPOSITION UNDER THE CIRCUMSTANCES. THIS CONTRASTS WITH THE REQUIRED OPINION FOR SECTION 4243, DEALING WITH AN ACQUITTED PERSON, WHERE THE ISSUE POSED IS THE PERSON'S RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO THE PROPERTY OF ANOTHER. IF THE EXAMINER'S REPORT FINDS THE PRESENCE OF A MENTAL DISEASE OR DEFECT BUT DOES NOT FIND THAT IT REQUIRES PLACEMENT OF THE PERSON IN A SUITABLE FACILITY, THE REPORT SHOULD INCLUDE A RECOMMENDATION AS TO THE SENTENCING ALTERNATIVES AVAILABLE THAT WILL BEST ACCORD THE DEFENDANT THE TREATMENT HE DOES NEED.

SUBSECTION (C) PROVIDES THAT A HEARING SHALL BE CONDUCTED IN ACCORD WITH THE PROVISIONS OF SECTION 4247(D), RELATING TO DUE PROCESS REQUIREMENTS. SUBSECTION (D) PROVIDES THAT IF, AFTER THE HEARING, THE COURT FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT IS PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT AND SHOULD, IN LIEU OF BEING SENTENCED TO IMPRISONMENT, BE COMMITTED TO A SUITABLE FACILITY FOR CARE OR TREATMENT, THE COURT THEN MUST COMMIT THE DEFENDANT TO THE CUSTODY OF THE ATTORNEY GENERAL FOR TREATMENT IN A SUITABLE FACILITY.

UNDER THE SUBSECTION, COMMITMENT IS TO BE TO THE CUSTODY OF THE ATTORNEY GENERAL, WHO MUST HOSPITALIZE THE DEFENDANT FOR TREATMENT IN A SUITABLE FACILITY. THIS COMMITMENT TO THE ATTORNEY GENERAL SHALL BE TREATED FOR ADMINISTRATIVE PURPOSES AS A PROVISIONAL SENTENCE TO IMPRISONMENT FOR THE MAXIMUM TERM AUTHORIZED FOR THE OFFENSE COMMITTED. THIS SENTENCE IS PROVISIONAL, HOWEVER, IN LIGHT OF THE RELEASE PROVISION SET FORTH IN SUBSECTION (E).

THE DEFENDANT'S MENTAL CONDITION, AND, IF NECESSARY, THE COURT MAY 
RECOMMEND THE *247 **3429 DEFENDANT TO THE CUSTODY OF THE ATTORNEY 
GENERAL FOR CONTINUED HOSPITALIZATION. 
SECTION 4247(E)(1) REQUIRES THE DIRECTOR OF THE FACILITY IN WHICH THE 
DEFENDANT IS HOSPITALIZED TO SUBMIT TO THE COMMITTING COURT ANNUAL 
REPORTS CONCERNING THE MENTAL CONDITION OF THE DEFENDANT AND 
RECOMMENDATIONS CONCERNING HIS CONTINUED HOSPITALIZATION. THIS 
SUBSECTION PARALLELS THE SIMILAR PROCEDURE SET FORTH IN SECTION 4247 FOR 
OTHER SECTIONS OF THE CHAPTER.

SECTION 4245. HOSPITALIZATION OF AN IMPRISONED PERSON SUFFERING FROM 
MENTAL 
DISEASE OR DEFECT

1. IN GENERAL

SECTION 4245 DEALS WITH THE HOSPITALIZATION OF AN IMPrISONED PERSON WHO 
IS PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT FOR WHICH HE IS IN 
NEED OF CUSTODY FOR CARE OR TREATMENT. THIS SECTION SIGNIFICANTLY CHANGES 

ONE MAJOR CHANGE THE COMMITTEE HAS MADE IN EXISTING LAW IS TO REQUIRE A 
COURT HEARING BEFORE A PRISONER MAY BE TRANSFERRED TO A MENTAL HOSPITAL 
IF HE OBJECTS TO SUCH A TRANSFER. THE NECESSITY FOR SUCH A HEARING IN STATE 
CASES WAS MADE CLEAR BY THE SUPREME COURT IN VITEK V. JONES [FN700] WHICH 
HELD THAT THE INVOLUNTARY TRANSFER OF A PRISONER TO A MENTAL HOSPITAL 
IMPLICATES A LIBERTY INTEREST THAT IS PROTECTED BY THE FOURTEENTH 
AMENDMENT. WHILE THE COMMITTEE IS IN AGREEMENT WITH THE PRESENT FEDERAL 
LAW WHICH PERMITS THE ATTORNEY GENERAL TO DETERMINE THE APPROPRIATE 
METHOD OF HANDLING FEDERAL PRISONERS, AS WELL AS THE APPROPRIATE PLACE OF 
INCARCERATION FOR THESE PRISONERS, AND IS UNAWARE OF ABUSES BY FEDERAL 
AUTHORITIES WITH RESPECT TO TRANSFER OF PRISONERS TO MENTAL HOSPITALS, 
THE COMMITTEE IS AWARE OF CERTAIN SHOCKING CASES INVOLVING TRANSFER OF 
STATE PRISONERS. [FN701] IT IS TO INSURE THAT FEDERAL PRISONERS CONTINUE TO 
RECEIVE FAIR AND JUST TREATMENT THAT THE COMMITTEE HAS INCLUDED THE 
PROTECTIVE PROCEDURES OF SECTION 4245.

CERTAIN FACTORS HAVE LED THE COMMITTEE TO THE CONCLUSION THAT 
INCARCERATION IN A SUITABLE FACILITY IS SUFFICIENTLY DIFFERENT FROM 
INCARCERATION IN A PENAL INSTITUTION TO REQUIRE THESE PROCEDURAL 
SAFEGUARDS. FIRST, ALTHOUGH REGRETTABLE, IT IS A FACT THAT THERE IS A STIGMA 
ATTACHED TO THE MENTALLY ILL WHICH IS DIFFERENT FROM THAT ATTACHED TO 
CRIMINALS. THUS, A PRISONER TRANSFERRED TO A MENTAL HEALTH FACILITY MIGHT 
POSSIBLY BE DESCRIBED AS 'TWICE CURSED.' [FN702]
SECOND, THERE ARE NUMEROUS RESTRICTIONS AND ROUTINES IN A MENTAL HEALTH 
FACILITY WHICH DIFFER SIGNIFICANTLY FROM THOSE IN A PRISON. SINCE THESE 
RESTRICTIONS AND ROUTINES ARE DESIGNED TO AID AND PROTECT *248 **3430 
THE MENTALLY ILL, PERSONS WHO DO NOT HAVE NEED FOR SUCH DISCIPLINE SHOULD 
NOT BE SUBJECT TO IT. [FN703]
MOST IMPORTANTLY, HOWEVER, THE COMMITTEE IS CONCERNED THAT A PERSON 
MISTAKENLY PLACED IN A MENTAL HEALTH FACILITY MIGHT SUFFER SEVERE 
EMOTIONAL AND PSYCHOLOGICAL HARM. AS THE SECOND CIRCUIT, IN A STATE 
PRISONER TRANSFER CASE, GRAPHICALLY PUT IT: [FN704] 
* * * (W)E ARE FACED WITH THE OBVIOUS BUT TERRIFYING POSSIBILITY THAT THE 
TRANSFERRED PRISONER MAY NOT BE MENTALLY ILL AT ALL. YET HE WILL BE 
CONFINED WITH MEN WHO ARE NOT ONLY MADE BUT DANGEROUSLY SO. * * * (H)E 
WILL BE EXPOSED TO PHYSICAL, EMOTIONAL, AND GENERAL MENTAL AGONY. 
CONFINED WITH THOSE WHO ARE INSANE AND INDEED TREATED AS INSANE, IT DOES
NOT TAKE MUCH FOR A MAN TO QUESTION HIS OWN SANITY AND IN THE END TO SUCCEED TO SOME MENTAL ABERRATION. * * *

ACCORDINGLY, THE COMMITTEE HAS CONCLUDED THAT A PRISONER’S TRANSFER TO A MENTAL HEALTH FACILITY OR PRISON MAINTAINED FOR THE CRIMinally INSANE CANNOT BE HANDLED AS A MERE ADMINISTRATIVE MATTER. IN VIEW OF THE SUBSTANTIAL DEPRIVATIONS, HARDSHIPS, AND INDIGNITIES SUCH A MOVE MAY PRODUCE IN A SAME PRISONER, JUDICIAL SCRUTINY IS NECESSARY TO INSURE THAT THE PROCEDURES PRECEDING THE TRANSFER OF A PRISONER WHO DOES NOT AGREE THAT HE SHOULD BE TRANSFERRED ADEQUATELY SAFEGUARD THE FUNDAMENTAL RIGHTS OF THE PRISONER.

2. PRESENT FEDERAL LAW

18 U.S.C. 4241 CURRENTLY PROVIDES THAT A BOARD OF EXAMINERS MUST EXAMINE AN INMATE OF A FEDERAL PENAL INSTITUTION WHO IS ALLEGED TO BE INSANE. THE BOARD MUST REPORT ITS FINDINGS TO THE ATTORNEY GENERAL WHO MAY DIRECT THAT THE PRISONER BE REMOVED TO THE UNITED STATES HOSPITAL FOR DEFECTIVE DELINQUENTS.

18 U.S.C. 4242 STATES THAT AN INMATE OF THE UNITED STATES HOSPITAL FOR DEFECTIVE DELINQUENTS WHOSE SANITY IS RESTORED PRIOR TO THE EXPIRATION OF HIS SENTENCE MAY BE RETRANSFERRED TO A PENAL INSTITUTION.

3. PROVISIONS OF THE BILL, AS REPORTED

UNDER SECTION 4245 A PRISONER WHO IS SERVING A SENTENCE IN A FEDERAL FACILITY MAY NOT BE TRANSFERRED OVER HIS OBJECTIONS TO A MENTAL HOSPITAL WITHOUT A COURT ORDER. SECTION 4245(A) PROVIDES THAT THE COURT FOR THE DISTRICT IN WHICH THE PERSON IS IMPRISONED MAY HOLD A HEARING ON THE PRESENT MENTAL CONDITION OF THE PERSON SERVING A SENTENCE OF IMPRISONMENT. FIRST, IF THE PERSON OBJECTS EITHER IN WRITING OR THROUGH HIS ATTORNEY TO BEING TRANSFERRED TO A SUITABLE FACILITY FOR CARE OR TREATMENT, AN ATTORNEY FOR THE GOVERNMENT, AT THE REQUEST OF THE DIRECTOR OF THE FACILITY IN WHICH THE PERSON IS IMPRISONED, MAY FILE A MOTION WITH THE COURT FOR A HEARING ON HIS OR HER PRESENT MENTAL CONDITION. A MOTION FILED UNDER THIS SUBSECTION STAYS THE TRANSFER OF THE PERSON UNTIL THE PROCEDURES CONTAINED IN THIS SECTION ARE COMPLETED. *249 **3431 AFTER THE MOTION IS FILED, THE COURT MUST ORDER A HEARING TO DETERMINE IF THERE IS REASONABLE CAUSE TO BELIEVE THAT THE PERSON MAY BE PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT FOR THE TREATMENT OF WHICH HE IS IN NEED OF CUSTODY FOR CARE OR TREATMENT IN A SUITABLE FACILITY. SECTION 4247(B) PROVIDES THAT AFTER THE COURT ORDERS A HEARING TO DETERMINE THE PRESENT MENTAL CONDITION OF THE DEFENDANT PURSUANT TO THIS SECTION, THE COURT, IN ITS DISCRETION, MAY ORDER THAT THE DEFENDANT BE EXAMINED BY A QUALIFIED PSYCHIATRIST OR A CLINICAL PSYCHOLOGIST. THE DEFENDANT MAY REQUEST THE COURT TO DESIGNATE AN ADDITIONAL EXAMINER SELECTED BY THE DEFENDANT. SECTION 4247(B) ALSO SETS FORTH TIME LIMITS APPLICABLE TO THE EXAMINATION. THESE ARE IDENTICAL TO THOSE WITH RESPECT TO SECTION 4241 AND THE DISCUSSION THERE SHOULD BE CONSULTED HERE. SECTION 4247(C) SETS FORTH THE REQUIREMENTS OF THE REPORT THAT IS TO BE FILED AND SECTION 4247(D) DESCRIBES THE HEARING THAT IS TO BE HELD. UNDER SUBSECTION (C), THE EXAMINER’S REPORT MUST INCLUDE, IN ADDITION TO THE DIAGNOSIS AND PROGNOSIS, THE EXAMINER’S OPINION AS TO WHETHER THE PERSON IS SUFFERING FROM A MENTAL DISEASE OR DEFECT AS A RESULT OF WHICH HE IS IN NEED OF CUSTODY FOR CARE OR TREATMENT IN A SUITABLE FACILITY. UNDER SUBSECTION (D), THE HEARING IS REQUIRED TO MEET CERTAIN DUE PROCESS REQUIREMENTS.
SUBSECTION (D) OF SECTION 4245 PROVIDES THAT IF, AFTER THE HEARING, THE COURT FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT THE PERSON IS PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT FOR THE TREATMENT OF WHICH HE IS IN NEED OF CUSTODY FOR CARE OR TREATMENT IN A SUITABLE FACILITY, THE COURT THEN MUST COMMIT HIM TO THE CUSTODY OF THE ATTORNEY GENERAL, WHO MUST HOSPITALIZE THE PERSON FOR TREATMENT IN A SUITABLE FACILITY. THE PHRASE ‘SUITABLE FACILITY’ IS MEANT TO INCLUDE THE PSYCHIATRIC SECTION OF A PRISON. THUS A PERSON WHO IS COMMITTED UNDER THIS SECTION NEED NOT NECESSARILY BE TRANSFERRED TO ANOTHER FACILITY IF THE PRISON HE IS IN HAS A SUITABLE SECTION FOR TREATMENT.

THE SUBSECTION ALSO PROVIDES THAT THE ATTORNEY GENERAL SHALL HOSPITALIZE THE PERSON UNTIL HE IS NO LONGER IN NEED OF CUSTODY FOR CARE OR TREATMENT OR UNTIL EXPIRATION OF THE TERM OF IMPRISONMENT, WHICHERVER IS EARLIER. IF HE HAS NOT RECOVERED FROM HIS MENTAL ILLNESS BEFORE HIS SENTENCE EXPIRES, PROCEDURES FOR COMMITMENT MAY BE UNDERTAKEN PURSUANT TO SECTION 4246. IF, HOWEVER, THE PERSON RECOVERS BEFORE HIS SENTENCE EXPIRES HE IS SUBJECT TO RELEASE AND REIMPRISONMENT PURSUANT TO SUBSECTION (E) OF THIS SECTION. ACCORDINGLY, THE COMMITTEE HAS TAKEN PRECAUTIONS TO INSURE THAT A PERSON WILL NOT BE WRONGFULLY HOSPITALIZED OR WRONGFULLY DETAINED IN A SUITABLE FACILITY.


IT SHOULD BE NOTED THAT, WHILE THE PROCEDURES OF SECTION 4245 WOULD NOT BE APPLIED TO A PRISONER WHO DID NOT OBJECT TO HOSPITALIZATION, IF SUCH A PRISONER OBJECTED TO CONTINUED HOSPITALIZATION AT A LATER DATE, THE PROCEDURES OF THIS SECTION WOULD HAVE TO BE FOLLOWED IF THE BUREAU OF PRISONS BELIEVED THAT CONTINUED HOSPITALIZATION WAS NECESSARY.

SECTION 4246. HOSPITALIZATION OF A PERSON DUE FOR RELEASE BUT SUFFERING FROM MENTAL DISEASE OR DEFECT

1. IN GENERAL

SECTION 4246 COVERS THOSE CIRCUMSTANCES WHERE STATE AUTHORITIES WILL NOT INSTITUTE CIVIL COMMITMENT PROCEEDINGS AGAINST A HOSPITALIZED DEFENDANT WHOSE FEDERAL SENTENCE IS ABOUT TO EXPIRE OR AGAINST WHOM ALL CRIMINAL CHARGES HAVE BEEN DROPPED FOR REASONS RELATED TO HIS MENTAL CONDITION AND WHO IS PRESENTLY MENTALLY ILL. AT SUCH A POINT THE RESPONSIBILITY FOR THE CARE OF INSANE PERSONS IS ESSENTIALLY A FUNCTION OF THE STATES. [FN705] THE COMMITTEE INTENDS THAT THIS SECTION BE USED ONLY IN THOSE RARE CIRCUMSTANCES WHERE A PERSON HAS NO PERMANENT RESIDENCE OR THERE ARE NO STATE AUTHORITIES WILLING TO ACCEPT HIM FOR COMMITMENT. IF CRIMINAL CHARGES ARE DROPPED FOR REASONS OTHER THAN THE MENTAL CONDITION OF THE DEFENDANT, SUCH AS INSUFFICIENT EVIDENCE, BUT THE DEFENDANT WAS MENTALLY ILL, THE ATTORNEY GENERAL WOULD RELEASE THE DEFENDANT TO STATE AUTHORITIES.

2. PRESENT FEDERAL LAW
18 U.S.C. 4243 PROVIDES THAT THE SUPERINTENDENT OF THE UNITED STATES HOSPITAL FOR DEFECTIVE DELINQUENTS MUST NOTIFY THE PROPER STATE AUTHORITIES OF THE DATE OF EXPIRATION OF SENTENCE OF ANY PRISONER WHO IS STILL INSANE. THE SUPERINTENDENT THEN MUST DELIVER THE PRISONER TO THESE AUTHORITIES.


18 U.S.C. 4248 PROVIDES THAT A COMMITMENT PURSUANT TO 18 U.S.C. 4247 SHALL RUN UNTIL THE SANITY OF THE PERSON IS RESTORED OR UNTIL OTHER SUITABLE ARRANGEMENTS HAVE BEEN MADE WITH THE STATE OF RESIDENCE OF THE PRISONER. WHENEVER EITHER OF THESE EVENTS OCCUR, THE ATTORNEY GENERAL MUST FILE A TERMINATION CERTIFICATE WITH THE COMMITTING COURT. IN ADDITION, IT IS PROVIDED THAT NOTHING IN SECTION 4248 PRECLUDES A PRISONER COMMITTED UNDER SECTION 4247 FROM ESTABLISHING HIS ELIGIBILITY FOR RELEASE BY A WRIT OF HABEAS CORPUS.

3. PROVISIONS OF THE BILL, AS REPORTED

SUBSECTION (A) OF SECTION 4246 PLACES RESPONSIBILITY IN THE DIRECTOR OF THE FACILITY IN WHICH A PERSON IS HOSPITALIZED AND WHOSE SENTENCE IS ABOUT TO EXPIRE, OR WHO HAS BEEN COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL PURSUANT TO SECTION 4241(D), OR AGAINST WHOM ALL CHARGES HAVE BEEN DISMISSED FOR REASONS RELATED TO THE MENTAL CONDITION OF THE PERSON, TO DETERMINE PRELIMINARILY WHETHER THE DEFENDANT SHOULD BE RELEASED. WHENEVER THE DIRECTOR OF THE FACILITY DETERMINES THAT THE PERSON IS PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT AS A RESULT OF WHICH HIS RELEASE WOULD CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO PROPERTY OF ANOTHER, HE MUST DETERMINE WHETHER OTHER SUITABLE ARRANGEMENTS FOR THE CARE AND CUSTODY OF THE PERSON ARE AVAILABLE. IN THIS CONTEXT, IT IS EXPECTED THAT HE WILL NOTIFY THE PROPER AUTHORITIES IN THE STATE IN WHICH THE PERSON MAINTAINS A RESIDENCE OR IN WHICH HE WAS TRIED TO DETERMINE IF THE STATE WILL ASSUME RESPONSIBILITY FOR THE DEFENDANT. IF THE STATE DETERMINES THAT HE SHOULD BE CIVILLY COMMITTED, THE DIRECTOR OF THE FACILITY MAY TRANSFER HIM UPON EXPIRATION OF HIS SENTENCE TO THE PROPER STATE AUTHORITIES. IN ESSENCE, THE PERSON IS ABOUT TO BE RELEASED AND BECAUSE OF HIS CONDITION THE STATE HAS INSTITUTED CIVIL COMMITMENT PROCEDURES AS IT WOULD AGAINST ANY OTHER MENTALLY ILL CITIZEN. ON THE OTHER HAND, IF THERE IS NO STATE TO WHICH THE PERSON HAS SUFFICIENT TIES, THEN THE HEAD OF THE FACILITY MUST PROCEED
PURSUANT TO THIS SECTION. IN ADDITION, IF THE STATE DETERMINES THAT HE IS NOT IN NEED OF FURTHER HOSPITALIZATION, THE DIRECTOR OF THE FACILITY MAY ATTEMPT COMMITMENT PURSUANT TO THIS SECTION SINCE *SUITABLE ARRANGEMENTS ARE NOT AVAILABLE* IN A STATE FACILITY. OF COURSE, ANY DETERMINATION IN A STATE PROCEEDING IS PROPER EVIDENCE AT THE HEARING HELD UNDER SUBSECTION (C) OF THIS SECTION.

IF SUITABLE ARRANGEMENTS FOR THE CUSTODY AND CARE OF THE PERSON ARE NOT OTHERWISE AVAILABLE, THE DIRECTOR OF THE FACILITY MUST TRANSMIT TO THE COURT FOR THE DISTRICT IN WHICH THE PERSON IS CONFINED A CERTIFICATE STATING THAT HE IS PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT AS A RESULT OF WHICH HIS RELEASE WOULD CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO PROPERTY OF ANOTHER, AND THAT SUITABLE ARRANGEMENTS FOR THE CUSTODY AND CARE ARE NOT OTHERWISE AVAILABLE. THE FILING OF THE CERTIFICATE STAYS THE RELEASE OF THE PERSON UNTIL COMPLETION OF THE PROCEDURES CONTAINED IN THIS SECTION. UPON RECEIPT OF THE CERTIFICATE, THE COURT MUST ORDER THAT A HEARING BE HELD TO DETERMINE WHETHER THE PERSON IS PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT AS A RESULT OF WHICH HIS RELEASE WOULD CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO PROPERTY OF ANOTHER.

SUBSECTION (B) PROVIDES FOR PSYCHIATRIC EXAMINATION AND FOR REPORTS UNDER SECTIONS 4247(B) AND (C), AND SUBSECTION (C) PROVIDES FOR A HEARING UNDER SECTION 4247(D). UNDER THOSE PROVISIONS THE PERSON MUST RECEIVE A DUE PROCESS HEARING AND THE EXAMINER MUST REPORT TO THE COURT HIS OPINIONS AS TO DIAGNOSIS AND PROGNOSIS FOR THE PERSON AND AS TO WHETHER THE PERSON IS SUFFERING FROM A MENTAL DISEASE OR DEFECT AS A RESULT OF WHICH HIS RELEASE WOULD CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO PROPERTY OF ANOTHER. SUBSECTION (D) PROVIDES THAT IF, AFTER THE HEARING, THE COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT THE PERSON IS PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT AS A RESULT OF WHICH HIS RELEASE WOULD CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO THE PROPERTY OF ANOTHER, THE COURT MUST COMMIT HIM TO THE CUSTODY OF THE ATTORNEY GENERAL, WHO SHALL RELEASE HIM TO THE APPROPRIATE OFFICIAL IN THE STATE OF THE PERSON’S DOMICILE OR IN WHICH HE WAS TRIED, IF SUCH STATE WILL ASSUME RESPONSIBILITY FOR HIS CUSTODY, CARE, AND TREATMENT. THE ATTORNEY GENERAL IS DIRECTED TO MAKE ALL REASONABLE EFFORTS TO CAUSE SUCH A STATE TO ASSUME SUCH RESPONSIBILITY. IF, NEVERTHELESS, THE STATE WILL NOT ASSUME RESPONSIBILITY, THE ATTORNEY GENERAL MUST HOSPITALIZE THE PERSON FOR TREATMENT IN A SUITABLE FACILITY. THE DURATION OF THE COMMITMENT IS UNTIL (1) SUCH A STATE WILL ASSUME SUCH RESPONSIBILITY OR (2) THE PERSON’S MENTAL CONDITION IS SUCH THAT HIS RELEASE, OR HIS CONDITIONAL RELEASE UNDER A PRESCRIBED REGIMEN OF MEDICAL CARE OR TREATMENT, WOULD NOT CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO PROPERTY OF ANOTHER, WHICHEVER IS EARLIER. THE ATTORNEY GENERAL IS INSTRUCTED UNDER THIS SUBSECTION, MOREOVER, TO CONTINUE PERIODICALLY TO EXERT ALL REASONABLE EFFORTS TO CAUSE A STATE TO ASSUME RESPONSIBILITY FOR THE PERSON’S CUSTODY, CARE AND TREATMENT.

UNDER THE PROVISIONS OF SUBSECTION (E), IF THE DIRECTOR OF THE FACILITY IN WHICH THE PERSON IS HOSPITALIZED DETERMINES THAT HE HAS RECOVERED FROM THE MENTAL DISEASE OR DEFECT TO SUCH AN EXTENT THAT HIS RELEASE, OR HIS CONDITIONAL RELEASE UNDER A PRESCRIBED REGIMEN OF MEDICAL CARE OR TREATMENT, WOULD NO LONGER CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO PROPERTY OF ANOTHER, HE MUST FILE A CERTIFICATE TO THAT EFFECT WITH THE CLERK OF THE COURT THAT ORDERED THE COMMITMENT, AND THE CLERK MUST SEND A COPY OF THE CERTIFICATE TO THE
PERSON'S COUNSEL AND TO THE ATTORNEY FOR THE GOVERNMENT. THE COURT MUST THEN EITHER RELEASE THE PERSON OR, ON MOTION OF THE ATTORNEY FOR THE GOVERNMENT OR ON ITS OWN MOTION, HOLD A HEARING TO DETERMINE WHETHER HE SHOULD BE RELEASED. THE PERSON MUST BE RELEASED IF THE COURT FINDS, BY A PREPONDERANCE OF THE EVIDENCE, THAT HIS RELEASE WOULD NO LONGER CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO PROPERTY OF ANOTHER. IF THE PERSON DOES NOT MEET THE CRITERIA FOR UNCONDITIONAL RELEASE BUT THE COURT FINDS THAT THE PERSON HAS RECOVERED FROM HIS MENTAL DISEASE OR DEFECT TO SUCH AN EXTENT THAT HIS CONDITIONAL RELEASE UNDER A PRESCRIBED REGIMEN OF MEDICAL CARE OR TREATMENT WOULD NOT CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO PROPERTY OF ANOTHER, THE COURT SHALL ORDER THAT HE BE DISCHARGED UNDER AN APPROPRIATE PRESCRIBED REGIMEN OF MEDICAL CARE OR TREATMENT ON THE EXPLICIT CONDITION THAT HE COMPLY WITH THE PRESCRIBED REGIMEN. THE COURT AT ANY TIME MAY, AFTER A HEARING, MODIFY OR ELIMINATE THE REGIMEN OF MEDICAL CARE OR TREATMENT EMPLOYING THE SAME CRITERIA APPLICABLE TO THE ORIGINAL DETERMINATION. THESE PROVISIONS ARE SIMILAR TO THOSE WITH RESPECT TO SECTION 4243 DEALING WITH PERSONS ACQUITTED BY REASON OF INSANITY, AND THE DISCUSSION THERE SHOULD BE CONSULTED HERE.

SUBSECTION (F) PROVIDES A PROCEDURE FOR DEALING WITH THE SITUATION IN WHICH THE RELEASED PERSON FAILS TO COMPLY WITH THE PRESCRIBED REGIMEN OF MEDICAL CARE OR TREATMENT. UNDER THIS PROCEDURE THE DIRECTOR OF THE MEDICAL FACILITY RESPONSIBLE FOR ADMINISTERING THE REGIMEN IMPOSED UNDER SUBSECTION (E) SHALL NOTIFY THE ATTORNEY GENERAL AND THE COURT HAVING JURISDICTION OVER THE CASE OF THE FAILURE TO COMPLY WITH THE PRESCRIBED REGIMEN. IN A PROCEDURE SIMILAR TO REVOCATION OF PROBATION UPON NOTICE BY THE MEDICAL DIRECTOR OR OTHER PROBABLE CAUSE TO BELIEVE THE PERSON HAS FAILED TO COMPLY WITH THE REGIMEN, THE PERSON MAY BE ARRESTED AND, UPON ARREST, MUST BE BROUGHT WITHOUT UNNECESSARY DELAY BEFORE THE COURT HAVING JURISDICTION. THE COURT MUST, AFTER A HEARING, DETERMINE WHETHER THE PERSON SHOULD BE REMANDED TO A SUITABLE FACILITY ON THE GROUND THAT, IN LIGHT OF HIS FAILURE TO COMPLY WITH THE PRESCRIBED REGIMEN OF MEDICAL CARE OR TREATMENT, HIS CONTINUED RELEASE WOULD CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO PROPERTY OF ANOTHER.

SECTION 4247(E)(1), DEALING WITH ANNUAL REPORTS BY THE DIRECTOR OF THE FACILITY CONCERNING A DEFENDANT COMMITTED UNDER THIS SECTION, AND SECTION 4247(H), DEALING WITH THE CONTINUING AVAILABILITY OF HABEAS CORPUS RELIEF, PROVIDE SIMILAR PROCEDURES TO THOSE PROVIDED IN OTHER SECTIONS OF THIS CHAPTER.

SUBSECTION (G) OF SECTION 4246 PROVIDES THE PROCEDURE TO BE FOLLOWED IN THE CASE OF A PERSON AGAINST WHOM ALL CHARGES HAVE BEEN DROPPED FOR REASONS UNRELATED TO HIS MENTAL CONDITION, SUCH AS IN A CASE WHERE THERE IS NOT ENOUGH EVIDENCE TO PROVE GUILT OF AN OFFENSE, BUT WHO IS, IN THE OPINION OF THE DIRECTOR OF THE FACILITY IN WHICH HE HAS BEEN HOSPITALIZED, PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT AS A RESULT OF WHICH HIS RELEASE WOULD CREATE A SUBSTANTIAL RISK OF BODILY INJURY TO ANOTHER PERSON OR SERIOUS DAMAGE TO PROPERTY OF ANOTHER. SINCE THE FEDERAL GOVERNMENT WOULD NOT HAVE ENOUGH CONTACTS WITH THE PERSON TO JUSTIFY CONTINUED FEDERAL HOSPITALIZATION OF A PERSON IF THERE WERE NO FEDERAL OFFENSE INVOLVED TO JUSTIFY SUCH HOSPITALIZATION, THIS SUBSECTION REQUIRES THAT THE ATTORNEY GENERAL, UPON RECEIVING A CERTIFICATE FROM THE DIRECTOR OF THE FACILITY IN WHICH THE PERSON WAS HOSPITALIZED THAT THE PERSON NEEDED CONTINUED HOSPITALIZATION, NOTIFY THE APPROPRIATE OFFICIAL OF THE STATE IN WHICH THE PERSON WAS DOMICILED OR IN WHICH HE WAS TRIED THAT HE...
WISHED TO PLACE THE PERSON IN THAT STATE'S CUSTODY. IF THE ATTORNEY GENERAL RECEIVED NOTICE THAT NEITHER STATE WOULD TAKE RESPONSIBILITY, HE WOULD HAVE TO RELEASE THE DEFENDANT. IN ANY EVENT, HE COULD NOT HOLD THE PERSON LONGER THAN 10 DAYS AFTER THE CERTIFICATION BY THE DIRECTOR OF THE FACILITY IN WHICH THE PERSON WAS HOSPITALIZED.

**SECTION 4247.** GENERAL PROVISIONS FOR CHAPTER 313

THIS SECTION CONTAINS, IN SUBSECTION (A), THE DEFINITION OF 'REHABILITATION PROGRAM' AS EDUCATIONAL TRAINING TO ASSIST THE DEFENDANT **254** **3436** IN UNDERSTANDING SOCIETY AND THE MAGNITUDE OF HIS OFFENSE, VOCATIONAL TRAINING, DRUG, ALCOHOL, AND OTHER TREATMENT PROGRAMS TO ASSIST IN OVERCOMING PSYCHOLOGICAL OR PHYSICAL DEPENDENCE, AND ORGANIZED SPORTS AND RECREATION PROGRAMS; AND THE DEFINITION OF 'SUITABLE FACILITY' AS A FACILITY THAT IS SUITABLE TO PROVIDE CARE OR TREATMENT GIVEN THE NATURE OF THE OFFENSE AND THE CHARACTERISTIC OF THE DEFENDANT.

**SECTION 4247** ALSO CONTAINS THE GENERAL PROCEDURES FOR PSYCHIATRIC EXAMINATIONS AND REPORTS (SUBSECTIONS (B) AND (C)), RIGHTS AT HEARINGS (SUBSECTION (D)), REPORTS OF MENTAL FACILITIES (SUBSECTION (E)(1)), ADMISSIBILITY OF DEFENDANT'S STATEMENT MADE DURING A MENTAL EXAMINATION (SUBSECTION (G)), AND RIGHTS TO HABEAS CORPUS (SUBSECTION (H)). THESE PROVISIONS ARE DISCUSSED IN DETAIL IN THE DISCUSSION OF THE PRECEDING SECTIONS.

SUBSECTION (E)(2) REQUIRES THE DIRECTOR OF THE FACILITY IN WHICH A PERSON IS HOSPITALIZED UNDER **SECTION 4241, 4243, 4244, 4245, OR 4246** TO INFORM THE PERSON OF AVAILABLE REHABILITATION PROGRAMS, AS DEFINED IN SUBSECTION (A).

SUBSECTION (F) OF THIS SECTION PROVIDES FOR A NEW PROCEDURE UNDER WHICH THE COURT, ON WRITTEN REQUEST OF DEFENSE COUNSEL, MAY IN ITS DISCRETION ORDER A VIDEOTAPE RECORD TO BE MADE OF THE DEFENDANT'S TESTIMONY OR INTERVIEW UPON WHICH THE PERIODIC REPORT OF THE DIRECTOR OF THE SUITABLE FACILITY PURSUANT TO SUBSECTION (E)(1) IS BASED. IF THE COURT ORDERS A VIDEOTAPE RECORD TO BE PREPARED, SUCH RECORD SHALL BE SUBMITTED TO THE COURT ALONG WITH THE PERIODIC REPORT. THE PURPOSE OF THIS SUBSECTION IS, BY ALLOWING A VIDEOTAPE RECORD TO BE CREATED, TO INSURE THE QUALITY OF MENTAL EXAMINATIONS OF PERSONS HOSPITALIZED UNDER THIS SUBCHAPTER, AND TO FURNISH COURTS WITH A BETTER BASIS UPON WHICH TO MAKE ULTIMATE DECISIONS AS TO THE MENTAL COMPETENCY, SANITY, AND DANGEROUSNESS OF SUCH PERSONS.

SUBSECTION (I) SUPPLEMENTS SUBSECTION (H) WITH RESPECT TO HABEAS CORPUS, BY PROVIDING THAT REGARDLESS OF WHETHER THE DIRECTOR OF THE FACILITY IN WHICH A PERSON IS HOSPITALIZED HAS FILED A CERTIFICATE PURSUANT TO SUBSECTION (E) OF **SECTION 4241, 4243, 4244, 4245, OR 4246**, COUNSEL FOR THE PERSON OR HIS LEGAL GUARDIAN MAY FILE WITH THE COURT THAT ORDERED THE COMMITMENT A MOTION FOR A HEARING TO DETERMINE WHETHER THE PERSON SHOULD BE DISCHARGED FROM SUCH FACILITY. A COPY OF THE MOTION SHALL BE SENT TO THE DIRECTOR OF THE FACILITY AND THE ATTORNEY FOR THE GOVERNMENT. MOTIONS MAY NOT BE FILED WITHIN 180 DAYS OF A COURT DETERMINATION THAT THE PERSON SHOULD CONTINUE TO BE HOSPITALIZED.

FINALLY, THIS SECTION, IN SUBSECTION (J), AUTHORIZES THE ATTORNEY GENERAL TO CONTRACT FOR NON-FEDERAL FACILITIES IN ORDER TO HOSPITALIZE PERSONS COMMITTED TO HIS CUSTODY PURSUANT TO THIS CHAPTER, AUTHORIZES HIM TO APPLY FOR CIVIL COMMITMENT TO THE STATES FOR A PERSON IN HIS CUSTODY PURSUANT TO **SECTION 4243 OR 4246**, DIRECTS HIM TO CONSIDER THE AVAILABILITY OF APPROPRIATE REHABILITATION PROGRAMS BEFORE DECIDING IN WHICH FACILITY TO PLACE A PERSON UNDER **SECTION 4241, 4243, 4244, 4245, OR 4246**, AND DIRECTS HIM TO CONSULT WITH THE SECRETARY OF HEALTH AND HUMAN SERVICES ON THE
IMPLEMENTATION OF THE CHAPTER AND ON ESTABLISHMENT OF STANDARDS FOR FACILITIES FOR IMPLEMENTING THE THE CHAPTER. IT IS INTENDED THAT THE ATTORNEY GENERAL WILL MAKE THE APPLICATION FOR STATE COMMITMENT UNLESS THERE IS CLEAR REASON NOT TO DO SO IN A PARTICULAR CASE.

*255 **3437 TITLE V-- DRUG ENFORCEMENT AMENDMENTS

INTRODUCTION

THE DRUG ENFORCEMENT AMENDMENTS OF TITLE V OF THE BILL (SECTIONS 501- 526) ARE DIVIDED INTO TWO PARTS. THE FIRST, PART A, IS DESIGNED TO IMPROVE THE PENALTY STRUCTURE FOR MAJOR DRUG TRAFFICKING OFFENSES. THE SECOND, PART B, CONTAINS A NUMBER OF AMENDMENTS THAT IMPROVE REGULATORY AUTHORITY REGARDING CONTROLLED SUBSTANCES. IN PARTICULAR, THESE AMENDMENTS IN PART B ARE INTENDED TO ENHANCE THE GOVERNMENT'S ABILITY TO STEM THE DIVERSION OF LICIT, BUT CONTROLLED, SUBSTANCES FOR IMPROPER USE.

PART A-- CONTROLLED SUBSTANCES PENALTIES

1. IN GENERAL


FIRST, WITH THE EXCEPTION OF OFFENSES INVOLVING MARIHUANA (SEE 21 U.S.C. 841(B)(6)), THE SEVERITY OF CURRENT DRUG PENALTIES IS DETERMINED EXCLUSIVELY BY THE NATURE OF THE CONTROLLED SUBSTANCE INVOLVED. WHILE IT IS APPROPRIATE THAT THE RELATIVE DANGEROUSNESS OF A PARTICULAR DRUG SHOULD HAVE A BEARING ON THE PENALTY FOR ITS IMPORTATION OR DISTRIBUTION, ANOTHER IMPORTANT FACTOR IS THE AMOUNT OF THE DRUG INVOLVED. WITHOUT THE INCLUSION OF THIS FACTOR, PENALTIES FOR TRAFFICKING IN ESPECIALLY LARGE QUANTITIES OF EXTREMELY DANGEROUS DRUGS ARE OFTEN INADEQUATE. THUS, UNDER CURRENT LAW THE PENALTY FOR TRAFFICKING IN 500 GRAMS OF HEROIN IS THE SAME AS THAT PROVIDED FOR AN OFFENSE INVOLVING 10 GRAMS. THE DRUG PENALTIES SCHEDULE OF THE CRIMINAL CODE REFORM BILL (S. 1630) REPORTED BY THE COMMITTEE IN THE 97TH CONGRESS [FN706] ADDRESSED THIS PROBLEM BY PUNISHING AS A CLASS B FELONY (UP TO 25 YEARS' IMPRISONMENT) OFFENSES INVOLVING TRAFFICKING IN LARGE AMOUNTS OF OPIATES AND OTHER EXTREMELY DANGEROUS DRUGS. BASED ON THIS APPROACH, THIS TITLE AMENDS 21 U.S.C. 841 AND 960 TO PROVIDE FOR MORE SEVERE PENALTIES THAN ARE CURRENTLY AVAILABLE FOR SUCH MAJOR TRAFFICKING OFFENSES.

THE SECOND PROBLEM ADDRESSED BY PART A OF TITLE V IS THE CURRENT FINE LEVELS FOR MAJOR DRUG OFFENSES. DRUG TRAFFICKING IS ENORMOUSLY PROFITABLE. YET CURRENT FINE LEVELS ARE, IN RELATION TO THE ILLICIT PROFITS**3438 *256 GENERATED, WOEFULY INADEQUATE. IT IS NOT UNCOMMON FOR A MAJOR DRUG TRANSACTION TO PRODUCE PROFITS IN THE HUNDREDS OF THOUSANDS OF DOLLARS. HOWEVER, WITH THE EXCEPTION OF THE MOST RECENTLY ENACTED PENALTY FOR DOMESTIC DISTRIBUTION OF LARGE AMOUNTS OF MARIHUANA, THE MAXIMUM FINE THAT MAY BE IMPOSED IS $25,000. [FN707] PART A OF TITLE V PROVIDES MORE REALISTIC FINE LEVELS THAT CAN SERVE AS APPROPRIATE PUNISHMENTS FOR, AND DETERRENTS TO, THESE TREMENDOUSLY LUCRATIVE CRIMES.
A THIRD PROBLEM ADDRESSED BY PART A IS THE DISPARATE SENTENCING FOR OFFENSES INVOLVING SCHEDULE I AND II SUBSTANCES, WHICH DEPENDS ON WHETHER THE CONTROLLED SUBSTANCE INVOLVED IN THE OFFENSE IS A NARCOTIC OR NON-NARCOTIC DRUG. OFFENSES INVOLVING SCHEDULE I AND II NARCOTIC DRUGS (OPIATES AND COCAINE) ARE PUNISHABLE BY A MAXIMUM OF 15 YEARS' IMPRISONMENT AND A $25,000 FINE. BUT IN THE CASE OF ALL OTHER SCHEDULE I AND II SUBSTANCES, THE MAXIMUM PENALTY IS ONLY FIVE YEARS' IMPRISONMENT AND A $15,000 FINE, THE SAME PENALTY APPLICABLE IN THE CASE OF A VIOLATION INVOLVING A SCHEDULE III SUBSTANCE. THIS PENALTY STRUCTURE IS AT ODDS WITH THE FACT THAT NON-NARCOTIC SCHEDULE I AND II CONTROLLED SUBSTANCES INCLUDE SUCH EXTREMELY DANGEROUS DRUGS AS PCP, LSD, METHAMPHETAMINES, AND METHAQUALONE, AND THAT FEDERAL PROSECUTIONS INVOLVING THESE DRUGS TYPICALLY INVOLVE HUGE AMOUNTS OF ILLICIT INCOME AND SOPHISTICATED ORGANIZATIONS. REMOVING THE DISTINCTION, FOR THE PURPOSES OF SENTENCING, BETWEEN NARCOTIC, AS OPPOSED TO NON-NARCOTIC, CONTROLLED SUBSTANCES IN SCHEDULES I AND II WAS PROPOSED IN S. 1951 IN THE 97TH CONGRESS, AND THIS CONCEPT IS INCLUDED IN THIS TITLE.

2. PRESENT FEDERAL LAW

OFFENSES INVOLVING DOMESTIC TRAFFICKING IN CONTROLLED SUBSTANCES ARE GOVERNED BY 21 U.S.C. 841. SUBSECTION (A) OF SECTION 841 PUNISHES THOSE WHO KNOWINGLY OR INTENTIONALLY (B) MANUFACTURE, DISTRIBUTE, DISTRIBUTE OR DISPENSE, OR POSSESS WITH INTENT TO MANUFACTURE, DISTRIBUTE, DISTRIBUTE OR DISPENSE, A CONTROLLED SUBSTANCE; OR (2) CREATE, DISTRIBUTE, DISPENSE, OR POSSESS WITH INTENT TO DISTRIBUTE OR DISPENSE, A COUNTERFEIT SUBSTANCE. THE PENALTIES FOR THESE OFFENSES ARE SET OUT IN SUBSECTION (B) OF SECTION 841, AND INCLUDE TERMS OF IMPRISONMENT, FINES, AND SPECIAL PAROLE TERMS. THE MAXIMUM PENALTIES ARE DOUBLED IF THE OFFENDER HAS PREVIOUSLY BEEN CONVICTED OF A FEDERAL DRUG OFFENSE. IN THE CASE OF AN ATTEMPT OR CONSPIRACY TO COMMIT ONE OF THE OFFENSES DESCRIBED IN 21 U.S.C. 841(A), THE PENALTY IS TO BE THE SAME AS FOR THE OFFENSE WHICH WAS THE OBJECT OF THE ATTEMPT OR CONSPIRACY. WHERE AN OFFENSE INVOLVES DISTRIBUTION TO PERSONS UNDER AGE TWENTY-ONE, THE APPLICABLE MAXIMUM PENALTIES UNDER 21 U.S.C. 841(B) ARE DOUBLED, OR IF THE OFFENDER HAS A PREVIOUS FEDERAL DRUG CONVICTION, THEY ARE TRIPLED. AS NOTED ABOVE, THE SEVERITY OF THE PENALTIES DESCRIBED IN 21 U.S.C. 841 DEPENDS, WITH BUT ONE EXCEPTION, SOLELY ON THE SCHEDULING OF THE CONTROLLED SUBSTANCE INVOLVED, AND IN THE CASE OF A CONTROLLED SUBSTANCE IN SCHEDULE I OR II, ON WHETHER THE CONTROLLED SUBSTANCE IS A 'NARCOTIC DRUG. THE ONLY INSTANCE IN WHICH THE AMOUNT OF CONTROLLED SUBSTANCE INFLUENCES THE SEVERITY OF THE PENALTY IS IN THE CASE OF MARIHUANA. IF THE OFFENSE INVOLVES MORE THAN 1,000 POUNDS OF MARIHUANA, 21 U.S.C. 841(B)(6) PRESCRIBES ENHANCED FINE AND IMPRISONMENT PENALTIES.


3. PROVISIONS OF THE BILL, AS REPORTED

SECTION 501

SECTION 501 PROVIDES THAT TITLE V MAY BE CITED AS THE 'CONTROLLED SUBSTANCES PENALTIES AMENDMENTS ACT OF 1983.'

SECTION 502

SECTION 502 AMENDS 21 U.S.C. 841(B), THE PROVISION WHICH SETS OUT THE PENALTIES FOR THE MOST SERIOUS DOMESTIC DRUG TRAFFICKING OFFENSES. EACH OF THE PARAGRAPHS OF THIS SECTION IS DISCUSSED BELOW.

PARAGRAPH (1) REVISES SECTION 841(B)(1), WHICH DESCRIBES THE PENALTIES FOR OFFENSES INVOLVING CONTROLLED SUBSTANCES IN SCHEDULES, I, II, AND III. CURRENTLY, OFFENSES INVOLVING NARCOTIC SCHEDULE I AND II SUBSTANCES ARE GOVERNED BY SECTION 841(B)(1)(A), WHILE OFFENSES INVOLVING NON-NARCOTIC SCHEDULE I AND II SUBSTANCES AND ALL SCHEDULE III SUBSTANCES ARE GOVERNED BY SECTION 841(B)(1)(B). [FN721] PARAGRAPH (1) OF SECTION 502 DESIGNATES THESE SUBPARAGRAPHS (A) AND (B) AS SUBPARAGRAPHS (B) AND (C) AND创造了 A NEW SUBPARAGRAPH (A) UNDER SECTION 841(B)(1) THAT WOULD PROVIDE, FOR OFFENSES INVOLVING LARGE AMOUNTS OF PARTICULARLY DANGEROUS DRUGS, HIGHER PENALTIES THAN THOSE NOW PROVIDED UNDER SECTION 841. UNDER THIS NEW SECTION 841(B)(1)(A), AN OFFENSE INVOLVING (I) 100 GRAMS OR MORE OF AN OPIATE; (II) A KILOGRAM OR MORE OF COCAINE (A MORE COMPLEX MANNER OF DEFINING OPIATES AND COCAINE IS NECESSARY IN THE AMENDMENT BECAUSE OF THE WAY IN WHICH SUCH SUBSTANCES ARE DEFINED ELSEWHERE IN
TITLE 21, UNITED STATES CODE); (III) 500 GRAMS OR MORE OF PCP; OR (IV) FIVE GRAMS OR MORE OF LSD, WOULD BE PUNISHABLE BY A MAXIMUM OF 20 YEARS' IMPRISONMENT AND A FINE OF $250,000. CONSISTENT WITH THE CURRENT STRUCTURE OF SECTION 841, THESE MAXIMUM PENALTIES WOULD BE DOUBLED WHERE THE DEFENDANT HAS A PRIOR FELONY DRUG CONVICTION. THE AMENDMENT'S DESCRIPTION OF THE PRIOR OFFENSE WHICH MAY TRIGGER THE MORE SEVERE PENALTY DOES, HOWEVER, DIFFER FROM THE DESCRIPTION USED IN CURRENT LAW. IN CURRENT LAW, THIS ENHANCED SENTENCING IS AVAILABLE ONLY IN THE CASE OF A PRIOR FEDERAL FELONY DRUG CONVICTION. THE AMENDMENT WOULD PERMIT PRIOR STATE AND FOREIGN FELONY DRUG CONVICTIONS TO BE USED FOR THIS PURPOSE AS WELL. THE PRIOR CONVICTION LANGUAGE OF CURRENT PROVISIONS OF SECTION 841 AND OF SECTION 962 (RELATING TO IMPORTATION AND EXPORTATION OFFENSES) IS AMENDED IN OTHER PROVISIONS OF THE BILL IN A SIMILAR MANNER TO INCLUDE STATE AND FOREIGN, AS WELL AS FEDERAL, FELONY DRUG CONVICTIONS. ALL OTHER OFFENSES INVOLVING A SCHEDULE I OR II SUBSTANCE, EXCEPT THOSE INVOLVING LESS THAN 50 KILOGRAMS OF MARIHUANA, 10 KILOGRAMS OF HASHISH, OR ONE KILOGRAM OF HASHISH OIL, ARE TO BE PUNISHED UNDER SECTION 841(B)(1)(B). THUS, THE CURRENT DISTINCTION, FOR PURPOSES OF PUNISHMENT, BETWEEN SCHEDULES I AND II SUBSTANCES WHICH ARE NARCOTIC DRUGS AND THOSE WHICH ARE NOT HAS BEEN ABANDONED. THE MAXIMUM 15-YEAR TERM OF IMPRISONMENT CURRENTLY APPLICABLE TO OFFENSES INVOLVING NARCOTIC SCHEDULE I AND II SUBSTANCES IS RETAINED FOR ALL SCHEDULE I AND II OFFENSES UNDER SECTION 841(B)(1)(B). HOWEVER, THE CURRENT MAXIMUM FINE LEVEL OF $25,000 HAS BEEN RAISED TO $125,000. BY VIRTUE OF CURRENT SECTION 841(B)(6), OFFENSES INVOLVING LARGE AMOUNTS OF MARIHUANA ARE ALREADY PUNISHABLE AT THIS LEVEL. PENALTIES FOR OFFENSES INVOLVING SCHEDULE III SUBSTANCES AND LESSER AMOUNTS OF MARIHUANA, HASHISH, AND HASHISH OIL, ARE TO BE GOVERNED BY 21 U.S.C. 841(B)(1)(C), AS AMENDED. THE CURRENT PENALTY OF FIVE YEARS' IMPRISONMENT, IS RETAINED, BUT THE MAXIMUM FINE HAS BEEN RAISED FROM $15,000 TO $50,000. MARIHUANA IS CURRENTLY TREATED IN THE SAME MANNER AS A SCHEDULE III CONTROLLED SUBSTANCE WHEN THE AMOUNT INVOLVED IS LESS THAN 1,000 POUNDS. THUS, THIS SECTION'S TWO-LEVEL TREATMENT OF MARIHUANA OFFENSES IS GENERALLY CONSISTENT WITH CURRENT LAW.

PARAGRAPH (2) AMENDS 21 U.S.C. 841(B)(2) TO RAISE THE FINE LEVEL FOR A VIOLATION INVOLVING A SCHEDULE IV SUBSTANCE FROM $10,000 TO $25,000. ALSO INCLUDED IS THE AMENDMENT NOTED ABOVE IN RELATION TO NEW SECTION 841(B)(1)(A) WHICH WOULD TREAT STATE AND FOREIGN, AS WELL AS FEDERAL, FELONY DRUG CONVICTIONS AS PRIOR CONVICTIONS FOR THE PURPOSE OF EXISTING ENHANCED SENTENCING PROVISIONS.

PARAGRAPH (3) AMENDS 21 U.S.C. 841(B)(3) TO RAISE THE FINE LEVEL FOR A VIOLATION INVOLVING A SCHEDULE V SUBSTANCE FROM $5,000 TO $10,000.

PARAGRAPH (4) IS A TECHNICAL AMENDMENT TO 21 U.S.C. 841(B)(4) (GOVERNING DISTRIBUTION OF SMALL AMOUNTS OF MARIHUANA) REFLECTING THE REDESIGNATION OF CURRENT SECTION 841(B)(1)(B) AS SECTION 841(B)(1)(C).

PARAGRAPH (5) DELETES PARAGRAPHS (5) AND (6) OF 21 U.S.C. 841(B). CURRENT 21 U.S.C. 841(B)(5) PROVIDES SPECIAL PENALTIES FOR VIOLATIONS INVOLVING PCP. SINCE PCP HAS BEEN DESIGNATED AS A SCHEDULE II SUBSTANCE, THIS SPECIAL PROVISION IS NO LONGER NECESSARY. CURRENT 21 U.S.C. 841(B)(6) PROVIDES FOR HEIGHTENED PENALTIES FOR TRAFFICKING IN LARGE AMOUNTS OF MARIHUANA. SINCE SECTION 502 OF THE BILL PROVIDES THAT SUCH OFFENSES WOULD BE PUNISHABLE UNDER SECTION 841(B)(1)(B) BY A MAXIMUM PENALTY OF 15 YEARS' IMPRISONMENT AND A $125,000 FINE, THIS SPECIAL PROVISION IS NO LONGER NECESSARY.

SECTION 503 AMENDS 21 U.S.C. 960(B), WHICH SETS OUT THE PENALTIES FOR THE
MAJOR DRUG IMPORTATION AND EXPORTATION OFFENSES, IN A MANNER CONSISTENT WITH SECTION 502'S AMENDMENTS TO 21 U.S.C. 841(B), DISCUSSED ABOVE. EACH OF THE PARAGRAPHS OF SECTION 503 IS DISCUSSED BELOW.

PARAGRAPH (1) REDESIGNATES CURRENT PARAGRAPHS (1) AND (2) OF 21 U.S.C. 960(B) AS PARAGRAPHS (2) AND (3) CREATES A NEW SECTION 960(B)(1) WHICH PROVIDES FOR HEIGHTENED PENALTIES FOR IMPORTATION OFFENSES INVOLVING LARGE AMOUNTS OF EXTREMELY DANGEROUS DRUGS. THIS SECTION IS ANALOGOUS TO THE NEW 21 U.S.C. 841(B)(1)(A) ADDED BY PARAGRAPH (1) OF SECTION 302 OF THE BILL.

PARAGRAPH (2) AMENDS SECTION 960(B)(2) (PRESENTLY SECTION 960(B)(1)), TO CONSOLIDATE THE TREATMENT OF OFFENSES INVOLVING ALL SCHEDULES I AND II SUBSTANCES EXCEPT LESSER AMOUNTS OF MARIHUANA AND HASHISH, AS WAS DONE WITH RESPECT TO SECTION 841(B)(1) IN SECTION 502 OF THE BILL. THE CURRENT 15-YEAR LEVEL OF IMPRISONMENT IS RETAINED, BUT THE FINE IS ELEVATED FROM $25,000 TO $125,000, AS WAS DONE IN SECTION 502 OF THE BILL WITH RESPECT TO THE ANALOGOUS OFFENSES PUNISHABLE UNDER 21 U.S.C. 841(B)(1).

PARAGRAPH (3) AMENDS CURRENT 21 U.S.C. 960(B)(2) (REDESIGNATED AS SECTION 960(B)(3) IN THIS SECTION), WHICH NOW GOVERNS OFFENSES INVOLVING ALL CONTROLLED SUBSTANCES OTHER THAN SCHEDULE I AND II NARCOTIC DRUGS. AS AMENDED, THIS SECTION WOULD CONTINUE TO GOVERN VIOLATIONS INVOLVING LESSER AMOUNTS OF MARIHUANA AND HASHISH, AND ALL SCHEDULE III, IV, AND V SUBSTANCES, WOULD RETAIN THE CURRENT FIVE-YEAR MAXIMUM TERM OF IMPRISONMENT, BUT WOULD RAISE THE CURRENT FINE OF $15,000 TO $50,000.

UNLIKE 21 U.S.C. 841(B), 21 U.S.C. 960 DOES NOT PROVIDE SEPARATE PENALTIES FOR OFFENSES INVOLVING SCHEDULE IV AND V SUBSTANCES.

SECTION 504

SECTION 504 AMENDS 21 U.S.C. 962 TO PERMIT PRIOR STATE AND FOREIGN, AS WELL AS FEDERAL, FELONY DRUG CONVICTIONS TO BE CONSIDERED FOR THE PURPOSE OF THIS SECTION'S ENHANCED SENTENCING FOR REPEAT DRUG OFFENDERS. AS NOTED ABOVE, VARIOUS PROVISIONS OF 21 U.S.C. 841(B) WERE AMENDED IN A SIMILAR MANNER.

PART B-- DIVERSION CONTROL AMENDMENTS

1. IN GENERAL AND PRESENT FEDERAL LAW

INDEED, THE PASSAGE BY THE CONGRESS IN 1970 OF THE CONTROLLED SUBSTANCES ACT (CSA) [FN724] WAS VERY MUCH A RESPONSE TO A DIVERSION PROBLEM THAT HAD GROWN SO SEVERE AT THAT TIME THAT NEARLY HALF OF ALL LEGITIMATELY PRODUCED AMPHETAMINES AND BARBITURATES WERE BEING DIVERTED TO ILLICIT CHANNELS. [FN725] IN ORDER TO ADDRESS THIS PROBLEM OF DRUG DIVERSION, THE CSA PROVIDED FOR A 'CLOSED' SYSTEM OF DRUG DISTRIBUTION FOR LEGITIMATE HANDLERS OF CONTROLLED DRUGS.

UNDER THE CONTROLLED SUBSTANCES ACT, DRUGS ARE CONTROLLED THROUGH THE EXERCISE OF THE ATTORNEY GENERAL'S RULEMAKING AUTHORITY. BASED ON THE SEVERITY OF THE ABUSE POTENTIAL OF A PARTICULAR DRUG, THE EXTENT TO WHICH IT LEADS TO PHYSICAL OR PSYCHOLOGICAL DEPENDENCE, AND HAS AN ACCEPTED MEDICAL USE, A DRUG IS PLACED ON ONE OF FIVE SCHEDULES. [FN726] FOR EXAMPLE, A SCHEDULE I SUBSTANCE IS ONE THAT HAS A HIGH POTENTIAL FOR ABUSE AND NO ACCEPTED MEDICAL USE, WHILE A SCHEDULE V SUBSTANCE IS ONE WITH A RELATIVELY LOW POTENTIAL FOR ABUSE AND DEPENDENCE AND AN ACCEPTED MEDICAL USE FOR TREATMENT. [FN727]

THOSE WHO ARE TO MANUFACTURE, DISTRIBUTE, IMPORT, EXPORT, DISPENSE AND ADMINISTER CONTROLLED SUBSTANCES LEGALLY MUST OBTAIN A REGISTRATION FROM THE ATTORNEY GENERAL. THOSE REGISTERED MUST ADHERE TO CERTAIN RECORDKEEPING AND REPORTING REQUIREMENTS THAT PERMIT MONITORING THE FLOW OF CONTROLLED SUBSTANCES WITHIN THE 'CLOSED' SYSTEM. IN KEEPING WITH THE NATURE OF THE DRUG DIVERSION PROBLEM AT THE TIME OF ITS ENACTMENT, THE CSA'S REGULATORY SCHEME FOCUSES MOST SHARPLY ON THE ACTIVITIES OF MANUFACTURERS AND DISTRIBUTORS OF CONTROLLED SUBSTANCES, WITH LESSER CONTROLS APPLICABLE TO PRACTITIONERS, THAT IS, THOSE WHO DISPENSE, PRESCRIBE, OR ADMINISTER CONTROLLED SUBSTANCES TO ULTIMATE USERS. IN MANY RESPECTS, THE CURRENT PROVISIONS OF THE CONTROLLED SUBSTANCES ACT HAVE BEEN QUITE EFFECTIVE IN MEETING THE DIVERSION PROBLEM AT THE MANUFACTURER AND DISTRIBUTOR LEVELS. [FN728] FOR THE MOST PART, CURRENT LAW GENERALLY PROVIDES STRONG AUTHORITY TO REGULATE THESE LEVELS OF THE 'CLOSED' DISTRIBUTION CHAIN. REGISTRATION TO MANUFACTURE OR DISTRIBUTE CONTROLLED SUBSTANCES IS ISSUED ONLY WHEN CLEARLY CONSISTENT WITH THE PUBLIC INTEREST. ADMINISTRATIVE, CIVIL, AND CRIMINAL ENFORCEMENT TOOLS GENERALLY OPERATE EFFECTIVELY AT THIS LEVEL AND MECHANISMS TO CONTROL DIVERSION BY MANUFACTURERS AND DISTRIBUTORS HAVE LARGELY PROVEN ADEQUATE.

UNFORTUNATELY, EXPERIENCE UNDER THE CONTROLLED SUBSTANCES ACT OVER THE PAST DECADE HAS DEMONSTRATED THAT THE SAME STRONG REGULATORY AUTHORITY TO MAINTAIN A 'CLOSED' DISTRIBUTION CHAIN DOES NOT EXIST AT THE PRACTITIONER LEVEL. YET, IT IS ESTIMATED THAT 80 TO 90 PERCENT OF ALL CURRENT DIVERSION OCCURS AT THIS LEVEL. [FN729] UNDER CURRENT LAW, THE GROUNDS FOR DENIAL OR REVOCATION OF THE REGISTRATION OF A PRACTITIONER ARE VERY LIMITED. INDEED, THE ATTORNEY GENERAL MUST PRESENTLY GRANT A PRACTITIONER'S REGISTRATION APPLICATION UNLESS HIS STATE LICENSE HAS BEEN REVOKED OR HE HAS BEEN CONVICTED OF A FELONY DRUG OFFENSE, [FN730] EVEN THOUGH SUCH ACTION MAY CLEARLY BE CONTRARY TO THE PUBLIC INTEREST.

RECORDKEEPING REQUIREMENTS HAS INHIBITED EFFORTS TO CONTROL THE DIVERSION OF HIGHLY ABUSED NONNARCOTIC DRUGS. INSUFFICIENT AUTHORITY EXISTS TO SAFEGUARD DANGEROUS DRUGS HELD BY PERSONS WHOSE REGISTRATION HAS EXPIRED OR WHO HAVE GONE OUT OF BUSINESS. AUTHORITY TO CONTROL THE IMPORT AND EXPORT OF CONTROLLED SUBSTANCES HAS PROVEN TOO LIMITED IN CERTAIN RESPECTS.

AT THE SAME TIME, CERTAIN REGULATORY REQUIREMENTS OF CURRENT LAW HAVE PROVEN OVERLY STRINGENT. ANNUAL REGISTRATION REQUIREMENTS FOR PRACTITIONERS, WHO COMPRISE THE OVERWHELMING MAJORITY OF ALL CONTROLLED SUBSTANCES REGISTRANTS AND WHO ARE GENERALLY LAW-ABIDING, HAS BECOME AN EXCESSIVE REGULATORY BURDEN FOR BOTH PRACTITIONERS AND THE GOVERNMENT. INSUFFICIENT AUTHORITY TO EXEMPT FROM CONTROLS SUBSTANCES THAT HAVE NO OR LOW ABUSE POTENTIAL OR THAT ARE NEEDED FOR SCIENTIFIC AND RESEARCH PURPOSES HAS RESULTED IN UNNECESSARY REGULATION.

THE DIVERSION CONTROL AMENDMENTS OF PART B OF TITLE V OF THE BILL ARE DESIGNED TO ADDRESS THIS VARIETY OF PROBLEMS THAT HAVE ARISEN IN THE MORE THAN A DECADE OF EXPERIENCE UNDER THE CONTROLLED SUBSTANCES ACT. IN ADDITION TO ADDRESSING THE MORE RECENT PROBLEM OF MAINTAINING THE INTENDED 'CLOSED' SYSTEM AT THE PRACTITIONER LEVEL, THEY STRENGTHEN OTHER ASPECTS OF CURRENT REGULATORY AUTHORITY WHERE NECESSARY AND AT THE SAME TIME GIVE ADDITIONAL REGULATORY FLEXIBILITY WHERE CURRENT LAW HAS PROVEN TOO RIGID. ALSO INCLUDED IS A GRANT-IN-AID PROGRAM THROUGH WHICH FINANCIAL ASSISTANCE COULD BE GIVEN TO STATES AND LOCALITIES IN ORDER TO INCREASE THEIR CAPACITIES TO RESPOND TO THE DRUG DIVERSION PROBLEM.

2. PROVISIONS OF THE BILL, AS REPORTED

SECTION 505

SECTION 505 AMENDS 21 U.S.C. 802, WHICH SETS FORTH THE DEFINITIONS OF TERMS USED IN THE CONTROLLED SUBSTANCES ACT, [FN731] FIRST, BY **263 **3445 ADDING A DEFINITION OF THE TERM 'ISOMER,' AND SECOND, BY PROVIDING AN EXPANDED AND MORE DETAILED DEFINITION OF THE TERM 'NARCOTIC DRUG.' AN ISOMER OF A DRUG IS A DIFFERENT COMPOUND, BUT ONE WHICH HAS THE SAME NUMBER AND KIND OF ATOMS. Thus, although an isomer is not strictly identical to the drug, it is so similar that it has many of the same chemical and physical properties of the drug. Isomers include optical, positional, and geometric isomers. In many instances, substances listed in Schedules I and II (see 21 U.S.C. 812(C) include drugs and their isomers. Moreover, international treaty obligations of the United States, such as the 1961 Single Convention on Narcotic Drugs and the 1971 Convention of Psychotropic Substances, require control of certain isomers of dangerous drugs. Because of the absence of a clear definition of what is meant by the term 'isomer,' clandestine manufacturers have attempted to circumvent the law by manufacturing positional and geometric isomers of hallucinogens in Schedule I and optical and geometric isomers of cocaine. Indeed, this practice with respect to cocaine has given rise to frequent assertion of what is termed the 'isomer defense.' [FN732] Isomers of dangerous drugs often elicit similar harmful pharmacological effects, and have no legitimate commercial use. The definition of the term 'isomer' set out in Section 505's amendment of 21 U.S.C. 802 will assure that those isomers requiring control under the Controlled Substances Act are clearly covered by the statute.

OPIUM AND OPIATES IS UNIFIED IN A MORE CONCISE PARAGRAPH (A). SECOND, POPPY STRAW AND ITS CONCENTRATE (NOT USED COMMERCIALY IN THE UNITED STATES AT THE TIME OF ENACTMENT OF THE CONTROLLED SUBSTANCES ACT) IS ADDED TO THE DEFINITION. THIRD, COCA LEAVES ARE MORE CLEARLY DESCRIBED. FOURTH, COCAINE AND ECOCINE [FN734] ARE GIVEN A DETAILED SPECIFIC LISTING WITHIN THE DEFINITION OF 'NARCOTIC DRUG.' (THIS ALSO ASSURES CONSISTENCY WITH THE SINGLE CONVENTION ON NARCOTIC DRUGS.)

THE DEFINITIONAL AMENDMENTS IN SECTION 505 ARE DESIGNED LARGELY TO CLARIFY THE SCOPE OF CURRENT LAW AND CURE ANY POTENTIAL LOOPHOLES OR AMBIGUITIES. THERE ARE NO SIGNIFICANT CHANGES IN THE SCOPE OF SUBSTANCES SUBJECT TO CONTROL.

SECTION 506


THE ATTORNEY GENERAL IS TO NOTIFY THE SECRETARY OF HEALTH AND HUMAN SERVICES OF THE PROPOSED TEMPORARY SCHEDULING OF ANY DRUG OR SUBSTANCE UNDER NEW SUBSECTION (H). THE SECRETARY MAY OBJECT TO THE TEMPORARY SCHEDULING OF THE SUBSTANCE WITHIN THIRTY DAYS. HOWEVER, UNLESS THE SECRETARY HAS CURRENTLY AVAILABLE EVIDENCE RELATING TO THE LACK OF ABUSE POTENTIAL OF THE SUBSTANCE, HIS CONSIDERATIONS ARE CONFINED TO THE SAME FACTORS WHICH ARE TO HAVE BEEN ASSESSED BY THE ATTORNEY GENERAL IN HIS DETERMINATION. SHOULD THE SECRETARY OBJECT TO THE TEMPORARY SCHEDULING HIS DECISION IS BINDING ON THE ATTORNEY GENERAL. [FN736] TEMPORARY SCHEDULING UNDER NEW SUBSECTION (H) IS TO EXPIRE AFTER ONE YEAR, BUT THE ATTORNEY GENERAL MAY EXTEND THE TEMPORARY SCHEDULING FOR AN ADDITIONAL PERIOD OF SIX MONTHS DURING THE PENDENCY OF ROUTINE CONTROL PROCEEDINGS UNDER SECTION 811(A).

IF A SUBSTANCE IS SUBJECT TO THE TEMPORARY CONTROL PROVIDED IN NEW SUBSECTION (H) OF 21 U.S.C. 811, THE PENALTY FOR ITS ILLEGAL MANUFACTURE,
DISTRIBUTION, DISPENSING, OR POSSESSION WITH INTENT TO ENGAGE IN SUCH CONDUCT, IS TO BE THE SAME AS THAT PROVIDED IN 21 U.S.C. 841(B)(1)(C) FOR SCHEDULE III SUBSTANCES. OF THE REGULATORY REQUIREMENTS OF TITLE II, PART C OF THE CONTROLLED SUBSTANCES ACT, ONLY THE REGISTRATION AND REPORTING AND RECORDKEEPING REQUIREMENTS OF 21 U.S.C. 822 AND 827 ARE TO APPLY TO TEMPORARILY SCHEDULED SUBSTANCES.

THE NEW EMERGENCY CONTROL AUTHORITY PROVIDED IN SECTION 506 OF THE BILL IS DESIGNED TO ALLOW THE ATTORNEY GENERAL TO RESPOND QUICKLY TO PROTECT THE PUBLIC FROM DRUGS OF ABUSE THAT APPEAR IN THE ILLICIT TRAFFIC TOO RAPIDLY TO BE EFFECTIVELY HANDLED UNDER THE LENGTHY *265 **3447 ROUTINE CONTROL PROCEDURES. IN SUCH SITUATIONS, LAW ENFORCEMENT CONSIDERATIONS AND THE NEED TO PROTECT THE PUBLIC MAY REQUIRE ACTION THAT CANNOT AWAIT THE EXHAUSTIVE MEDICAL AND SCIENTIFIC DETERMINATIONS ORDINARILY REQUIRED WHEN A DRUG IS BEING CONSIDERED FOR CONTROL. THE EMERGENCY CONTROL AMENDMENT OF SECTION 506 PERMITS SUCH ACTION ON A TEMPORARY BASIS UNTIL THE MORE EXTENSIVE SCHEDULING PROCEDURES REQUIRED UNDER CURRENT LAW CAN BE MET.

SECTION 507

UNDER CURRENT 21 U.S.C. 811(G)(1), THE ATTORNEY GENERAL MAY EXEMPT FROM A SCHEDULE OF CONTROL CERTAIN COMPOUNDS, MIXTURES, OR PREPARATIONS CONTAINING STIMULANT OR DEPRESSANT SUBSTANCES. SECTION 507 OF THE BILL AMENDS THIS PROVISION OF CURRENT LAW TO CLARIFY AND EXPAND THE EXEMPTION AUTHORITY OF THE ATTORNEY GENERAL. THE COMPOUNDS, MIXTURES, AND PREPARATIONS WHICH MAY BE EXCLUDED ARE THOSE THAT DO NOT PRESENT ANY SIGNIFICANT POTENTIAL FOR ABUSE BECAUSE OF THE NATURE OF THEIR PREPARATION. AS AMENDED, 21 U.S.C. 811(G)(1) WOULD SPECIFY THREE CATEGORIES OF COMPOUNDS WHICH MAY BE EXEMPTED FROM THE CONTROLS OF THE CONTROLLED SUBSTANCES ACT. THESE ARE 'EXEMPT OVER THE COUNTER PREPARATIONS,' 'EXEMPT PRESCRIPTION PREPARATIONS,' AND 'EXEMPT CHEMICAL PREPARATIONS.' AS DEFINED IN PARAGRAPHS (A), (B), AND (C) OF SECTION 811(G)(1), AS AMENDED, 'EXEMPT OVER THE COUNTER PREPARATIONS' ARE THOSE CONTAINING A NONNARCOTIC CONTROLLED SUBSTANCE WHICH MAY BE LAWFULLY SOLD OVER-THE-COUNTER UNDER THE FEDERAL FOOD, DRUG AND COSMETIC ACT; [FN737] 'EXEMPT PRESCRIPTION PREPARATIONS' ARE THOSE CONTAINING A NONNARCOTIC CONTROLLED SUBSTANCE WHICH IS COMBINED WITH ONE OR MORE NONCONTROLLED ACTIVE INGREDIENTS SO THAT THE POTENTIAL FOR ABUSE IS VITIATED; AND 'EXEMPTED CHEMICAL PREPARATIONS' ARE COMPOUNDS, MIXTURES, OR PREPARATIONS WHICH ARE NOT FOR ADMINISTRATION TO HUMANS OR ANIMALS AND DO NOT PRESENT ANY SIGNIFICANT ABUSE POTENTIAL. SECTION 507'S EXPANSION OF THE AUTHORITY TO EXEMPT SUBSTANCES FROM CONTROL WHICH DO NOT POSE A SIGNIFICANT THREAT TO PUBLIC HEALTH AND SAFETY ALLOWS A REDUCTION IN UNNECESSARY REGULATORY BURDENS. BECAUSE THE CONCEPT OF 'EXEMPT PRESCRIPTION PREPARATIONS' ADDED TO THE EXEMPTION AUTHORITY UNDER 21 U.S.C. 811(G) IS ANALOGOUS TO THE BASIS FOR EXEMPTION SET OUT IN CURRENT 21 U.S.C. 812(D), THE SEPARATE EXEMPTION AUTHORITY UNDER SECTION 812(D) IS DELETED.

SECTION 508

SECTION 508 AMENDS 21 U.S.C. 822(A) BY AUTHORIZING THE ATTORNEY GENERAL TO ESTABLISH A REGISTRATION PERIOD FOR PRACTITIONERS THAT MAY BE UP TO THREE YEARS IN DURATION, BUT NOT LESS THAN ONE YEAR. CURRENTLY, PRACTITIONERS DISPENSING CONTROLLED SUBSTANCES, AS WELL AS MANUFACTURERS AND DISTRIBUTORS OF CONTROLLED SUBSTANCES, MUST REGISTER ANNUALLY. THE
ANNUAL REGISTRATION REQUIREMENT FOR MANUFACTURERS AND DISTRIBUTORS IS RETAINED. PRACTITIONERS, THOSE WHO DISPENSE CONTROLLED SUBSTANCES TO ULTIMATE USERS, NOW COMPRISE ALMOST 98 PERCENT OF ALL REGISTRANTS. [FN738] *266 **3448** THUS, THIS AMENDMENT WILL ALLOW SUBSTANTIAL COST AND TIME SAVINGS TO BOTH PRACTITIONER REGISTRANTS AND THE GOVERNMENT BY ALLEVIATING THE BURDEN OF ANNUAL REGISTRATION.

SECTION 509

IMPROPER DIVERSION OF CONTROLLED SUBSTANCES BY PRACTITIONERS IS ONE OF THE MOST SERIOUS ASPECTS OF THE DRUG ABUSE PROBLEM. HOWEVER, EFFECTIVE FEDERAL ACTION AGAINST PRACTITIONERS HAS BEEN SEVERELY INHIBITED BY THE LIMITED AUTHORITY IN CURRENT LAW TO DENY OR REVOKE PRACTITIONER REGISTRATIONS. UNDER CURRENT 21 U.S.C. 823(F), THE ATTORNEY GENERAL MUST REGISTER A PHYSICIAN, PHARMACY, OR OTHER PRACTITIONER AS LONG AS THE PRACTITIONER IS AUTHORIZED TO DISPENSE CONTROLLED SUBSTANCES IN THE STATE IN WHICH HE PRACTICES. THE AUTHORITY TO DENY OR REVOKE A PRACTITIONER'S REGISTRATION UNDER CURRENT 21 U.S.C. 824(A) IS LIMITED TO INSTANCES IN WHICH THE REGISTRANT HAS (1) MATERIALLY FALSELY FABRICATED AN APPLICATION, (2) BEEN CONVICTED OF A STATE OR FEDERAL FELONY RELATING TO CONTROLLED SUBSTANCES, OR (3) HAD HIS STATE REGISTRATION OR LICENSE SUSPENDED, REVOKED OR DENIED. THE CURRENT LIMITED GROUNDS FOR REVOKING OR DENYING A PRACTITIONER'S REGISTRATION HAVE BEEN CITED AS CONTRIBUTING TO THE PROBLEM OF DIVERSION OF DANGEROUS DRUGS. [FN739] IN ADDITION, BECAUSE OF A VARIETY OF LEGAL, ORGANIZATIONAL, AND RESOURCE PROBLEMS, MANY STATES ARE UNABLE TO TAKE EFFECTIVE OR PROMPT ACTION AGAINST VIOLATING REGISTRANTS. [FN740] SINCE STATE REVOCATION OF A PRACTITIONER'S LICENSE OR REGISTRATION IS A PRIMARY BASIS ON WHICH FEDERAL REGISTRATION MAY BE REVOKED OR DENIED, PROBLEMS AT THE STATE REGULATORY LEVEL HAVE HAD A SEVERE ADVERSE IMPACT ON FEDERAL ANTI-DIVERSION EFFORTS. THE CRITERIA OF PRIOR FELONY DRUG CONVICTION FOR DENIAL OR REVOCATION OF REGISTRATION HAS PROVEN TOO LIMITED IN CERTAIN CASES AS WELL, FOR MANY VIOLATIONS INVOLVING CONTROLLED SUBSTANCES WHICH ARE PRESCRIPTION DRUGS ARE NOT PUNISHABLE AS FELONIES UNDER STATE LAW. MOREOVER, DELAYS IN OBTAINING CONVICTION ALLOW PRACTITIONERS TO CONTINUE TO DISPENSE DRUGS WITH A HIGH ABUSE POTENTIAL EVEN WHERE THERE IS STRONG EVIDENCE THAT THEY HAVE SIGNIFICANTLY ABUSED THEIR AUTHORITY TO DISPENSE CONTROLLED SUBSTANCES.

CLEARLY, THE OVERLY LIMITED BASES IN CURRENT LAW FOR DENIAL OR REVOCATION OF A PRACTITIONER'S REGISTRATION DO NOT OPERATE IN THE PUBLIC INTEREST. SECTION 509 OF THE BILL WOULD AMEND 21 U.S.C. 824(F) TO EXPAND THE AUTHORITY OF THE ATTORNEY GENERAL TO DENY A PRACTITIONER'S REGISTRATION APPLICATION. UNDER 21 U.S.C. 824(F), AS AMENDED BY SECTION 509 OF THE BILL, THE ATTORNEY GENERAL WOULD BE REQUIRED TO REGISTER A PRACTITIONER AUTHORIZED UNDER STATE LAW TO DISPENSE OR CONDUCT RESEARCH WITH CONTROLLED SUBSTANCES UNLESS HE MADE A SPECIFIC FIND THAT REGISTRATION WOULD BE 'INCONSISTENT WITH THE PUBLIC INTEREST,' WHETHER REGISTRATION IS IN THE PUBLIC INTEREST IS TO BE BASED ON CONSIDERATION OF THE FOLLOWING FACTORS: (1) THE RECOMMENDATION OF THE APPROPRIATE STATE LICENSING BOARD OR PROFESSIONAL DISCIPLINARY AUTHORITY; [FN741] (2) THE APPLICANT'S PAST EXPERIENCE IN DISPENSING **267 **3449** OR CONDUCTING RESEARCH WITH RESPECT TO CONTROLLED SUBSTANCES; (3) THE APPLICANT'S PRIOR CONVICTION RECORD CONCERNING CONTROLLED SUBSTANCES OFFENSES; [FN742] (4) COMPLIANCE WITH APPLICABLE STATE, FEDERAL, OR LOCAL CONTROLLED SUBSTANCES LAWS; AND (5) OTHER FACTORS THAT ARE RELEVANT TO AND CONSISTENT WITH THE PUBLIC HEALTH AND SAFETY. [FN743]
THE AMENDMENT SET FORTH IN SECTION 509 WILL CONTINUE TO ALLOW THE ATTORNEY GENERAL TO ROUTINELY REGISTER MOST PRACTITIONER APPLICANTS. HOWEVER, IN THOSE CASES IN WHICH REGISTRATION IS CLEARLY CONTRARY TO THE PUBLIC INTEREST, THE AMENDMENT WOULD ALLOW A SWIFT AND SURE RESPONSE TO THE DANGER POSED TO THE PUBLIC HEALTH AND SAFETY BY THE REGISTRATION OF THE PRACTITIONER IN QUESTION. THE BROADER CONSIDERATIONS FOR REGISTRATION OF PRACTITIONERS SET OUT IN SECTION 509 OF THE BILL ARE SIMILAR TO THOSE APPLICABLE UNDER CURRENT LAW TO REGISTRATION APPLICATIONS ON THE PART OF THE MANUFACTURERS AND DISTRIBUTORS OF CONTROLLED SUBSTANCES. [FN744] HOWEVER, THE AMENDMENT WOULD CONTINUE TO GIVE DEFERENCE TO THE OPINIONS OF STATE LICENSING AUTHORITIES, SINCE THEIR RECOMMENDATIONS ARE THE FIRST OF THE FACTORS TO BE CONSIDERED WITH RESPECT TO PRACTITIONER APPLICATIONS. [FN745]

SECTION 510

SECTION 510 AMENDS 21 U.S.C. 824(A) TO ADD TO THE CURRENT BASES FOR DENIAL, REVOCATION, OR SUSPENSION OF REGISTRATION A FINDING THAT REGISTRATION WOULD BE INCONSISTENT WITH THE PUBLIC INTEREST ON THE GROUNDS SPECIFIED IN 21 U.S.C. 823, WHICH WILL INCLUDE CONSIDERATION OF THE NEW FACTORS ADDED BY SECTION 509, AS DISCUSSED SUPRA.

SECTION 511

SECTION 511 AMENDS 21 U.S.C. 824(F) BY ADDING A NEW PROVISION THAT WOULD AUTHORIZE THE ATTORNEY GENERAL TO PLACE UNDER SEAL ANY CONTROLLED SUBSTANCES OWNED OR POSSESSED BY A REGISTRANT WHOSE REGISTRATION HAS EXPIRED OR WHO HAS CEASED TO PRACTICE OR DO BUSINESS. THE CONTROLLED SUBSTANCES ARE TO BE HELD FOR THE BENEFIT OF THE REGISTRANT OR HIS SUCCESSOR IN INTEREST FOR 90 DAYS. AT THE END OF THIS 90-DAY PERIOD, THE ATTORNEY GENERAL MAY DISPOSE OF THE CONTROLLED SUBSTANCES IN ACCORDANCE WITH 21 U.S.C. 881(E), WHICH GOVERNS THE DISPOSAL OF CONTROLLED SUBSTANCES FORFEITED TO THE UNITED STATES. THE AMENDMENT SET FORTH IN SECTION 511 IS DESIGNED TO GIVE THE ATTORNEY GENERAL NECESSARY AUTHORITY TO SAFEGUARD QUANTITIES OF CONTROLLED SUBSTANCES WHICH POSE A RISK OF THEFT OR HAZARD TO THE PUBLIC HEALTH AND SAFETY BECAUSE THEY ARE IN THE POSSESSION OF THOSE NO LONGER REGISTERED OR WHO HAVE GONE OUT OF BUSINESS. THIS AUTHORITY IS IN ADDITION TO THE EXISTING AUTHORITY UNDER CURRENT 21 U.S.C. 824(F) TO FORFEIT CONTROLLED SUBSTANCES HELD BY THOSE WHOSE REGISTRATION HAS BEEN REVOKED OR SUSPENDED. [FN746]

SECTIONS 512 AND 513

THE ADMINISTERING OF CONTROLLED SUBSTANCES, UNLESS THE PRACTITIONER 'REGULARLY ENGAGES IN THE DISPENSING OR ADMINISTERING OF CONTROLLED SUBSTANCES AND CHARGES HIS PATIENTS * * * FOR SUBSTANCES SO ADMINISTERED.' THIS SAME FORMULATION APPLIES UNDER CURRENT 21 U.S.C. 827(C)(1)(B) TO A PRACTITIONER'S DISPENSING OF NONNARCOTIC CONTROLLED SUBSTANCES.

THE ADDITIONAL RECORDKEEPING BURDEN ON PRACTITIONERS RESULTING FROM THE AMENDMENTS SET OUT IN SECTIONS 512 AND 513 WILL BE MINIMAL, BUT THE INCREASE IN ACCOUNTABILITY WILL BE A MAJOR LAW ENFORCEMENT IMPROVEMENT. THE PRESENT LACK OF RECORDKEEPING WITH RESPECT TO THE DISPENSING OF NONNARCOTIC DRUGS IS A SERIOUS PROBLEM IN DETECTING ILLICIT SALE AND DIVERSION BY PRACTITIONERS. THESE AMENDMENTS ELIMINATE THIS LOOPHOLE WHILE STILL PRESERVING A RECORDKEEPING EXEMPTION FOR PRESCRIPTIONS AND LIMITED ADMINISTRATION OF CONTROLLED SUBSTANCES WITHIN THE PRACTITIONER'S OFFICE.

SECTION 514

SECTION 514 AMENDS 21 U.S.C. 827 BY ADDING A NEW SUBSECTION THAT WOULD REQUIRE REGISTRANTS TO REPORT A CHANGE OF PROFESSIONAL OR BUSINESS ADDRESS. THIS WILL FACILITATE THE TRANSMITTAL AND PROMPT RESPONSE TO APPLICATIONS FOR REGISTRATION RENEWAL. ALSO, IN LIGHT OF THE AMENDMENT IN SECTION 508 OF THE BILL ALLOWING THE REGISTRATION OF PRACTITIONERS TO REMAIN IN EFFECT FOR A PERIOD OF UP TO THREE YEARS, A REQUIREMENT THAT REGISTRANTS GIVE NOTICE OF CHANGE OF ADDRESS IS PARTICULARLY APPROPRIATE.

SECTION 515

CURRENTLY, 21 U.S.C. 843(A)(2) PROHIBITS THE USE OF A REGISTRATION NUMBER THAT IS FICTITIOUS, REVOKED, SUSPENDED, OR ISSUED TO ANOTHER PERSON. SECTION 515 OF THE BILL ADDS TO THIS LIST OF PROHIBITED ACTS THE USE OF A REGISTRATION NUMBER THAT HAS EXPIRED. THUS, THIS AMENDMENT CURES THE LOOPHOLE IN CURRENT LAW REGARDING USE OF AN EXPIRED REGISTRATION NUMBER AND CLARIFIES THE LEGAL STATUS OF A REGISTRANT WHO HAS FAILED TO REAPPLY FOR REGISTRATION.

**269 **3451 SECTION 516

ADDRESSING THE SERIOUS PROBLEM OF ILLICIT DIVERSION OF LEGALLY PRODUCED DRUGS REQUIRES THE CONCERTED EFFORT NOT ONLY OF FEDERAL AGENCIES, BUT OF STATE AND LOCAL LAW ENFORCEMENT AND REGULATORY AGENCIES AS WELL. HOWEVER, FOR A NUMBER OF REASONS, MANY STATES AND LOCALITIES SIMPLY DO NOT HAVE THE CAPACITY TO EFFECTIVELY ADDRESS THIS PROBLEM. [FN747] SECTION 516 WOULD PROVIDE A MEANS OF INCREASING THE ABILITY OF STATES AND LOCALITIES TO DEAL WITH THE DIVERSION PROBLEM BY ALLOWING THE ATTORNEY GENERAL TO ENTER INTO GRANT-IN-AID PROGRAMS WITH STATE AND LOCAL GOVERNMENTS 'TO ASSIST THEM TO SUPPRESS THE DIVERSION OF CONTROLLED SUBSTANCES FROM LEGITIMATE MEDICAL, SCIENTIFIC, AND COMMERCIAL CHANNELS.' FUNDS APPROPRIATED FOR THESE GRANT-IN-AID PROGRAMS ARE TO REMAIN AVAILABLE UNTIL EXPENDED.

WOULD BE FOR SPECIFIED TERMS WITH APPROPRIATE MATCHING FUNDS PROVIDED BY THE STATE. [FN748]

SECTION 517

CURRENTLY, CONTROLLED SUBSTANCES MANUFACTURED, DISTRIBUTED, DISPENSED, OR ACQUIRED IN VIOLATION OF THE CONTROLLED SUBSTANCES ACT ARE SUBJECT TO FORFEITURE UNDER 21 U.S.C. 881(A)(1). SECTION 517 WOULD AMEND THIS PROVISION TO INCLUDE CONTROLLED SUBSTANCES THAT ARE POSSESSED IN VIOLATION OF LAW. THIS AMENDMENT ALLEVIATES THE PROBLEM NOW POSED WHEN A REGISTRANT HAS LAWFULLY ACQUIRED CONTROLLED SUBSTANCES, BUT CONTINUES TO POSSESS THEM AFTER HIS REGISTRATION HAS EXPIRED OR BEEN TERMINATED. IN SUCH SITUATIONS, CONTROLLED SUBSTANCES ARE OFTEN LEFT IN UNSECURED OR VACANT BUILDINGS AND SO POSE A SERIOUS RISK OF THEFT AND DANGER TO THE PUBLIC SAFETY. SECTION 517 OF THE BILL WOULD GIVE THE ATTORNEY GENERAL THE AUTHORITY TO PLACE SUCH CONTROLLED SUBSTANCES UNDER SEAL, RETAIN THEM FOR SAFEKEEPING, AND EVENTUALLY DISPOSE OF THEM PURSUANT TO FORFEITURE PROCEEDINGS. [FN749]

SECTION 518

UNDER CURRENT 21 U.S.C. 952(A)(2), THE IMPORTATION OF CONTROLLED SUBSTANCES IN SCHEDULES I AND II AND NARCOTIC SUBSTANCES IN SCHEDULES II, IV, AND V FOR MEDICAL, SCIENTIFIC, AND OTHER LEGITIMATE PURPOSES IS GENERALLY LIMITED TO THOSE CASES IN WHICH THERE IS A FINDING THAT COMPETITION AMONG DOMESTIC MANUFACTURERS IS INADEQUATE. THIS REQUIREMENT HAS CREATED DIFFICULTIES IN SITUATIONS WHICH ROUTINELY ARISE WHEN RESEARCHERS NEED SPECIFIC SUBSTANCES FOR COMPARATIVE STUDIES ON FOREIGN-DEVELOPED COMPOUNDS THAT ARE UNIQUE IN THEIR MANUFACTURE. SECTION 518 WOULD ACCOMMODATE THE NEED TO IMPORT SUCH SUBSTANCES BY ADDING A NEW PROVISION TO 21 U.S.C. 952 (A)(2) THAT WOULD ALLOW IMPORTATION OF LIMITED QUANTITIES OF CONTROLLED SUBSTANCES FOR PURPOSES EXCLUSIVELY OF ULTIMATE SCIENTIFIC, ANALYTIC, OR RESEARCH USES.

SECTION 519

SECTION 519 AMENDS 21 U.S.C. 952(B)(2) BY AUTHORIZING THE ATTORNEY GENERAL TO REQUIRE IMPORT PERMITS FOR NONNARCOTIC SCHEDULE III SUBSTANCES. CURRENTLY SUCH PERMITS ARE REQUIRED FOR IMPORTATION OF NARCOTIC SCHEDULE III SUBSTANCES, BUT ARE NOT REQUIRED FOR OTHER SCHEDULE III SUBSTANCES WITH HIGH ABUSE POTENTIAL UNLESS SUCH SUBSTANCES ARE LISTED IN SCHEDULE I OR II OF THE CONVENTION ON PSYCHOTROPIC SUBSTANCES. [FN750] IT IS APPROPRIATE THAT IMPORT CONTROLS EXTEND TO ALL DANGEROUS DRUGS CLASSIFIED IN SCHEDULE III OF THE CONTROLLED SUBSTANCES ACT.

SECTION 520

SECTION 520 OF THE BILL AMENDS 21 U.S.C. 953(E) TO TIGHTEN THE CRITERIA FOR EXPORT OF CONTROLLED SUBSTANCES WHICH ARE NONNARCOTIC SCHEDULE III OR IV SUBSTANCES OR SCHEDULE V SUBSTANCES. UNDER 21 U.S.C. 953(E)(1), EXPORT OF THESE CONTROLLED SUBSTANCES IS NOT PERMITTED UNLESS DOCUMENTARY PROOF IS SUBMITTED SHOWING THAT IMPORTATION IS NOT CONTRARY TO THE LAWS OR REGULATIONS OF THE 'COUNTRY OF DESTINATION.' SECTION 520 AMENDS THIS PROVISION TO MAKE IT CLEAR THAT THE REQUIRED DOCUMENTATION IS TO RELATE TO THE COUNTRY WHERE THE CONTROLLED SUBSTANCE IS DESTINED FOR ULTIMATE
CONSUMPTION FOR MEDICAL, SCIENTIFIC, OR OTHER LEGITIMATE PURPOSES, AND NOT TO A COUNTRY OF TRANSHIPMENT. SECTION 520 OF THE BILL ALSO AMENDS 21 U.S.C. 953(E) TO REQUIRE AN EXPORT PERMIT FOR NONNARCOTIC, AS WELL AS NARCOTIC, SCHEDULE III SUBSTANCES. THIS LATTER AMENDMENT PARALLELS THE REQUIREMENT FOR IMPORT PERMITS FOR ALL SCHEDULE III SUBSTANCES PROVIDED IN SECTION 519 OF THE BILL.

SECTION 521


SECTION 522


SECTION 523

UNDER CURRENT 21 U.S.C. 958(B) A PERSON REGISTERED TO IMPORT OR EXPORT SCHEDULE I OR II SUBSTANCES MAY IMPORT OR EXPORT ONLY THOSE CONTROLLED SUBSTANCES SPECIFIED IN HIS REGISTRATION. IN CONTRAST, THE REGISTRATIONS OF IMPORTERS AND EXPORTERS OF SUBSTANCES IN SCHEDULES III, IV, AND V ARE NOT DRUG SPECIFIC. THUS, THIS LATTER CATEGORY OF REGISTRANTS CAN TRADE IN ANY AND ALL SUBSTANCES IN THE SCHEDULE FOR WHICH THEY ARE REGISTERED, AND THE ABILITY OF THE GOVERNMENT TO MONITOR IMPORT AND EXPORT ACTIVITY WITH RESPECT TO DRUGS OF SPECIAL INTEREST IN SCHEDULES III, IV, AND V IS
CONSEQUENTLY INHIBITED. SECTION 523’S AMENDMENT OF 21 U.S.C. 958(B) WOULD CURE THIS PROBLEM BY ALLOWING THE REGISTRATIONS OF THOSE EXPORTING OR IMPORTING ANY CONTROLLED SUBSTANCE TO BE LIMITED TO TRADING IN SPECIFIC CONTROLLED SUBSTANCES WITHIN PARTICULAR SCHEDULES.

SECTION 524


SECTION 525


SECTION 525 ALSO AMENDS CURRENT 21 U.S.C. 958(H) (REDESIGNATED AS SUBSECTION (I)) WHICH GIVES REGISTERED DOMESTIC MANUFACTURERS OF BULK CONTROLLED SUBSTANCES AN OPPORTUNITY FOR A HEARING WITH RESPECT TO THE REGISTRATION APPLICATION OF AN IMPORTER. THE AMENDMENT IN SECTION 525 MAKES IT CLEAR THAT SUCH MANUFACTURERS ARE TO HAVE AN OPPORTUNITY TO PRESENT THEIR VIEWS ON THE ADEQUACY OF COMPETITION AMONG DOMESTIC MANUFACTURERS. IT ALSO REMOVES THE REQUIREMENT OF A HEARING, WHICH HAS CONSIDERABLY SLOWED THE PROCESS OF REVIEWING IMPORT AND EXPORT APPLICATIONS. THIS, THIS SECTION WILL RETAIN THE OPPORTUNITY FOR DOMESTIC MANUFACTURERS TO RAISE PERTINENT ISSUES REGARDING AN IMPORT REGISTRATION APPLICATION, BUT WILL SPEED THE PROCESS OF APPROVING REGISTRATION SO THAT NEW APPLICANTS CAN ENTER THE MARKET, PROVIDED THEY CAN DEMONSTRATE TO
THE ATTORNEY GENERAL THAT THEY MEET THE STRINGENT REGISTRATION REQUIREMENTS.

SECTION 526

SECTION 526 AMENDS 21 U.S.C. 952(A)(1) TO ALLOW THE IMPORT OF POPPY STRAW AND ITS CONCENTRATE IN AMOUNTS THAT THE ATTORNEY GENERAL DETERMINES ARE NECESSARY TO MEDICAL, SCIENTIFIC, AND OTHER LEGITIMATE PURPOSES, IN THE SAME MANNER AS NOW PROVIDED FOR CRUDE OPIUM AND COCA LEAVES. IMPORT OF POPPY STRAW AND ITS CONCENTRATE HAS OCCURRED FOR SEVERAL YEARS UNDER EMERGENCY IMPORT AUTHORITY.

TITLE VI-- JUSTICE ASSISTANCE

INTRODUCTION


THIS TITLE OF S. 1762, AS REPORTED, IS IDENTICAL TO TITLE VIII OF S. 829, EXCEPT THAT IT INCORPORATES WITH MINOR CHANGES THE AMENDMENTS ADOPTED BY THE COMMITTEE IN THE COURSE OF ITS CONSIDERATION OF S. 53 ON JUNE 16, 1983. [FN756]

THE JUSTICE ASSISTANCE PROGRAM AUTHORIZED BY THIS TITLE IS INTENDED BY THE ADMINISTRATION AND THE COMMITTEE TO PROVIDE A HIGHLY TARGETED PROGRAM OF FEDERAL FINANCIAL ASSISTANCE, OPERATING UNDER A REVISED ORGANIZATIONAL STRUCTURE WITHIN THE DEPARTMENT OF JUSTICE, TO STATE AND LOCAL LAW ENFORCEMENT AUTHORITIES. THE MAJOR PROVISIONS (1) REORGANIZE THE JUSTICE ASSISTANCE PROGRAM; (2) REAUTHORIZE THE CURRENT ASSISTANCE, STATISTICS, AND RESEARCH PROGRAMS; (3) TARGET BLOCK GRANT FEDERAL FINANCIAL ASSISTANCE ON STATE AND LOCAL ANTI-CRIME ACTIVITIES OF PROVEN SUCCESS; AND (4) ESTABLISH A NEW BUREAU OF CRIMINAL JUSTICE FACILITIES WITHIN THE OFFICE OF JUSTICE ASSISTANCE TO ADMINISTER A PROGRAM DESIGNED, AMONG OTHER THINGS, TO ASSIST STATE AND LOCAL GOVERNMENTS IN THE CONSTRUCTION AND MODERNIZATION OF CORRECTION FACILITIES.

HISTORY OF JUSTICE ASSISTANCE

AMENDING LANGUAGE SO THAT THIS PERIOD SAW THE LEAA CHANGE GREATLY IN SIZE AND COMPLEXITY.


THE HISTORY OF LEAA PROVIDES IMPORTANT LESSONS FOR USE IN THE DESIGN OF A NEW EFFORT TO ATTACK THE PROBLEM OF CRIME. IT DEMONSTRATES THAT A PROGRAM WHOSE PRIORITIES WERE UNCLEAR AND CONSTANTLY SHIFTING RESULTED IN CONFUSION AND WASTE. IT ALSO INDICATES THAT OVERLY DETAILED STATUTORY AND REGULATORY SPECIFICATION PRODUCES BUREAUCRATIC RED TAPE, WHICH INHIBITS PROGRESS TOWARD THE GOALS OF THE PROGRAM.

THE LEAA EXPERIENCE ALSO DEMONSTRATES THAT THE CONCEPT OF FEDERAL SEED MONEY FOR CAREFULLY DESIGNED PROGRAMS DOES WORK, AND THAT CERTAIN CAREFULLY DESIGNED PROJECTS CAN HAVE A SIGNIFICANT IMPACT ON CRIMINAL JUSTICE.


FOLLOWING MEETINGS WITH CHAIRMAN THURMOND, SENATOR SPECTER AND MEMBERS OF THE HOUSE, THE ADMINISTRATION AGREED TO ENDORSE THE CONCEPT OF A HIGHLY TARGETED PROGRAM OF FEDERAL FINANCIAL ASSISTANCE TO STATE AND LOCAL CRIMINAL JUSTICE EFFORTS AND PROPOSED THAT IT OPERATE WITHIN A RESTRUCTURED ORGANIZATIONAL FRAMEWORK.


STATEMENT

TITLE VI OF THIS BILL AS ADOPTED BY THE COMMITTEE IS INTENDED TO RESPOND TO THE VIOLENT CRIME PROBLEM WHICH HAS BEEN CONSISTENTLY SHOWN TO BE A NATIONAL ONE OF MAJOR PROPORTIONS, BOTH IN THE NUMBER OF VIOLENT CRIMES COMMITTED AND IN THE PUBLIC PERCEPTION OF CRIME AS A LEADING PERSONAL CONCERN. ACCORDING TO THE FBI'S 'CRIME CLOCK' FOR 1981, ONE VIOLENT CRIME IS COMMITTED EVERY 24 SECONDS AND ONE PROPERTY CRIME IS COMMITTED EVERY THREE SECONDS. [FN764] THE FIGGIE REPORT FOUND THAT 41 PERCENT OF AMERICANS WERE 'HIGHLY FEARFUL' THAT THEY WOULD BECOME VICTIMS OF VIOLENT
CRIME. [FN765] AN ADDITIONAL 29 PERCENT WERE 'MODERATELY FEARFUL.' THE NEWS MEDIA HAVE GIVEN SUSTAINED PROMINENCE TO THE PROBLEM OF CRIME, HEIGHTENING PUBLIC AWARENESS OF ITS MAGNITUDE AND SUSTAINING THE PUBLIC'S DEMAND FOR EFFECTIVE ACTION BY GOVERNMENT AT ALL LEVELS. WHILE STATE AND LOCAL GOVERNMENTS SHOULDER THE PRIMARY BURDEN OF DEALING WITH VIOLENT CRIME, A FEDERAL ROLE IS APPROPRIATE IN ORDER TO COORDINATE AND SUPPLEMENT STATE AND LOCAL EFFORTS.

TITLE VI OF S. 1762 IS FOR THE MOST PART A COMPLETE SUBSTITUTE FOR TITLE I OF THE OMNIBUS CRIME CONTROL AND STATE STREETS ACT OF 1968. THIS SUBSTITUTE IS MADE UP OF PARTS A THROUGH N, WITH A VARYING NUMBER OF SECTIONS IN EACH PART. UNLESS OTHERWISE SPECIFIED, REFERENCES TO PARTS AND SECTION NUMBERS REFER TO THE NEW TITLE OF THE CRIME CONTROL AND SAFE STREETS ACT OF 1968.

THE PROVISIONS OF THIS NEW TITLE ARE DESIGNED TO REFLECT AN APPRECIATION FOR THE LESSONS OF THE LEAA EXPERIENCE BY PROVIDING FOR A HIGHLY TARGETED PROGRAM OF ASSISTANCE FROM WITHIN A STREAMLINED AND SIMPLIFIED ORGANIZATIONAL ARRANGEMENT IN THE DEPARTMENT OF JUSTICE. IT ELIMINATES THE BURDENSOME COMPREHENSIVE PLANNING REQUIREMENTS IN THE CURRENT LAW AND SUBSTITUTES A SIMPLIFIED APPLICATION PROCESS WHICH WILL ASSURE THE DELIVERY OF FEDERAL ASSISTANCE WITH A MINIMUM OF RED TAPE AND DELAY. UNDER THE LEAA PROGRAM, STATES SUBMITTED DETAILED COMPREHENSIVE CRIMINAL JUSTICE IMPROVEMENT PLANS AS THE BASIS FOR THEIR USE OF FEDERAL FUNDS. THIS REQUIREMENT LED TO ANNUAL STATE PLANS OF EXTRAORDINARY LENGTH FOR WHICH UP TO $60 MILLION OF FEDERAL FUNDS WERE SPENT ANNUALLY.


TITLE VI ESTABLISHES AN OFFICE OF JUSTICE ASSISTANCE (OJA) WITHIN THE DEPARTMENT OF JUSTICE, HEADED BY AN ASSISTANT ATTORNEY GENERAL. THE COMMITTEE CONCLUDED THAT PLACING AUTHORITY AND RESPONSIBILITY FOR THE ENTIRE STATE AND LOCAL PROGRAM AT THE LEVEL OF AN ASSISTANT ATTORNEY GENERAL ENHANCES THE STATURE OF THE ORGANIZATION AND PROVIDES A CLEAR LINE OF AUTHORITY AND ACCOUNTABILITY.


ADVISING THE ASSISTANT ATTORNEY GENERAL WOULD BE A CONSOLIDATED JUSTICE ASSISTANCE ADVISORY BOARD APPOINTED BY THE PRESIDENT. THIS BOARD, REPLACING THE TWO SEPARATE BOARDS ADVISING THE NATIONAL INSTITUTE OF

INVOLVED.
The Bureau of Justice Programs will have the responsibility to provide technical assistance, training and funds to state and local criminal justice and non-profit organizations through a combination of block and discretionary grant funds; 80 percent of the funds authorized to be appropriated are for the purposes of implementing a block grant program. Each state would receive an allocation of block grant funds based on its relative population. At least a proportional share of the funds must then be passed-through to local governments for program implementation with a priority to local jurisdictions on the basis of criteria to be established by the Director. Furthermore, should a state not qualify, or choose not to participate, local jurisdictions within the state shall be able to apply for and receive funds. A base amount of $250,000 will be awarded to each state with the remaining block grant portion allocated on the basis of each state's relative population.

Reported crime rate was not included as an allocation factor for three reasons. First, numerous jurisdictions, including some large cities and many small or rural communities, do not participate in the FBI's Uniform Crime Reports (UCR) Data Collection Program. Second, the number of crimes reported to the police do not necessarily reflect either the actual rate of criminal acts or the level of public fear of crime in a particular locality. Finally, the use of crime rate data as a basis for the distribution of funds may penalize the more efficient and effective law enforcement agencies while rewarding the less effective.

Federal funds would be matched in cash on a 50-50 basis. Individual projects would not be entitled to receive more than three years of federal assistance. Funding would be limited to specific types of activities based on program models with a demonstrated record of success, which relate primarily to violent crimes, repeat offenders, victim-witness assistance, and crime prevention projects. No federal funds may be used to pay state or local administrative costs, nor may they be used for construction projects, personnel salaries or hardware, except as a necessary and incidental expense associated with an approved project.

Unlike the former Law Enforcement Assistance Administration Program, which attempted to 'improve the criminal justice system,' at state and local levels, this bill focuses on those specific areas where modest resources can have a significant impact. [FN767] Past experience with the Law Enforcement Assistance Administration Program is ample evidence of the need for a narrow focus to the financial assistance program in order to prevent dissipation of limited resources and to assure maximum impact on serious and violent crime.

Twenty percent of the funds authorized to be appropriated are for a discretionary grant program. The discretionary funds will focus on technical assistance, training, [FN768] and multi-jurisdictional or national programs related to the same priority objectives specified for the block grant funds. In addition, discretionary funds may be used for demonstration programs to test the effectiveness of new anti-crime ideas. Federal funding for such programs may be up to 100 percent of their cost.

This title eliminates the complex application submission and review procedures required under the earlier program. It retains only those administrative provisions necessary to the exercise of appropriate stewardship over public funds and to assure that the funds are being effectively used for the purposes identified in the *280 **3461 act. In lieu of the establishment of a statutorily mandated state planning agency, it

OUR NATION'S PRISONS AND JAILS ARE TEEMING WITH INMATES SLEEPING IN TENTS, BOILERROOMS, GYMNASIUMS, HALLWAYS AND TEMPORARY TRAILER HOUSES. UNSANITARY AND UNSAFE, MANY OF OUR OVERFLOWING PRISONS NO LONGER HAVE THE CAPACITY TO LEGALLY HOLD THE BURGEONING INMATE POPULATIONS CREATED BY OUR EVER INCREASING WAY ON CRIME. WARDENS AND JAILERS, AS WELL AS MAYORS AND GOVERNORS, FACE THOUSANDS OF LAWSUITS CHALLENGING THE RIGHT TO HOLD PRISONERS UNDER CONDITIONS THAT VIOLATE FUNDAMENTAL CONCEPTS OF HUMAN DECENTY. THIRTY-NINE STATES AND HUNDREDS OF COUNTIES AND CITY EXECUTIVES AND LAW ENFORCEMENT OFFICERS ARE UNDER COURT ORDER OR ARE DEFENDING LAWSUITS BECAUSE OF SUBSTANDARD AND INHUMANE PRISON AND JAIL CONDITIONS. [FN772] THE CONDITION OF OUR NATION'S CORRECTIONS INFRASTRUCTURE OF MORE THAN 650 PRISONS, 3,500 JAILS, AND NUMEROUS HALFWAY HOUSES, DETENTION CENTERS AND OTHER CORRECTIONAL FACILITIES TODAY REPRESENT THE CRITICALLY WEAK LINK IN THE NATION'S BATTLE AGAINST CRIME. DURING THE 1970'S, WHILE RESOURCES TO DETECT, APPREHEND AND PROSECUTE CRIMINALS WERE EXPANDING, EXPENDITURES FOR CONVICTED AND PRETRIAL PRISONERS CONTINUED TO DECLINE IN REAL TERMS. THE CAPACITY AND EFFICIENCY OF ALL CRIMINAL JUSTICE AGENCIES INCREASED, EXCEPT CORRECTIONS, LEAVING THE NATION'S LAST LINE OF DEFENSE AGAINST CRIME WITH TOO MANY PRISONERS IN TOO LITTLE SPACE.

THE NEW BUREAU OF CRIMINAL JUSTICE FACILITIES WILL DIRECT NEW FEDERAL FINANCIAL AND TECHNICAL ASSISTANCE TO STATES AND LOCALITIES IN THEIR EFFORTS TO REDUCE DANGEROUS AND EPIDEMIC PRISON AND JAIL OVERCROWDING AND OTHER SUBSTANDARD CONDITIONS OF CONFINEMENT. *281 **3462 THE AUTHORIZATION FOR THIS PROGRAM IS CAPPED AT $25 MILLION FOR EACH FISCAL YEAR 1984 THROUGH 1987. THE BUREAU OF CRIMINAL JUSTICE FACILITIES WILL RENDER ASSISTANCE IN SEVERAL IMPORTANT AREAS. IT WILL (1) PROVIDE FOR SUBSIDIES TO REDUCE INTEREST COSTS ON PRISON AND JAIL BONDS TO HELP MOVE NECESSARY RENOVATION AND CONSTRUCTION PROJECTS OFF THE DRAWING BOARDS; (2) AUTHORIZE GRANTS FOR DEVELOPING STATE CORRECTIONS MASTER PLANS FOR RENOVATION OR CONSTRUCTION PROJECTS TO RELIEVE UNCONSTITUTIONAL AND SUBSTANDARD PRISON AND JAIL CONDITIONS; AND (3) ESTABLISH A STATE-OF-THE-ART CLEARINGHOUSE FOR CRIMINAL JUSTICE FACILITIES WITH EXPERT TECHNICAL ASSISTANCE FOR FACILITY PLANNING, DESIGN, CONSTRUCTION AND OPERATIONS. THE COMMITTEE BELIEVES THAT FEDERAL ASSISTANCE SHOULD EMPHASIZE AIDING STATE AND LOCAL GOVERNMENTS THAT ARE STRIVING TO BRING THEIR
CORRECTIONAL FACILITIES INTO COMPLIANCE WITH FEDERAL CONSTITUTIONAL AND OTHER LEGAL MANDATES. SINCE SUCH MANDATES CONTEMPLATE EVOLVING STANDARDS OF DECENCY, ASSISTANCE SHOULD ALSO ENCOURAGE EFFORTS TO MEET LOCAL OR NATIONALLY DEVELOPED STANDARDS OR ACCREDITATION REQUIREMENTS THROUGH THE APPLICATION OF ADVANCED PRACTICES. [FN773]

THE VEHICLE SERVING AS THE APPLICATION FOR ASSISTANCE-- THE STATE CORRECTIONS MASTER PLAN-- REPRESENTS ONE OF THE MOST POTENT RESOURCES A STATE CAN MARSHALL TO COMBAT SUBSTANDARD PRISON CONDITIONS AND OVERCROWDING. THE APPLICATION PROCESS ITSELF ENCOURAGES STATES TO BEGIN MANAGING THEIR PRISON PROBLEMS IN A PROACTIVE RATHER THAN REACTIVE MANNER. NO ELABORATE OVERLAY OF STATUTORY OR REGULATORY REQUIREMENTS ARE PROVIDED OR INTENDED TO ENCOURAGE SUCH PLANNING EFFORTS. APPLICATION REQUIREMENTS ARE INTENDED PRIMARILY TO INSURE A MODICUM OF FISCAL ACCOUNTABILITY AND ENCOURAGE COORDINATED SYSTEM-WIDE PLANNING EFFORTS. STATE PLANS CONCISELY SETTING OUT CORRECTIONAL FACILITY NEEDS AND DESCRIBING LEGISLATIVE, EXECUTIVE, AND JUDICIAL SOLUTIONS BEING PURSUED IN A CONSTRUCTION AND NON-CONSTRUCTION CONTEXT WILL SATISFY THE PURPOSES INTENDED FOR SUCH PLANS BY THE COMMITTEE.

THE COMMITTEE BELIEVES THAT NON-CONSTRUCTION INITIATIVES-- SUCH AS DEVELOPING CORRECTIONS STANDARDS, SEEKING ACCREDITATION OF INSTITUTIONS, SENTENCING REFORM, EMERGENCY OVERCROWDING CONTINGENCY PLANS, INNOVATIVE CLASSIFICATION PLANS, COMMUNITY CORRECTIONS, ENHANCED PRISON EDUCATION, INDUSTRY AND WORK RELEASE PROGRAMS, AND OTHER STRATEGIES UTILIZED BY A NUMBER OF STATES TO ENHANCE OR SUPPLANT CONSTRUCTION EFFORTS TO IMPROVE PRISON CONDITIONS AND REDUCE OVERCROWDING-- SHOULD BE ENCOURAGED AS A CONCOMITANT TO PROVIDING RENOVATION OR CONSTRUCTION ASSISTANCE. [FN774]

*282 **3463 TITLE VI ALSO PROVIDES FOR FEDERAL ASSISTANCE TO STATE OR LOCAL GOVERNMENTS CONFRONTING AN 'UNCOMMON SITUATION IN WHICH STATE AND LOCAL RESOURCES ARE INADEQUATE TO RECEIVE AND APPROVE OR DISAPPROVE APPLICATIONS FROM THE CHIEF EXECUTIVE OF ANY STATE FOR DESIGNATION OF A STATE OR LOCALITY EXPERIENCING SUCH A SITUATION AS A 'LAW ENFORCEMENT EMERGENCY JURISDICTION. ' WHEN THE ATTORNEY GENERAL FINDS THAT A JURISDICTION QUALIFIES FOR SUCH DESIGNATION ACCORDING TO CRITERIA HE IS REQUIRED TO ESTABLISH AND PUBLISH, ASSISTANCE MAY BE PROVIDED BY FEDERAL AGENCIES HAVING LAW ENFORCEMENT RESPONSIBILITIES. FEDERAL ASSISTANCE IS DEFINED AS 'EQUIPMENT, TRAINING, INTELLIGENCE INFORMATION, AND TECHNICAL EXPERTISE.' IN ADDITION, THE OFFICE OF JUSTICE ASSISTANCE MAY PROVIDE FUNDS FOR THE LEASE OR RENTAL OF SPECIALIZED EQUIPMENT AND OTHER FORMS OF EMERGENCY ASSISTANCE, EXCEPT THAT THE FUNDS MAY NOT BE USED TO PAY THE SALARIES OF LOCAL CRIMINAL JUSTICE PERSONNEL OR OTHERWISE SUPPLANT STATE OR LOCAL FUNDS.

THE COMMITTEE ANTICIPATES THAT THE EMERGENCY ASSISTANCE PROVISION COULD APPLY TO SUCH SITUATIONS AS THE NOTORIOUS ATLANTA CHILD MURDERS, THE MOUNT ST. HELENS VOLCANIC ERUPTION WHICH DISABLED POLICE VEHICLES AND COMMUNICATIONS, AND PUBLIC SAFETY PLANNING FOR NATIONAL POLITICAL CONVENTIONS AND INTERNATIONAL EVENTS, SUCH AS THE OLYMPIC GAMES.


FINALLY, THIS TITLE EXTENDS THE ORIGINAL PRISON INDUSTRY ENHANCEMENT CERTIFICATION AUTHORITY ENACTED IN THE JUSTICE SYSTEM IMPROVEMENT ACT OF
1979 FROM 7 TO 20 PROJECTS. THE 1979 ACT AUTHORIZED THE LAW ENFORCEMENT
ASSISTANCE ADMINISTRATION TO DESIGNATE SEVEN PROJECTS FOR EXEMPTION FROM
FEDERAL LAWS PROHIBITING THE SALE OF PRISONER-MADE GOODS TO THE FEDERAL
GOVERNMENT AND THE PLACEMENT OF THOSE GOODS IN INTERSTATE COMMERCE. 18
U.S.C. 1761(A). THE SEVEN AUTHORIZED CERTIFICATIONS HAVE BEEN ISSUED AND
EARLY EVALUATIONS INDICATE THAT THE DESIGNATED PROJECTS HAVE BEEN
SUCCESSFUL IN TEACHING INMATES MARKETABLE JOB SKILLS, REDUCING THE NEED
FOR THEIR FAMILIES TO RECEIVE PUBLIC ASSISTANCE, DECREASING THE NET COST OF
OPERATING CORRECTIONAL FACILITIES, AND BREAKING THE RECIDIVIST CYCLE. THE
COMMITTEE BELIEVES A MODEST EXPANSION OF THE PROGRAM TO 20 PROJECTS WILL
PERMIT WILLING AND ABLE CORRECTIONS FACILITIES TO PARTICIPATE IN THE
PROGRAM AND WILL ALLOW THE DEPARTMENT TO BETTER EVALUATE WHICH PRISON
INDUSTRY PROJECTS BEST ACCOMPLISH THE GOALS OF THE PROGRAM.

SECTION-BY-SECTION ANALYSIS

SECTION 601 OF THE BILL, IN EFFECT, REPEALS TITLE I, OF THE OMNIBUS CRIME
CONTROL AND SAFE STREETS ACT OF 1968, AS AMENDED TO DATE, *283 **3464 AND
SUBSTITUTES A COMPLETELY NEW TITLE. THE NEW TITLE IS DISCUSSED BELOW

PART A-- OFFICE OF JUSTICE ASSISTANCE

SECTION 101 ESTABLISHES AN OFFICE OF JUSTICE ASSISTANCE IN THE DEPARTMENT
OF JUSTICE, HEADED BY AN ASSISTANT ATTORNEY GENERAL APPOINTED BY THE
PRESIDENT WITH THE ADVICE AND CONSENT OF THE SENATE AND UNDER THE
GENERAL AUTHORITY OF THE ATTORNEY GENERAL.

SECTION 102 DESCRIBES THE ROLE OF THE ASSISTANT ATTORNEY GENERAL, WHO HAS
AUTHORITY OVER THE ACTIVITIES CARRIED OUT UNDER THIS ACT AND IS
RESPONSIBLE FOR COORDINATION AND PROVISION OF STAFF SUPPORT AND SERVICES
TO THE UNITS ESTABLISHED UNDER THIS TITLE. THE RESPONSIBILITIES OF THE
ASSISTANT ATTORNEY GENERAL INCLUDE DISSEMINATION OF INFORMATION,
COORDINATION WITH STATE AND LOCAL GOVERNMENTS, AND COOPERATION WITH
STATE AND LOCAL CRIMINAL JUSTICE AGENCIES AND OFFICIALS. THE ASSISTANT
ATTORNEY GENERAL IS EXPECTED TO SERVE AS THE FOCAL POINT FOR
COMMUNICATIONS WITH THE DEPARTMENT OF JUSTICE FROM STATE AND LOCAL
CRIMINAL JUSTICE AGENCIES AND TO FUNCTION WITHIN THE DEPARTMENT AS AN
ADVOCATE FOR THE INTERESTS AND NEEDS OF STATE AND LOCAL CRIMINAL JUSTICE.

SECTION 103 ESTABLISHES A JUSTICE ASSISTANCE ADVISORY BOARD OF NOT MORE
THAN 21 MEMBERS APPOINTED BY THE PRESIDENT AND SETS QUALIFICATIONS FOR
MEMBERS. THE BOARD IS AUTHORIZED TO MAKE RECOMMENDATIONS TO THE
ASSISTANT ATTORNEY GENERAL CONCERNING PROGRAM PRIORITIES OF THE
OPERATING UNITS AND TO PROVIDE SUCH ADVICE AS IS APPROPRIATE. THE BOARD
REPLACES THE SEPARATE ADVISORY BOARDS TO THE NATIONAL INSTITUTE OF JUSTICE
AND BUREAU OF JUSTICE STATISTICS, WITH THE OBJECTIVE OF ESTABLISHING A
SINGLE ADVISORY BODY CAPABLE OF MAKING RECOMMENDATIONS PERTAINING TO
THE FULL RANGE OF STATE AND LOCAL CRIMINAL JUSTICE CONCERNS RATHER THAN
THE LIMITED VIEWPOINTS OF ONLY RESEARCH OR ONLY STATISTICAL ISSUES.

PART B-- BUREAU OF JUSTICE PROGRAMS

SECTION 201 ESTABLISHES A BUREAU OF JUSTICE PROGRAMS WITHIN THE OFFICE OF
JUSTICE ASSISTANCE. THE BUREAU IS TO BE HEADED BY A DIRECTOR APPOINTED BY
THE ATTORNEY GENERAL.

SECTION 202 DESCRIBES THE DUTIES AND FUNCTIONS OF THE BUREAU OF JUSTICE
PROGRAMS (BJP) AND ITS DIRECTOR. IT AUTHORIZES THE PROVISION OF FINANCIAL
AND TECHNICAL ASSISTANCE AND TRAINING TO STATE AND LOCAL CRIMINAL JUSTICE
AGENCIES AND PRIVATE NONPROFIT ORGANIZATIONS THROUGH BLOCK AND DISCRETIONARY GRANTS. IT PROVIDES AUTHORITY TO MAKE GRANTS AND ENTER INTO CONTRACTS AND INTERAGENCY AGREEMENTS AND REQUIRES THE DIRECTOR TO ESTABLISH PRIORITIES IN ACCORDANCE WITH SPECIFIED CRITERIA. THE DIRECTOR IS CALLED UPON TO FOSTER LOCAL PARTICIPATION IN TECHNICAL ASSISTANCE AND TRAINING PROGRAMS, AND TO ENCOURAGE THE TARGETING OF STATE AND LOCAL RESOURCES ON ACTIVITIES DIRECTED TOWARD VIOLENT CRIME AND THE APPREHENSION AND PROSECUTION OF REPEAT OFFENDERS.

PART C-- NATIONAL INSTITUTE OF JUSTICE

SECTION 301 DESCRIBES THE PURPOSE OF THE NATIONAL INSTITUTE OF JUSTICE, WHICH IS TO PROVIDE FOR AND ENCOURAGE RESEARCH AND DEMONSTRATION EFFORTS DESIGNED TO IMPROVE FEDERAL, STATE AND LOCAL CRIMINAL JUSTICE SYSTEMS AND RELATED ASPECTS OF THE CIVIL JUSTICE SYSTEM, PREVENT AND REDUCE CRIME, INSURE CITIZEN ACCESS TO DISPUTE-RESOLUTION FORUMS, IMPROVE EFFORTS TO DETECT, INVESTIGATE AND PROSECUTE WHITE-COLLAR CRIME AND PUBLIC CORRUPTION, AND IDENTIFY PROGRAMS OF DEMONSTRATED SUCCESS. SECTION 302 ESTABLISHES THE NATIONAL INSTITUTE OF JUSTICE WITHIN THE OFFICE OF JUSTICE ASSISTANCE TO BE HEADED BY A DIRECTOR APPOINTED BY THE ATTORNEY GENERAL. THE INSTITUTE IS AUTHORIZED TO MAKE GRANTS AND ENTER INTO CONTRACTS FOR A VARIETY OF RESEARCH AND DEVELOPMENT PURPOSES RELATING TO CRIME AND CRIMINAL JUSTICE. SECTION 303 AUTHORIZES THE INSTITUTE TO MAKE GRANTS AND ENTER INTO CONTRACTS FOR UP TO 100 PERCENT OF PROJECT COSTS.

PART D-- BUREAU OF JUSTICE STATISTICS

SECTION 401 INDICATES THAT THE PURPOSE OF THIS PART IS TO PROVIDE FOR THE COLLECTION AND ANALYSIS OF STATISTICAL INFORMATION ON CRIME, JUVENILE DELINQUENCY AND THE OPERATION OF THE CRIMINAL JUSTICE SYSTEM AND RELATED ASPECTS OF CIVIL JUSTICE SYSTEM AND TO ENCOURAGE THE DEVELOPMENT OF INFORMATION AND STATISTICAL SYSTEMS PROGRAMS AT THE FEDERAL, STATE AND LOCAL LEVELS. SECTION 402 ESTABLISHES THE BUREAU OF JUSTICE STATISTICS WITHIN THE OFFICE OF JUSTICE ASSISTANCE TO BE HEADED BY A DIRECTOR APPOINTED BY THE ATTORNEY GENERAL. IT AUTHORIZES THE BUREAU TO MAKE GRANTS AND ENTER INTO CONTRACTS FOR A VARIETY OF STATISTICAL COLLECTION AND ANALYSIS PURPOSES INVOLVING CRIME, JUVENILE DELINQUENCY AND CRIMINAL JUSTICE SYSTEMS AT FEDERAL, STATE AND LOCAL LEVELS, AND TO ASSIST THE DEVELOPMENT OF INFORMATION AND STATISTICAL SYSTEMS PROGRAMS AND CAPABILITIES AT STATE AND LOCAL LEVELS. SECTION 403 AUTHORIZES THE BUREAU TO MAKE GRANTS AND ENTER INTO CONTRACTS FOR UP TO 100 PERCENT OF PROJECT COSTS. SECTION 404 DIRECTS THAT DATA COLLECTED BY THE BUREAU SHALL BE USED ONLY FOR STATISTICAL OR RESEARCH PURPOSES AND SHALL BE GATHERED IN A MANNER THAT PRECLUDES USE FOR LAW ENFORCEMENT OR OTHER PURPOSES RELATING TO A PARTICULAR INDIVIDUAL.

PART E-- STATE AND LOCAL ALLOCATIONS

SECTION 501 INDICATES THAT THE PURPOSE OF THIS PART IS TO ASSIST STATES AND LOCAL GOVERNMENTS TO ESTABLISH PROGRAMS OF PROVEN SUCCESS OR THAT HAVE HIGH PROBABILITY OF IMPROVING CRIMINAL JUSTICE SYSTEMS AND WHICH FOCUS PRIMARILY ON VIOLENT CRIME AND SERIOUS OFFENDERS. IT AUTHORIZES THE
BUREAU OF JUSTICE PROGRAMS TO ESTABLISH CRITERIA AND MAKE GRANTS TO STATES FOR TWELVE ENUMERATED PROGRAM ACTIVITIES PLUS AN ADDITIONAL CATEGORY AUTHORIZING PROGRAMS WHICH HAVE BEEN CERTIFIED BY THE DIRECTOR AS LIKELY TO PROVE SUCCESSFUL AND ADDRESS ADDITIONAL CRITICAL PROBLEMS OF CRIME.

SECTION 502 LIMITS THE DURATION OF FEDERAL FINANCIAL ASSISTANCE UNDER THIS PART TO NOT MORE THAN THREE YEARS AND LIMITS THE FEDERAL SHARE OF ANY GRANT TO A STATE UNDER THIS PART TO 50 PERCENT OF THE COST OF PROGRAMS OR PROJECTS SPECIFIED IN THE APPLICATION. IT DIRECTS THAT THE NON-FEDERAL SHARE MUST BE IN CASH. IT ALSO PROVIDES THAT THE FEDERAL SHARE MAY BE INCREASED IN THE CASE OF GRANTS TO INDIAN TRIBES OR OTHER ABORIGINAL GROUPS UNDER CERTAIN CIRCUMSTANCES.

SECTION 503 ARTICULATES APPLICATION REQUIREMENTS, INCLUDING THE STIPULATION THAT THE APPLICATION MUST SET FORTH PROGRAMS FOR A TWO-YEAR PERIOD WHICH MEET OBJECTIVES OF SECTION 501 AND MUST DESIGNATE WHICH SECTION 501 OBJECTIVE WILL BE ACHIEVED BY EACH PROGRAM. IT ALSO PROVIDES THAT CERTAIN SPECIFIC ASSURANCES MUST BE INCLUDED IN THE APPLICATION, INCLUDING A PLEDGE TO SUBMIT AN ANNUAL PERFORMANCE REPORT, ASSESSMENT OF THE IMPACT OF FUNDED ACTIVITIES AND CERTIFICATION THAT FEDERAL FUNDS WILL NOT BE USED TO SUPPLANT STATE OR LOCAL FUNDS. IT REQUIRES OTHER ASSURANSES CONCERNING FUND ACCOUNTING, MAINTENANCE OF DATA AND EQUIPMENT USE.

SECTION 504 DIRECTS THAT THE BUREAU SHALL PROVIDE FINANCIAL ASSISTANCE TO EACH STATE APPLICANT IF ITS APPLICATION IS CONSISTENT WITH THE REQUIREMENTS OF THIS TITLE AND WITH PRIORITIES AND CRITERIA OF SECTION 501. IT ALSO DIRECTS THAT AN APPLICATION WILL BE DEEMED APPROVED UNLESS THE BUREAU INFORMS THE APPLICANT OF REASONS FOR DISAPPROVAL WITHIN 60 DAYS OF ITS RECEIPT. IT GIVES THE BUREAU AUTHORITY TO SUSPEND FUNDING FOR THAT PART OF A PROGRAM THAT HAS FAILED TO MEET THIS TITLE’S OBJECTIVES. IT PROHIBITS THE USE OF GRANT FUNDS UNDER PARTS E AND F FOR CERTAIN ENUMERATED PURPOSES, INCLUDING GENERAL SALARY PAYMENTS AND CONSTRUCTION PROJECTS. IT GIVES AN APPLICANT UNDER THIS PART THE RIGHT OF NOTICE AND AN OPPORTUNITY FOR RECONSIDERATION UNDER SECTION 802 BEFORE FINAL DISAPPROVAL OF THE APPLICATION.

SECTION 505 PROVIDES THAT OF THE TOTAL SUM APPROPRIATED FOR PARTS E (BLOCK GRANTS) AND F (DISCRETIONARY GRANTS), 80 PERCENT WILL BE FOR PART E AND 20 PERCENT FOR PART F. IT SETS ALLOCATION AND DISTRIBUTION REQUIREMENTS, INCLUDING THE PROVISION OF A $250,000 BASE AMOUNT TO EACH STATE AND THE PASS-THROUGH OF FUNDS TO LOCAL UNITS OF GOVERNMENT AT LEAST PROPORTIONATE TO THE RELATIVE LOCAL EXPENDITURES FOR CRIMINAL JUSTICE. INASMUCH AS MOST AUTHORIZED ACTIVITIES UNDER SECTION 501 ARE CARRIED OUT BY LOCAL JURISDICTIONS, THE STATES ARE ENCOURAGED TO PASS THROUGH TO LOCAL GOVERNMENTS THE MAXIMUM AMOUNT OF AVAILABLE FUNDS.

SECTION 506 SPECIFIES THAT THE CHIEF EXECUTIVE OF EACH PARTICIPATING STATE WILL DESIGNATE AN OFFICE TO ADMINISTER ITS BLOCK GRANT FUNDS. STATES ARE NOT REQUIRED TO ESTABLISH AN ADMINISTRATIVE ENTITY BY STATUTE, AS REQUIRED UNDER CURRENT LAW, INASMUCH AS FEDERAL PROGRAM FUNDS MAY NOT BE USED TO PAY THE STATE OR LOCAL ADMINISTRATIVE COSTS. THUS, STATES ARE AFFORDED MAXIMUM DISCRETION IN PROVIDING APPROPRIATE STEWARDSHIP OF BLOCK GRANT FUNDS.

PART F-- DISCRETIONARY GRANTS

SECTION 601 AUTHORIZES A DISCRETIONARY PROGRAM TO PROVIDE FINANCIAL ASSISTANCE, IN AMOUNTS UP TO 100 PERCENT OF PROGRAM OR PROJECT COSTS, TO STATES, UNITS OF LOCAL GOVERNMENT, AND PRIVATE NONPROFIT ORGANIZATIONS
FOR SPECIFIC ACTIVITIES, INCLUDING DEMONSTRATION PROGRAMS, EDUCATION, TRAINING AND TECHNICAL ASSISTANCE, NATIONAL OR MULTI-STATE EFFORTS WHICH ADDRESS THE 12 ACTIVITIES ENUMERATED IN SECTION 501, AND THE DEVELOPMENT OF STANDARDS AND VOLUNTARY ACCREDITATION PROCESSES.

SECTION 602 REQUIRES THE BUREAU TO ESTABLISH ANNUAL FUNDING PRIORITIES AND SELECTION CRITERIA FOR DISCRETIONARY GRANTS AND PROVIDES FOR PRIOR NOTICE AND OPPORTUNITY FOR PUBLIC COMMENT.

SECTION 603 SPECIFIES CERTAIN PROGRAMMATIC AND CERTIFICATION REQUIREMENTS FOR APPLICATIONS FOR DISCRETIONARY FUNDING, INCLUDING THE PROVISION FOR EVALUATION IN ORDER TO DETERMINE THE IMPACT OF THE PROGRAM OR PROJECT AND ITS EFFECTIVENESS IN ACHIEVING THE STATED GOALS. IT REQUIRES THAT NONPROFIT ORGANIZATIONS INCLUDE EVIDENCE OF CONSULTATION WITH APPROPRIATE STATE AND LOCAL OFFICIALS.

SECTION 604 LIMITS FINANCIAL ASSISTANCE TO PROGRAMS OR PROJECTS FUNDED UNDER THIS PART TO NOT MORE THAN THREE YEARS, WITH CERTAIN EXCEPTIONS.

PART G-- CRIMINAL JUSTICE FACILITIES

SECTION 701 ESTABLISHES THE BUREAU OF CRIMINAL JUSTICE FACILITIES (BCJF) WITHIN THE OFFICE OF JUSTICE ASSISTANCE. THIS BUREAU IS HEADED BY A DIRECTOR APPOINTED BY THE ATTORNEY GENERAL. THE SECTION ALSO PROHIBITS THE DIRECTOR FROM ENGAGING IN OTHER EMPLOYMENT OR HOLDING ANY POSITION WITH ORGANIZATIONS WITH WHICH THE BUREAU OF CRIMINAL JUSTICE FACILITIES HAS ANY DEALINGS IN ORDER TO PREVENT CONFLICTS OF INTEREST.

SECTION 702 DIRECTS THE BUREAU OF CRIMINAL JUSTICE FACILITIES TO MAKE GRANTS TO STATES TO AID IN THE CONSTRUCTION AND MODERNIZATION OF CORRECTIONAL FACILITIES WHICH ARE DEFINED IN SECTION 709. THE BUREAU OF CRIMINAL JUSTICE FACILITIES, IN CONJUNCTION WITH THE DUTIES OUTLINED IN SECTION 707, SHALL ALSO PROVIDE FOR THE WIDEST PRACTICAL AND APPROPRIATE PUBLIC DISSEMINATION OF INFORMATION OBTAINED FROM THE PROGRAMS AND PROJECTS ASSISTED BY THE BUREAU OF CRIMINAL JUSTICE FACILITIES. SUCH INFORMATION SHOULD EMPHASIZE EVALUATIVE DATA ON THE RELATIVE SUCCESSES OF VARIOUS PROVEN AND PROMISING CONSTRUCTION AND NON-CONSTRUCTION INITIATIVES AIMED AT REDUCING CORRECTIONAL FACILITY OVERCROWDING AND IMPROVING SUBSTANDARD CONDITIONS OF CONFINEMENT.


OF THE FUNDS REMAINING FOR THE STATES, ONE-HALF IS ALLOCATED BASED ON POPULATION AND THE REMAINING HALF IS TO BE ALLOCATED CONSIDERING RELATIVE CORRECTIONAL FACILITY NEEDS AND EFFORTS AS ESTABLISHED IN APPROVED STATE PLAN APPLICATIONS.

IN DETERMINING RELATIVE NEEDS OF EACH STATE, THE DIRECTOR IS REQUIRED TO CONSIDER WHETHER OVERCROWDING OR FACILITY CONDITIONS VIOLATE CONSTITUTIONAL OR STATUTORY STANDARDS AND THE AMOUNT AND TYPE OF ASSISTANCE REQUIRED TO BRING A FACILITY INTO COMPLIANCE WITH THE LAW. THE SIZE, DENSITY, AND NATURE OF AN INMATE POPULATION ARE ALSO FACTORS THAT ARE TO BE CONSIDERED BY THE DIRECTOR IN DETERMINING THE RELATIVE NEEDS OF A GIVEN STATE. AS AN EXAMPLE, OLDER INMATE POPULATIONS AND THOSE
SERVING LONG SENTENCES PLACE HEAVY DEMANDS ON CERTAIN INSTITUTION RESOURCES, SUCH AS MEDICAL SERVICES. THE COURTS HAVE PLACED A STRONG EMPHASIS ON STAFFING, INMATE HEALTH, SAFETY, ACTIVITY, AND ACCESS TO EXERCISE AND OTHER PROGRAM AREAS IN RELATION TO NUMBER OF HOURS PER DAY INMATES ARE CONFINED IN LOCKED CELLS, TO DETERMINE WHETHER A FACILITY IS CONSIDERED LEGALLY OVERCROWDED. DOUBLE CELLING SITUATIONS-- WHICH HAVE BEEN RULED CONSTITUTIONAL BY THE COURTS FOR PRISONERS CONFINED IN NEW, WELL-STAFFED FACILITIES WHERE PRISONERS SPEND MOST OF THEIR TIME OUT OF THEIR CELLS IN PROGRAM OR DAY ROOM AREAS-- MAY NOT BE TOLERABLE IN AN OLDER INSTITUTION LACKING ADEQUATE STAFFING OR PROGRAMS FOR INMATES. IN ALLOCATING ASSISTANCE, THE COMMITTEE EMPHASIZES THAT THE DIRECTOR GIVE PRIORITY TO THE NEEDS OF STATES WHICH HAVE DEMONSTRATED THAT THEY HAVE IMPLEMENTED, OR ARE IN THE PROCESS OF IMPLEMENTING, SIGNIFICANT LEGISLATIVE, EXECUTIVE OR JUDICIAL NON-CONSTRUCTION, AS WELL AS CONSTRUCTION, INITIATIVES TO REDUCE OVERCROWDING OR IMPROVE CONDITIONS OF CONFINEMENT.

SECTION 705 GOVERNS THE STATE APPLICATIONS PLAN. THE BUREAU OF CRIMINAL JUSTICE FACILITIES WILL PROMULGATE ADMINISTRATIVE RULES TO IMPLEMENT THE PURPOSES OF THIS PART. STATES SEEKING ASSISTANCE SHALL SUBMIT A FIVE YEAR STATE NEEDS ASSESSMENT AND ACTION PLAN AS AN APPLICATION, SUPPLEMENTED AS NECESSARY WITH ANNUAL REVISIONS. STATE PLANS ARE TO (1) PROVIDE THAT THE PROGRAM BE ADMINISTERED BY A STATE AGENCY WHICH GENERALLY REPRESENTS STATE AND LOCAL CORRECTIONAL INTERESTS; (2) CONTAIN A COMPREHENSIVE STATEWIDE PROGRAM PLAN WHICH SETS OUT NEEDS, PRIORITIES, AND CONSTRUCTION AND NON-CONSTRUCTION ACTION PLANS TO RELIEVE OVERCROWDING AND IMPROVE CONFINEMENT CONDITIONS IN CORRECTIONS FACILITIES; (3) ASSURE THAT GRANT FUNDS AND PROPERTY DERIVED FROM SUCH FUNDS WILL BE ADMINISTERED, HELD AND CONTROLLED BY A PUBLIC AGENCY TO BE USED FOR THE PURPOSES PROVIDED BY THIS PART; (4) PROVIDE ASSURANCES THAT STATE OR LOCAL GOVERNMENT WILL, AFTER A REASONABLE PERIOD OF FEDERAL ASSISTANCE, PAY, WITH NON-FEDERAL FUNDS, ANY REMAINING OR CONTINUING Construction, NON-CONSTRUCTION, OR PROGRAM COSTS OF ASSISTED PROJECTS; (5) PROVIDE ASSURANCES THAT, TO THE EXTENT PRACTICAL, CORRECTIONAL FACILITIES WILL BE USED FOR OTHER CRIMINAL JUSTICE PURPOSES IF THEY ARE NO LONGER USED FOR THE SPECIFIC PURPOSE FOR WHICH THEY WERE BUILT; (6) ASSURE THAT THE STATE WILL TAKE INTO ACCOUNT THE NEEDS AND REQUESTS OF LOCAL GOVERNMENT AND ENCOURAGE THE DEVELOPMENT OF LOCAL PROJECTS; (7) PROVIDE FOR AN APPROPRIATELY BALANCED ALLOCATION OF FUNDS BETWEEN STATE AND LOCAL GOVERNMENTS BASED ON REQUESTS AND RELATIVE NEED; (8) PROVIDE FOR APPROPRIATE EXECUTIVE AND JUDICIAL REVIEW OF ACTIONS TAKEN BY THE STATE AGENCY CONCERNING APPLICATIONS OR THE AWARDING OF FUNDS TO LOCAL GOVERNMENT; (9) ASSURE THAT THE ASSISTANCE ALLOCATED UNDER THIS PART WILL NOT SUPPLANT BUT AUGMENT STATE OR LOCAL FUNDS; AND (10) ASSURE THAT THE STATE IS MAKING DILIGENT EFFORTS CONSISTENT WITH PUBLIC SAFETY, TO REDUCE OVERCROWDING AND IMPROVE PROGRAMS AND CONDITIONS OF CONFINEMENT IN CORRECTIONS FACILITIES.

SECTION 706 REQUIRES BASIC CRITERIA TO BE ESTABLISHED BY THE BUREAU OF CRIMINAL JUSTICE FACILITIES TO GENERALLY ESTABLISH PROJECT PRIORITIES. THE STATES SHOULD BE ACCORDED WIDE DISCRETION IN DETERMINING THE PRIORITY OF VARIOUS PROJECTS AND GENERALLY SHOULD CONSIDER (1) THE RELATIVE NEEDS OF AN AREA WITHIN THE STATE FOR FACILITY ASSISTANCE NECESSARY TO BRING EXISTING FACILITIES INTO COMPLIANCE WITH FEDERAL OR STATE LAW; (2) THE RELATIVE ABILITY OF A LOCAL AGENCY TO SUPPORT A CORRECTIONAL FACILITY CONSTRUCTION OR MODERNIZATION PROGRAM; AND (3) THE EXTENT TO WHICH A PROJECT CONTRIBUTES TO AN EQUITABLE DISTRIBUTION OF ASSISTANCE WITHIN THE STATE.
SECTION 707 PROVIDES FOR A CLEARINGHOUSE ON THE CONSTRUCTION AND MODERNIZATION OF CRIMINAL JUSTICE FACILITIES. THE DIRECTOR OF THE BUREAU OF CRIMINAL JUSTICE FACILITIES IS AUTHORIZED TO ENTER INTO CONTRACTS WITH PUBLIC AGENCIES OR PRIVATE ORGANIZATIONS TO OPERATE A CLEARINGHOUSE ON THE CONSTRUCTION AND MODERNIZATION OF CORRECTIONAL FACILITIES. THE CLEARINGHOUSE WILL DEVELOP, COLLECT, AND DISSEMINATE STATE-OF-THE-ART INFORMATION ON CONSTRUCTION AND MODERNIZATION OF CORRECTIONAL FACILITIES. SINCE THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION FUNDING OF THE NATIONAL CLEARINGHOUSE FOR CRIMINAL JUSTICE PLANNING AND ARCHITECTURE ENDED IN 1979, THERE HAS BEEN NO COMPARABLE FEDERAL RESEARCH IN CRIMINAL JUSTICE PROGRAM PLANNING AND CORRECTIONAL FACILITY RESPONSES.

SECTION 708 AUTHORIZES THE SECRETARY OF THE TREASURY TO PAY TO STATE OR LOCAL GOVERNMENTS AMOUNTS NECESSARY TO REDUCE THE COST OF BOND INTEREST PAYMENTS TO FIVE PERCENT FOR QUALIFYING ISSUE OBLIGATIONS TO FINANCE THE RENOVATION OR CONSTRUCTION OF CORRECTIONS FACILITIES. PAYMENTS ARE MADE ONLY ON THE APPLICATION OF THE ISSUER CONSISTENT WITH THE CRITERIA ESTABLISHED FOR ALLOCATING OF THE ISSUER CONSISTENT WITH THE CRITERIA ESTABLISHED FOR ALLOCATING FUNDS UNDER SECTIONS 705 AND 706. IF THE ISSUE INCLUDES THE FINANCING OF A FACILITY WHICH INCLUDES NON-CORRECTIONS COMPONENTS, SUCH AS A PUBLIC SAFETY CENTER, SUCH PROJECT QUALIFIES FOR ASSISTANCE WHEN SUBSTANTIALLY ALL OF THE PROCEEDS ARE TO BE USED TO FINANCE THE CORRECTIONS COMPONENT OF THE PROJECT. PAYMENTS FOR QUALIFYING ISSUES MAY BE MADE BY THE SECRETARY, IN CONSULTATION WITH THE DIRECTOR, IN ADVANCE, BY INSTALLMENT AND ON THE BASIS OF ESTIMATES.

A STATE MAY RECEIVE A COMBINATION OF GRANTS AND BOND INTEREST SUBSIDIES EQUAL TO, BUT NOT IN EXCESS OF, EACH STATE'S FORMULA ALLOCATION. THE SUBSIDIZATION OF BOND INTEREST PAYMENTS SHALL NOT AFFECT THE STATUS OF ANY OBLIGATION UNDER SECTION 103 OF THE INTERNAL REVENUE CODE OF 1954 GOVERNING EXCLUDABILITY OF GOVERNMENTAL BOND INTEREST INCOME NOR SHALL IT CAUSE THE INTEREST ON SUCH AN ISSUE TO BE EXCLUDABLE ONLY IN PART UNDER SECTION 103.

MANY JURISDICTIONS FACED WITH THE CRITICAL NEED TO RENOVATE OR REPLACE ANTIQUATED PRISON OR JAIL FACILITIES HAVE HAD CLOSE VOTES AT THE POLLS TO APPROVE CORRECTIONAL FACILITY BOND ISSUES. RELATIVELY MODEST INTEREST SUBSIDIES WILL SERVE TO SUPPORT A SIGNIFICANT NUMBER OF PRISON OR JAIL RENOVATION OR CONSTRUCTION PROJECTS AND ENHANCE THE LIKELIHOOD THAT NEEDED PROJECTS WILL BE APPROVED.

SECTION 709 BROADLY DEFINES THE TERM CORRECTIONAL FACILITY TO INCLUDE ANY PRISON, JAIL, REFORMATORY, WORK FARM, DETENTION CENTER, PRETRIAL DETENTION FACILITY, COMMUNITY BASED CORRECTIONAL FACILITY, HALF WAY HOUSE, OR ANY OTHER INSTITUTION DESIGNED FOR THE CONFINEMENT OR REHABILITATION OF PERSONS CHARGED WITH OR CONVICTED OF ANY CRIMINAL OFFENSE, INCLUDING JUVENILE OFFENDERS. CONSTRUCTION, AS USED IN THIS PART, NOT ONLY INCLUDES CONSTRUCTION IN ITS USUAL SENSE, BUT FACILITY REMODELING, EXTENSION, OR ACQUISITION, AND THE PREPARATION OF DRAWINGS AND SPECIFICATIONS FOR FACILITIES FOR WHICH BOND INTEREST SUBSIDIES OR GRANT ASSISTANCE WOULD BE AVAILABLE. THE INSPECTION AND SUPERVISION OF CONSTRUCTION ARE ALSO INCLUDED IN THE DEFINITION OF CONSTRUCTION. THE TERM DOES NOT INCLUDE INTERESTS IN LAND OR OFF-SITE IMPROVEMENTS.

PART H-- ADMINISTRATIVE PROVISIONS

SECTION 801 AUTHORIZES THE ATTORNEY GENERAL TO ESTABLISH RULES, REGULATIONS, AND PROCEDURES FOR THE ACTIVITIES AUTHORIZED UNDER THIS TITLE.
SECTION 802 GIVES THE OFFICE AUTHORITY FOR GRANT TERMINATION AND FUND SUSPENSION FOR NONCOMPLIANCE WITH LAW, REGULATIONS OR GRANT TERMS. IT ESTABLISHES THE AUTHORITY AND PROCEDURES IN THE OFFICE FOR RECONSIDERATION OF TERMINATION OF A GRANT UNDER THIS TITLE. SECTION 803 SPECIFIES THE OFFICE'S FINAL AUTHORITY IN DETERMINATIONS, FINDINGS AND CONCLUSIONS UNDER THE TITLE. SECTION 804 GRANTS THE OFFICE SUBPOENA POWER AND AUTHORITY TO HOLD AND CONDUCT HEARINGS TO DISCHARGE ITS DUTIES UNDER THE TITLE. SECTION 805 GIVES THE OFFICE THE PERSONNEL AND ADMINISTRATIVE AUTHORITY TO FULFILL ITS FUNCTIONS AND DUTIES UNDER THE TITLE. SECTION 806 SPECIFIES THAT TITLE TO PERSONAL PROPERTY PURCHASED UNDER THIS TITLE SHALL VEST IN THE AGENCY OR ORGANIZATION PURCHASING THE PROPERTY IF IT CERTIFIES IT WILL BE USED FOR CRIMINAL JUSTICE PURPOSES. IF THERE IS NO CERTIFICATION, TITLE VESTS IN THE STATE OFFICE WITH PROPERTY TO BE USED FOR CRIMINAL JUSTICE PURPOSES. SECTION 807 DISCLAIMS ANY INTERPRETATION OF THIS TITLE TO AUTHORIZE AGENCY OR EMPLOYEE DIRECTION OR CONTROL OVER ANY POLICE FORCE OR OTHER STATE OR LOCAL CRIMINAL JUSTICE AGENCY. SECTION 808 PROHIBITS DISCRIMINATION ON THE BASIS OF RACE, COLOR, RELIGION, NATIONAL ORIGIN, OR GENDER IN CONNECTION WITH ANY PROGRAM FUNDED UNDER THIS TITLE. IT PROVIDES A BASIS FOR CIVIL ACTION BY THE ATTORNEY GENERAL AND SUSPENSION OF FUNDS BY THE OFFICE. SECTION 809 ESTABLISHES RECORDKEEPING REQUIREMENTS FOR THE RECIPIENTS OF FUNDS AND GIVES AUTHORITY TO THE OFFICE AND THE COMPTROLLER GENERAL TO CONDUCT AUDITS. SECTION 810 CONTINUES PROVISIONS FOR THE CONFIDENTIALITY OF DATA AND INFORMATION COLLECTED, STORED, MAINTAINED, OR DISSEMINATED WITH SUPPORT UNDER THIS TITLE, INCLUDING AUTHORITY OF OFFICE TO ESTABLISH STANDARDS TO PROTECT CONFIDENTIALITY AND INDIVIDUALS' PRIVACY AND CONSTITUTIONAL RIGHTS.

PART I-- DEFINITIONS

SECTION 901 PROVIDES DEFINITIONS OF TERMS, INCLUDING 'CRIMINAL JUSTICE,' 'UNIT OF LOCAL GOVERNMENT,' AND 'CRIMINAL HISTORY INFORMATION.'

PART J-- FUNDING


PART K-- PUBLIC SAFETY OFFICERS' DEATH BENEFITS

SECTION 1101 PROVIDES FOR PAYMENT OF $50,000 TO PRESCRIBED SURVIVOR OF PUBLIC SAFETY OFFICER WHO DIES FROM PERSONAL INJURY SUSTAINED IN THE LINE OF DUTY. IT ESTABLISHES CERTAIN ADMINISTRATIVE PROCEDURES. SECTION 1102 ESTABLISHES THE SAME LIMITATIONS ON THE PAYMENT OF BENEFITS
UNDER THIS TITLE AS UNDER CURRENT LAW, AND CLARIFIES EXCEPTIONS IN PRIOR LEGISLATIVE HISTORY THAT VOLUNTARY INTOXICATION OR GROSS NEGLIGENCE BY OFFICER AT TIME OF DEATH WILL BAR BENEFITS.

SECTION 1103 DEFINES TERMS PERTAINING TO ELIGIBLE RECIPIENTS OF THE BENEFIT PAYMENT AND ESTABLISHES THE DEFINITION OF THE TERM 'INTOXICATION' FOR THE PURPOSES OF THIS PART.

SECTION 1104 AUTHORIZES THE OFFICE TO ESTABLISH SUCH RULES AND REGULATIONS AS ARE NECESSARY TO CARRY OUT THE PURPOSES OF THIS PART.

SECTION 1105 PROVIDES THAT THE UNITED STATES CLAIMS COURT SHALL HAVE EXCLUSIVE JURISDICTION OVER THESE CLAIMS.

PART L-- FBI TRAINING OF STATE AND LOCAL CRIMINAL JUSTICE PERSONNEL

SECTION 1201 AUTHORIZES THE FBI DIRECTOR TO ESTABLISH AND CONDUCT TRAINING FOR STATE AND LOCAL CRIMINAL JUSTICE PERSONNEL AT THE FBI ACADEMY AT QUANTICO AND TO ASSIST IN CONDUCTING LOCAL AND REGIONAL TRAINING PROGRAMS AT THE REQUEST OF A STATE OR UNIT OF LOCAL GOVERNMENT.

PART M-- EMERGENCY FEDERAL LAW ENFORCEMENT ASSISTANCE

SECTION 1301 AUTHORIZES THE ATTORNEY GENERAL TO RECEIVE FROM THE CHIEF EXECUTIVE OF ANY STATE AN APPLICATION FOR DESIGNATION AS A 'LEGAL ENFORCEMENT EMERGENCY JURISDICTION.' THE APPLICATION WILL BE EVALUATED ACCORDING TO CRITERIA ESTABLISHED BY THE ATTORNEY GENERAL AND PUBLISHED IN THE FEDERAL REGISTER.

SECTION 1302 PROVIDES THAT, IF AN APPLICATION FOR EMERGENCY DESIGNATION IS APPROVED, FEDERAL AGENCIES ARE AUTHORIZED TO PROVIDE ASSISTANCE FOR THE DURATION OF THE EMERGENCY. COSTS OF SUCH ASSISTANCE MAY BE PAID BY THE OFFICE OF JUSTICE ASSISTANCE FROM FUNDS SPECIFICALLY APPROPRIATED FOR EMERGENCY PURPOSES. THE OFFICE OF JUSTICE ASSISTANCE MAY ALSO PROVIDE TECHNICAL ASSISTANCE, FUNDS FOR THE LEASE OR RENTAL OF SPECIALIZED EQUIPMENT, AND OTHER FORMS OF EMERGENCY ASSISTANCE, EXCEPT THAT NO FUNDS MAY BE USED TO PAY THE SALARIES OF LOCAL CRIMINAL JUSTICE PERSONNEL OR OTHERWISE SUPPLANT STATE OR LOCAL FUNDS. THE FEDERAL SHARE OF EMERGENCY ASSISTANCE MAY BE UP TO 100 PERCENT OF PROJECT COSTS.

SECTION 1303 DEFINES CERTAIN KEY TERMS. 'FEDERAL LAW ENFORCEMENT ASSISTANCE' IS DEFINED AS 'EQUIPMENT, TRAINING, INTELLIGENCE INFORMATION, AND TECHNICAL EXPERTISE.' 'LEGAL ENFORCEMENT EMERGENCY' MEANS AN UNCOMMON SITUATION IN WHICH STATE AND LOCAL RESOURCES ARE INADEQUATE TO PROTECT THE LIVES AND PROPERTY OF CITIZENS OR ENFORCE THE CRIMINAL LAW.

SECTION 1304 PROVIDES THAT THE RECORDKEEPING AND ADMINISTRATIVE REQUIREMENTS APPLICABLE TO OTHER OFFICE OF JUSTICE ASSISTANCE ACTIVITIES SHALL APPLY ALSO TO THE EMERGENCY ASSISTANCE PROGRAM.

PART N-- TRANSITION

SECTION 1401 PROVIDES FOR THE CONTINUATION OF RULES, REGULATIONS AND INSTRUCTIONS IN EFFECT AT TIME OF ENACTMENT. IT PERMITS THE ASSISTANT ATTORNEY GENERAL TO OBLIGATE UNUSED OR REVERSIONARY FUNDS PREVIOUSLY APPROPRIATED.

OTHER SECTIONS OF TITLE VI OF S. 1762

SECTION 602 OF S. 1762 CHANGES REFERENCES IN OTHER LAWS TO THE OFFICE OF

*292 TITLE VII-- SURPLUS FEDERAL PROPERTY AMENDMENTS

INTRODUCTION


OVER HALF OF THE STATES ARE UNDER COURT ORDER TO REDUCE OVERCROWDING, YET ARE FACED WITH A 5-7 YEAR DELAY FROM TIME OF PRISON FINANCING TO TIME OF ACTIVATION. MANY STATES HAVE HAD TO RESORT TO A VARIETY OF SHORT-TERM ARRANGEMENTS TO MEET THEIR NEEDS. THESE INCLUDE DOUBLE CELLING AND HOUSING INMATES IN TENTS OR PREFABRICATED BUILDINGS OR IN SPACE PREVIOUSLY ALLOCATED TO OTHER USES. IN ADDITION TO HAVING SPACE SHORTAGES, MANY PRISONS ARE ANTIQUATED: TOO LARGE TO OPERATE EFFICIENTLY, UNSAFE AND UNDERSTAFFED. THE JUSTICE DEPARTMENT ESTIMATES THAT 43 PERCENT OF ALL PRISONERS ARE BEING HOUSED IN FACILITIES BUILT BEFORE 1925. WHILE MOUNTING PUBLIC CONCERN HAS PRODUCED STIFFER PAROLE POLICIES AND LESS FREQUENT USE OF INCARCERATION ALTERNATIVES SUCH AS PROBATION, JUDGES RECENTLY HAVE BEGUN TO RESPOND TO THE SEVERITY OF PRISON OVERCROWDING BY A GREATER WILLINGNESS TO USE SUCH OPTIONS. THIS HAS INCREASED THE POSSIBILITY THAT SOME DEFENDANTS WHO SHOULD BE INCARCERATED REMAIN AT LARGE.

**THE COMMITTEE ON THE JUDICIARY CONCURS WITH THE COMMITTEE ON GOVERNMENTAL AFFAIRS THAT THE PROBLEMS RAISED BY PRISON OVERCROWDING ARE OF SUCH A SERIOUS AND URGENT NATURE TO JUSTIFY ADDING CORRECTIONAL FACILITIES TO THE SMALL GROUP OF ACTIVITIES WHICH ENJOY PUBLIC BENEFIT DISPOSAL PREFERENCE-- EVEN THOUGH THIS PARTICIPATION DILUTES THE POOL OF PROPERTY AVAILABLE TO OTHER NON-FEDERAL RECIPIENTS. HOWEVER, IT SHOULD BE STRESSED THAT, IN IMPLEMENTING THIS TITLE, THE DEPARTMENT OF JUSTICE AND THE GENERAL SERVICES ADMINISTRATION SHOULD FULLY APPRECIATE THE SENSITIVITIES INVOLVED IN NATIONAL LAW ENFORCEMENT NEEDS VIS-A-VIS OTHER LOCAL LAND USE INTERESTS WITH RESPECT TO SURPLUS FEDERAL REAL PROPERTY. ACCORDINGLY, ADMINISTRATIVE PROCEDURES SHOULD BE ADOPTED AND DESIGNED TO MAKE SURE THAT (1) FEDERAL REAL PROPERTY IS APPROPRIATELY USED CONSISTENT WITH ITS EXISTING PHYSICAL CHARACTERISTICS, THEREBY PROVIDING STATES AND LOCALITIES THE FULL BENEFIT OF THE FEDERAL GOVERNMENT'S INVESTMENT IN THE PROPERTY; AND (2) DECISIONS BETWEEN CORRECTIONAL USE PROPOSALS AND COMPETING PROPOSALS WILL BE RESERVED TO THE ADMINISTRATOR OF GENERAL SERVICES SO THAT THE MERITS OF EACH WILL BE FULLY AND PROMPTLY CONSIDERED ON THE BASIS OF THE OVERALL NATIONAL INTERESTS INVOLVED.

**DONATION OF SURPLUS FEDERAL PROPERTY

1. PRESENT FEDERAL LAW

THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949 PROVIDES THE STATUTORY MEANS FOR THE DISPOSAL OF MOST FEDERAL REAL PROPERTY WHICH FEDERAL AGENCIES FIND IS NO LONGER REQUIRED FOR THEIR NEEDS AND THE DISCHARGE OF THEIR RESPONSIBILITIES. UNDER THE ACT, THIS PROPERTY IS REPORTED TO THE GENERAL SERVICES ADMINISTRATION, WHEREUPON IT IS DEEMED 'EXCESS' AND IS SUBJECT TO UTILIZATION BY OTHER EXECUTIVE AGENCIES. WHEN THE ADMINISTRATOR OF GSA DETERMINES THAT THE PROPERTY IS NOT REQUIRED BY ANY OTHER FEDERAL AGENCY, IT IS DEEMED 'SURPLUS' AND DISPOSED OF IN ACCORDANCE WITH SPECIFIC AUTHORITIES PROVIDED IN THE ACT. A NUMBER OF THESE AUTHORITIES (REFERRED TO AS PUBLIC BENEFIT DISPOSALS) PROVIDE FOR CONVEYANCES TO STATE AND LOCAL GOVERNMENTAL UNITS AND ELIGIBLE NON-PROFIT ORGANIZATIONS FOR SUCH PURPOSES AS AIRPORTS, HOSPITALS, SCHOOLS AND RECREATIONAL AREAS AT NO COST OR AT A SUBSTANTIAL MONETARY DISCOUNT. UNDER THESE AUTHORITIES, THE ADMINISTRATOR IS AUTHORIZED AT HIS DISCRETION TO DONATE SURPLUS REAL PROPERTY FOR ONE OF THESE PURPOSES TO THE ELIGIBLE RECIPIENTS UPON RECEIVING A FAVORABLE RECOMMENDATION FROM THE FEDERAL AGENCY (SUCH AS THE DEPARTMENT OF EDUCATION, THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES, ETC.) WHICH
DETERMINES THE ELIGIBILITY OF THE PROPOSED RECIPIENT AND EVALUATES THE PROGRAM OF USE. THE EFFECT OF THIS TITLE WOULD BE TO ADD CORRECTIONAL FACILITIES TO THIS LIST OF PUBLIC BENEFIT DISPOSALS FOR SURPLUS FEDERAL PROPERTY AND TO AUTHORIZE THE ADMINISTRATOR OF GSA TO DONATE SUCH PROPERTY TO STATES AND LOCALITIES FOR CORRECTIONAL USES UPON THE RECOMMENDATION OF THE ATTORNEY GENERAL.

2. PROVISIONS OF THE BILL, AS REPORTED

THE BILL AMENDS SECTION 203 OF THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949 TO PROVIDE FOR THE DONATION OF SURPLUS REAL AND RELATED PERSONAL PROPERTY FOR CORRECTIONAL USE. COMMONWEALTHS AND TRUST TERRITORIES WOULD BE ELIGIBLE TO RECEIVE SUCH PROPERTY. IN KEEPING WITH SAFEGUARDS CONTAINED IN OTHER PUBLIC BENEFIT CONVEYANCE AUTHORITIES, PROPERTY DONATED UNDER THIS MEASURE WILL REVERT TO GSA AT THE DISCRETION OF THE ADMINISTRATOR IN THE EVENT OF INAPPROPRIATE USE. SECTION 701 OF THIS TITLE AMENDS SECTION 484 OF TITLE 40, U.S.C., BY ADDING A NEW SUBSECTION (P) IMMEDIATELY AT THE END THEREOF. PARAGRAPH 484(P)(1) AUTHORIZES THE ADMINISTRATOR TO TRANSFER TO THE STATES, THE DISTRICT OF COLUMBIA, THE TRUST TERRITORIES AND THE COMMONWEALTHS, OR TO ANY POLITICAL SUBDIVISION OR INSTRUMENTALITY THEREOF, SURPLUS PROPERTY DETERMINED BY THE ATTORNEY GENERAL TO BE REQUIRED FOR CORRECTIONAL FACILITY USE BY THE RECIPIENT. PROPERTY SHALL BE USED ONLY UNDER A PROGRAM OR PROJECT FOR THE CARE OR REHABILITATION OF CRIMINAL OFFENDERS AS APPROVED BY THE ATTORNEY GENERAL. TRANSFERS OR CONVEYANCES SHALL BE MADE WITHOUT PAYMENTS TO THE UNITED STATES. AN APPROPRIATE PROGRAM OR PROJECT MAY BE ANY STATE CORRECTIONAL AGENCY, COUNTY JAIL, HALFWAY HOUSE, WORK-RELEASE FACILITY, TRAINING FACILITY, PRISON SUPPORT SERVICE OR ANY ACTIVITY DIRECTLY CONTRIBUTING TO THE CARE OF REHABILITATION OF CRIMINAL OFFENDERS. SURPLUS REAL PROPERTY SUBSTANTIALLY COMPRISED OF FACILITIES FORMERLY USED BY THE FEDERAL GOVERNMENT FOR CORRECTIONAL PURPOSES SHOULD BE REVIEWED BY THE GENERAL SERVICES ADMINISTRATION, WITH THE DEPARTMENT OF JUSTICE PRISON NEEDS CLEARINGHOUSE, IN CONSULTATION WITH AFFECTED STATES AND LOCAL GOVERNMENTS, FOR THE PURPOSE OF CORRECTIONAL FACILITY USE ONLY. THE PRISON NEEDS CLEARINGHOUSE IS LOCATED IN THE FEDERAL BUREAU OF PRISONS AND WAS CREATED IN AUGUST 1981 TO ASSIST STATES IN THEIR EFFORTS TO OBTAIN SURPLUS FEDERAL PROPERTY FOR CORRECTIONAL USE. UNDER THIS LEGISLATION, THE CLEARINGHOUSE WILL BE THE AGENCY THROUGH WHICH THE ATTORNEY GENERAL SCREENS PROPOSED CONVEYANCES AND MAKES HIS RECOMMENDATIONS TO THE ADMINISTRATOR OF GSA. PRIOR TO MAKING HIS RECOMMENDATION, THE ATTORNEY GENERAL SHALL DETERMINE THAT THE APPLICANT HAS PROVIDED FOR THE CONSIDERATION OF LOCAL VIEWS WITH REGARD TO THE REQUEST FOR CONVEYANCE OF THIS PROPERTY. IF UPON COMPLETION OF HIS REVIEW, THE GSA ADMINISTRATOR DETERMINES THAT NO PROPOSAL IS PROPERLY JUSTIFIED IN LIGHT OF THE NATURE OR VALUE OF THE PROPERTY, OR IF NO APPLICATION IS RECEIVED, THE PROPERTY SHOULD THEN BE MADE AVAILABLE FOR OTHER PURPOSES AUTHORIZED BY THE FEDERAL PROPERTY ACT AND RELATED LEGISLATION. SECOND, WITH RESPECT TO SURPLUS REAL PROPERTY NOT PREVIOUSLY USED FOR CORRECTIONAL PURPOSES, SUCH PROPERTY SHOULD BE SCREENED AMONG ALL AUTHORIZED RECIPIENTS FOR USES GENERALLY PROVIDED BY THE FEDERAL PROPERTY ACT AND RELATED LEGISLATION, IN ACCORDANCE WITH NORMAL SURPLUS PROPERTY PROCEDURES. THESE PROPERTIES SHOULD BE SCREENED WITH THE CLEARINGHOUSE. SHOULD ANY APPLICATION FOR CORRECTIONAL USE BE RECEIVED TOGETHER WITH APPLICATIONS FOR OTHER PURPOSES, THE SELECTION OF THE GRANTEE WILL BE
RESERVED TO THE ADMINISTRATOR OF GENERAL SERVICES ON THE BASIS OF THE JUSTIFICATION SUBMITTED WITH THE APPLICATION. THE MERITS OF EACH SHOULD BE CONSIDERED IN LIGHT OF ALL **3476 FACTORS AFFECTING USE, INCLUDING ADAPTABILITY OF THE PROPERTY FOR CORRECTIONAL PURPOSES, ITS IMPORTANCE FOR THESE PURPOSES, THE BENEFITS TO BE DERIVED FROM OTHER USES, AND THE CHARACTER AND VALUE OF REAL PROPERTY.

PARAGRAPHS 484(P)(2) AND (3) ARE AMENDMENTS AUTHORIZING GSA TO PLACE SUCH CONDITIONS AND RESERVATIONS UPON THE DEED OF CONVEYANCE AS ARE NECESSARY TO PROTECT THE INTERESTS OF THE UNITED STATES AND THE TRANSFEREE.

PARAGRAPH (2) PROVIDES FOR REVERSION OF THE PROPERTY TO THE UNITED STATES AT THE OPTION OF THE GOVERNMENT IN THE EVENT OF USE INCONSISTENT WITH THE PURPOSE FOR WHICH ORIGINALLY FURNISHED. WHILE THE ADMINISTRATOR OF GSA SHALL MAKE THE FINAL DETERMINATION, THIS PROVISION IS NOT INTENDED TO PRECLUDE USE OF THE PROPERTY FOR SOME COMPLEMENTARY PURPOSE SO LONG AS THAT PURPOSE IS CLEARLY SECONDARY AND IS CONSISTENT WITH THE CORRECTIONAL OBJECTIVE FOR WHICH THE PROPERTY WAS TRANSFERRED.

SUBPARAGRAPH (3)(A) AUTHORIZES THE ADMINISTRATOR TO DETERMINE AND ENFORCE COMPLIANCE WITH THE TERMS OF ANY TRANSFER AGREEMENT.

SUBPARAGRAPH (3)(B) EMPOWERS THE ADMINISTRATOR TO REFORM, CORRECT OR AMEND ANY TRANSFER AGREEMENT IN ORDER TO SATISFY LEGAL REQUIREMENTS IN EXISTENCE AT THE TIME OF THE TRANSFER. THIS PROVISION DOES NOT AUTHORIZE GSA TO ATTACH ADDITIONAL TERMS OR RESTRICTIONS TO *296 ANY TRANSFER AGREEMENT AS A RESULT OF A LAW, REGULATION, OR POLICY DETERMINATION NOT IN EXISTENCE AT THE TIME OF THE TRANSFER.

SUBPARAGRAPH (3)(C) FURTHER AUTHORIZES THE ADMINISTRATOR TO GRANT RELEASES FROM A TRANSFER AGREEMENT OR ANY OF ITS TERMS, OR TO YIELD ANY RIGHT OR INTEREST PREVIOUSLY RESERVED TO THE UNITED STATES, IF HE DETERMINES THAT THE PROPERTY NO LONGER SERVES THE PURPOSE FOR WHICH IT WAS TRANSFERRED OR THAT SUCH RELEASE OR QUIETCLAIM WILL NOT PREVENT ACCOMPLISHMENT OF THAT PURPOSE. THE COMMITTEE IS AWARE THAT, SUBSEQUENT TO THE TRANSFER, OCCASIONS MAY ARISE UPON WHICH THE RECIPIENT WILL HAVE A LEGITIMATE NEED TO CHANGE THE TERMS OF A DEED.

FOR EXAMPLE, PROPERTY LOCATED ON BLYTH ISLAND, GEORGIA, CONVEYED TO THE STATE OF GEORGIA FOR PARK AND RECREATIONAL PURPOSES WAS RECONVEYED TO GLYNN COUNTY FOR SIMILAR USE. THE RESTRICTIONS REQUIRING PARK USE BY THE STATE WERE RELEASED SO THAT THE PROPERTY COULD BE CONVEYED TO THE COUNTY ALLOWING AN APPROVED RECREATIONAL PROGRAM WHILE IMPOSING THE ORIGINAL PARK USE RESTRICTIONS ON THE COUNTY.

ONE OF THE PURPOSES OF THIS SECTION IS TO PROVIDE GSA WITH FLEXIBILITY TO ACCOMMODATE THESE NEEDS WHILE PROTECTING THE INTERESTS OF THE FEDERAL GOVERNMENT AS ORIGINALLY INTENDED. THIS SECTION ALSO GIVES THE ADMINISTRATOR OF GSA DISCRETION TO RELEASE RECIPIENTS FROM ALL OBLIGATIONS TO THE GOVERNMENT CONCERNING TRANSFERRED PROPERTY WHEN THE ADMINISTRATOR DETERMINES THAT SUCH PROPERTY CAN NO LONGER BE ECONOMICALLY USED FOR THE ORIGINAL PURPOSE, AND WHEN IT IS NOT ECONOMICALLY FEASIBLE OR PRACTICAL FOR THE GOVERNMENT TO EXERCISE ITS RIGHT OF REVERSION.

SECTION 702 OF THIS TITLE AMENDS SECTION 484(O) OF TITLE 40, U.S.C., AS AMENDED, BY REVISING THE FIRST SENTENCE. THE REVISION REQUIRES THE ADMINISTRATOR TO MAKE AN ANNUAL REPORT TO CONGRESS **3477 ON THE TOTAL ACQUISITION VALUE OF ALL PERSONAL AND REAL PROPERTY TRANSFERRED PURSUANT TO SUBSECTION (P) OF THIS SECTION. THIS PROVISION EXTENDS TO PUBLIC BENEFIT CONVEYANCES FOR CORRECTIONAL PURPOSES THE CONGRESSIONAL MONITORING REQUIREMENT NOW IN EFFECT FOR ALL OTHER CATEGORIES OF PUBLIC BENEFIT CONVEYANCES.
*297* TITLE VIII-- LABOR RACKETEERING AMENDMENTS

IN GENERAL AND PRESENT FEDERAL LAW


CURRENT FEDERAL PROHIBITIONS AND PENALTIES DESIGNED TO PROTECT THE LEGITIMACY OF LABOR RELATIONS HAVE, IN CERTAIN RESPECTS, PROVED TO BE INADEQUATE. FOR EXAMPLE, WHILE SECTION 302 OF THE TAFT-HARTLEY ACT PROHIBITS, AMONG OTHER THINGS, THE BUYING AND SELLING OF LABOR PEACE, VIOLATION OF THIS PROHIBITION IS AT PRESENT ONLY A MISDEMEANOR SUBJECT TO A FINE OF UP TO $10,000 AND IMPRISONMENT OF NO MORE THAN ONE YEAR OR BOTH. THESE SANCTIONS NEED TO BE MADE MORE FIRM. AT THE SAME TIME, THE COMMITTEE RECOGNIZES THAT A WIDE RANGE OF TAFT-HARTLEY SECTION 302 VIOLATIONS DO NOT INVOLVE PAYOFFS OR BRIBES, BUT SIMPLY FAIL TO MEET THE DETAILED REQUIREMENTS FOR CERTAIN EXEMPTIONS UNDER SECTION 302(C). THE REQUIREMENTS FOR A CRIMINAL CONVICTION UNDER TAFT-HARTLEY SECTION 302(C)(4) THROUGH (9) SHOULD BE TIGHTENED TO DRAW A CLEAR LINE BETWEEN VIOLATIONS PROPERLY DEEMED CRIMINAL WRONGS-- PAYOFFS AND BRIBES-- AND THOSE VIOLATIONS PROPERLY DEEMED TO BE CIVIL WRONGS.

ERISA CURRENTLY CONTAINS A LIST OF CRIMES THAT DISQUALIFY AN INDIVIDUAL FROM HOLDING A POSITION OF RESPONSIBILITY WITH AN EMPLOYEE BENEFIT PLAN. THE MAXIMUM PERIOD OF DISQUALIFICATION IS THE DATE OF THE JUDGMENT OF THE TRIAL COURT OR THE DATE ON WHICH THAT JUDGMENT IS SUSTAINED UPON APPEAL, WHICHEVER IS LATER. IT IS NECESSARY TO MOVE TO ENSURE THAT ANY FELONY INVOLVING THE ABUSE OR MISUSE OF A POSITION WITH AN EMPLOYEE BENEFIT PLAN LEADS TO THE DEBARMENT OF THE INDIVIDUAL CONVICTED. ADDITIONALLY, THE LIST OF POSITIONS TO WHICH THE DISQUALIFICATION CURRENTLY APPLIES IS TOO NARROW, AND THE FIVE-YEAR DEBARMENT PERIOD IS OFTEN TOO SHORT, TO PREVENT CONVICTED OFFICIALS FROM REASSERTING THEIR INFLUENCE OVER A BENEFIT PLAN. MOREOVER, ALLOWING CONVICTED OFFICIALS TO RETAIN THEIR POSITIONS WHILE THE CONVICTIONS ARE BEING APPEALED (A PERIOD SOMETIMES EXCEEDING TWO YEARS) ONLY ENCOURAGES FURTHER CRIME AND JEOPARDIZES EMPLOYEE BENEFITS.

*298 **3478* THE PROVISIONS OF THE LANDRUM-GRIFFIN ACT ADDRESSED BY THIS TITLE PARALLEL THE PROVISIONS OF ERISA THAT THIS TITLE AMENDS. AGAIN, THE LIST OF CRIMES THAT BRING DISQUALIFICATION NEEDS TO BE AUGMENTED; ALSO, THE DEBARMENT PERIOD AND THE METHOD FOR FIXING THE OPERATIVE DATE OF DISQUALIFICATION SUFFER THE SAME DEFECTS AS DO THE SIMILAR ERISA PROVISIONS. HERE, TOO, THE LIST OF POSITIONS TO WHICH DISQUALIFICATION APPLIES MUST BE EXPANDED; CONVICTED OFFICIALS DISQUALIFIED FROM ONE POSITION HAVE BEEN KEPT ON THE PAYROLL IN ANOTHER CATEGORY, SUCH AS CHAUFFEUR, AND HAVE IMMEDIATELY MOVED BACK INTO POSITIONS OF POWER ONCE THE DISQUALIFICATION PERIOD ENDS.

THE PROVISIONS OF THE BILL, AS REPORTED

SECTION 801 OF TITLE VIII AMENDS SECTION 302(D) OF THE TAFT-HARTLEY ACT TO PROVIDE THAT WILLFUL VIOLATIONS INVOLVING LABOR BRIBERY OR A PAYOFF OF AN AMOUNT IN EXCESS OF $1,000 SHALL BE A FELONY PUNISHABLE BY A FINE OF NOT MORE THAN $15,000 OR IMPRISONMENT FOR NOT MORE THAN 5 YEARS, OR BOTH. CRIMES INVOLVING AMOUNTS OF LESS THAN $1,000 WOULD CONTINUE TO BE
MISDEMEANORS SUBJECT TO THE CURRENT PENALTIES OF $10,000 OR ONE YEAR IMPRISONMENT, OR BOTH.

**TITLE VIII** GRANTS SPECIAL TREATMENT TO TRANSACTIONS ADDRESSED BY SUBSECTIONS 302(C)(4) THROUGH (9). THESE SUBSECTIONS CONTAIN EXCEPTIONS, OFTEN TECHNICAL IN NATURE, TO THE PROHIBITIONS CONTAINED IN SECTIONS 302(A) AND (B). BECAUSE A PERSON CAN VIOLATE A PROHIBITION OF SECTIONS 302(A) AND (B) EVEN THOUGH HE PROCEEDED IN THE BELIEF THAT HIS CONDUCT FELL WITHIN THE EXCEPTED BEHAVIOR OF SECTIONS 302(C)(4) THROUGH (9), TITLE VIII ADDS TO THE 'WILLFUL' REQUIREMENTS FOR THIS BEHAVIOR THE ADDITIONAL ELEMENT THAT SUCH CONDUCT BE 'WITH INTENT TO BENEFIT HIMSELF OR TO BENEFIT OTHER PERSONS WHOM HE KNOWS ARE NOT PERMITTED TO RECEIVE SUCH PAYMENT, LOAN, MONEY OR OTHER THING OF VALUE UNDER SUBSECTION (C)(4) THROUGH (C)(9).'

A VIOLATION OF TAFT-HARTLEY SECTIONS 302(C)(4) THROUGH (9) WHICH IS 'WILLFUL' AND COMMITTED WITH THE REQUISITE 'INTENT,' AND WHICH INVOLVES AN AMOUNT IN EXCESS OF $1,000, IS A FELONY PUNISHABLE BY A FINE OF NOT MORE THAN $15,000 OR IMPRISONMENT FOR NOT MORE THAN 5 YEARS, OR BOTH. IF THE AMOUNT INVOLVED IS $1,000 OR LESS, THEN VIOLATIONS REMAIN MISDEMEANORS SUBJECT TO A FINE OF NOT MORE THAN $10,000 OR ONE YEAR IMPRISONMENT, OR BOTH.

**SECTION 801** ALSO AMENDS TAFT-HARTLEY SECTION 302(E). THE AMENDMENTS PROVIDE CIVIL JURISDICTION IN THE UNITED STATES DISTRICT COURTS OVER SUITS BROUGHT BY THE UNITED STATES ALLEGING SPECIFIC VIOLATIONS OF TAFT-HARTLEY AND OVER SUITS BROUGHT BY ANY PERSON DIRECTLY AFFECTED BY AN ALLEGED VIOLATION OF SECTION 302. IT PRESERVES THE JURISDICTION OF SUCH COURTS TO RESTRAIN VIOLATIONS UNDER THE ACT.

**SECTION 802** AMENDS SECTION 411(A) OF ERISA, WHICH PROHIBITS PERSONS CONVICTED OF CERTAIN CRIMES FROM SERVING IN LISTED POSITIONS WITH AN EMPLOYEE BENEFIT PLAN. ADDED TO THIS LIST OF CRIMES ARE THOSE OFFENSES RELATING TO ABUSE OR MISUSE OF SUCH PERSON'S EMPLOYEE BENEFIT PLAN POSITION. THE CATEGORIES OF POSITIONS AFFECTED BY THE DISBARMENT PROVISIONS ALSO ARE ENLARGED. **SECTION 802** ALSO EXTENDS THE DISBARMENT PERIOD TO 10 YEARS, UNLESS, ON THE CONVICTED INDIVIDUAL'S MOTION, THE SENTENCING COURT SETS A LESSER PERIOD OF AT LEAST 5 YEARS.

**SECTION 802** ALSO AMENDS SECTION 411(B) OF ERISA BY INCREASING THE PENALTIES FOR INTENTIONAL VIOLATIONS OF THIS SECTION FROM 1 YEAR TO 5 YEARS.

**SECTION 802** AMENDS SECTION 411(C) OF ERISA TO CHANGE THE DEFINITION OF THE WORD 'CONVICTED.' CURRENT LAW DEFINES THIS AS THE DATE OF THE TRIAL COURT JUDGMENT OR THE FINAL APPEAL THEREOF, WHICHEVER IS LATER. THIS TITLE CHANGES THE DATE OF DISQUALIFICATION TO THE DATE OF THE TRIAL COURT JUDGMENT, REGARDLESS OF APPEALS.

**SECTION 802** ALSO ADDS A NEW SECTION 411(D) TO ERISA WHICH PROVIDES THAT ANY SALARY FOR A POSITION IN AN EMPLOYEE BENEFIT PLAN OTHERWISE PAYABLE TO A PERSON CONVICTED BY A TRIAL COURT SHALL BE PLACED IN ESCROW PENDING FINAL DISPOSITION OF ANY APPEAL.

**SECTION 803** AMENDS SECTION 504(A) OF LANDRUM-GRIFFIN BY ADDING TO THE LIST OF CRIMES IN THE SAME MANNER THAT **SECTION 802** EXTENDED THEM UNDER ERISA. THE SAME DISBARMENT PROVISIONS AS CONTAINED IN **SECTION 802** ARE ADDED AS WELL.

**SECTION 803** AMENDS SECTION 504(B) OF LANDRUM-GRIFFIN TO INCREASE THE PENALTY FOR WILLFUL VIOLATIONS OF THAT SECTION FROM IMPRISONMENT FOR NOT MORE THAN 1 YEAR TO NOT MORE THAN 5 YEARS.

**SECTION 802** AMENDS SECTION 504(C) OF LANDRUM-GRIFFIN BY CHANGING THE DEFINITION OF THE TERM 'CONVICTED' IN THE SAME MANNER AS IN SECTION 411(C) OF ERISA AS DISCUSSED IN **SECTION 802** ABOVE.

**SECTION 803** ADDS NEW SECTION 504(D) TO LANDRUM-GRIFFIN TO PROVIDE THE SAME ESCROW PROVISIONS ADDED TO ERISA DISCUSSED WITH RESPECT TO **SECTION**
SECTION 804 amends Section 411(c) of ERISA and Section 504(c) of Landrum-Giffin to make retroactive the commencement of the period of disability at the time of the trial court judgment, as prescribed in Sections 802 and 803 of this title.

*300* Title IX -- Currency and Foreign Transactions Reporting Amendments

INTRODUCTION

Title IX of this bill amends certain provisions in Subchapter 53 of Title 31 (relating to Currency and Foreign Transactions Reporting) and the Racketeer Influenced and Corrupt Organization (RICO) Chapter of Title 18, U.S.C. in order to improve United States efforts to stem the illicit flow of currency involved in narcotics trafficking and money laundering schemes often associated with organized crime. [FN781] Senator Roth, at the time he introduced a bill earlier this Congress (S. 902) containing comparable provisions, noted: [FN782]

**3480** Organized crime in the United States conceals as much as $40 billion a year in offshore countries whose banking and commercial secrecy laws prevent scrutiny. Ill-gotten gains, particularly from drug traffickers, are laundered routinely through these offshore havens. Conversion of drug profits into useable funds is now a highly sophisticated and professional operation. As a matter of fact, it is these offshore bank secrecy laws that are the glue holding criminal operations together. A whole new service industry has sprung up to support these illegal, unreported money flows. Satellite communications, advanced computers, CPA's, high-priced lawyers, light aircraft, fast boats, weapons, payoffs to officials, and intimidation all play an integral role in the growing success of funds laundering. Frequently, the base of operations for these illicit cash flows is nested in a tropical paradise with a solicitous and obliging government.

* * * *

One of the most effective tools available to assist in monitoring and curtailing the vast flow of the illegal drug profits out of the country is * * * The Currency and Foreign Transactions Reporting Act, * * * intended to provide law enforcement agencies with recordkeeping and reporting *301* tools to investigate the financial resources connected with illegal activities, including drug trafficking. Yet various loopholes which have been found * * *

Unless these loopholes are closed, the hands of the law enforcement authorities are virtually tied, as the major drug traffickers move billions of dollars out of the country without fear of detection or penalty.

Thus, the purpose of this title is to refine and improve an important successful Federal program to inhibit the illicit drug trade and organized crime. [FN783] It does so by focusing on the scope of the conduct prohibited, the level of civil and criminal penalties, search and seizure authority, rewards for informants, and scope of the racketeering offenses. [FN784]

Currency and Foreign Transactions Reporting Amendments

1. Present Federal Law

31 U.S.C. 5317 PROVIDES AUTHORITY FOR THE SECRETARY OF THE TREASURY TO APPLY TO A COURT FOR A SEARCH WARRANT WHEN THE SECRETARY REASONABLY BELIEVES A MONETARY INSTRUMENT IS BEING TRANSPORTED AND A REPORT EITHER HAS NOT BEEN FILED, OR IF FILED, CONTAINS A MATERIAL OMISSION OR MISSTATEMENT. IT DOES NOT SPECIFICALLY ADDRESS WARRANTLESS SEARCHES. 31 U.S.C. 5321 PROVIDES FOR THE IMPOSITION OF A CIVIL PENALTY OF UP TO $1,000 AGAINST A DOMESTIC FINANCIAL INSTITUTION, OR AN AGENT THEREOF, FOR WILLFULLY VIOLATING THE REQUIREMENT OF THE SUBCHAPTER, *302* WITH A SEPARATE VIOLATION FOR EACH DAY THE VIOLATION CONTINUES AND AT EACH OFFICE, BRANCH, OR PLACE OF BUSINESS AT WHICH THE VIOLATION OCCURS OR CONTINUES. AN ADDITIONAL CIVIL PENALTY MAY BE IMPOSED ON A PERSON NOT FILING A REPORT, OR FILING A FALSE REPORT, NOT TO EXCEED THE AMOUNT OF THE MONETARY INSTRUMENT FOR WHICH THE REPORT WAS REQUIRED.

FINALLY, 31 U.S.C. 5322 MAKES IT AN OFFENSE PUNISHABLE BY NOT MORE THAN ONE YEAR IN PRISON AND A FINE OF $1,000, OR BOTH, TO WILLFULLY VIOLATE A PROVISION OF THE SUBCHAPTER OR A REGULATION PRESCRIBED THEREUNDER. WILLFULLY VIOLATING SUCH A PROVISION OR REGULATION WHILE, AT THE SAME TIME, VIOLATING ANOTHER LAW OF THE UNITED STATES, OR AS A PART OF A PATTERN OF ILLEGAL ACTIVITIES INVOLVING TRANSACTIONS OF MORE THAN $100,000 IN A 12-MONTH PERIOD, MAY BE IMPRISONED FOR NOT MORE THAN FIVE YEARS AND FINED NOT MORE THAN $500,000, OR BOTH.

CURRENT LAW DOES NOT INCLUDE CURRENCY AND FOREIGN TRANSACTION REPORTING VIOLATIONS IN THE RACKETEERING OR ELECTRONIC SURVEILLANCE PROVISIONS OF TITLE 18.

2. PROVISIONS OF THE BILL AS REPORTED

THE PROVISIONS OF TITLE IX OF S. 1762, AS NOTED, FOCUS ON A NUMBER OF SIGNIFICANT POINTS TO FINE TUNE THE CURRENT CURRENCY REPORTING LAW.

SECTION 901 OF THE BILL AMENDS TITLE 31 TO INCREASE BOTH THE CIVIL AND CRIMINAL PENALTIES APPLICABLE TO A VIOLATION OF THE RECORDS AND REPORTING REQUIREMENTS IN SUBCHAPTER II OF CHAPTER 53. WHILE THE FULL SCOPE OF THESE PROVISIONS IS BROAD, IT IS IMPORTANT TO RECOGNIZE THAT THEY ARE PRIMARILY DIRECTED AT PERSONS WHO MAKE A LUCRATIVE CAREER IN THE ILlicit DRUG TRADE AND ORGANIZED CRIME. AS SUCH, THE PENALTIES ARE FAR TOO LOW TO DETER AND PUNISH SUCH ACTIVITY. INDEED, THE MODEST PENALTIES NOW APPLICABLE MAY SIMPLY BE WRITTEN OFF AS A COST OF DOING BUSINESS.

ACCORDINGLY, SECTION 901(A) OF THE BILL RAISES THE BASIC CIVIL PENALTY FOR A WILLFUL VIOLATION FROM $1,000 TO $10,000 AND SECTION 901(B) INCREASES THE
Criminal penalty for such a violation from a one year misdemeanor with a fine of up to $1,000 to a five year felony with a fine of up to $250,000.

Significantly, Section 901(C) of the bill would broaden the scope of the reporting requirement in 31 U.S.C. 5316 to apply a person who knowingly 'attempts to transport or have transported' a monetary instrument under circumstances otherwise requiring a report. This amendment closes a major loophole in the current law to permit apprehension of offenders before they depart the United States.

Section 901(C) also amends 31 U.S.C. 5316 to raise the reporting requirement threshold from $5,000 to $10,000. This amendment is designed to focus enforcement efforts on relatively large transactions, to eliminate the paper work and red tape with respect to relatively minor transactions, and to ameliorate the impact of inflation on the legitimate international traveler who commonly will travel abroad with amounts of more than $5,000 but less than $10,000.

Section 901(D) of this bill amends the search and seizure part of 31 U.S.C. 5317 to expressly provide authority for a customs officer to 'stop and search, without a search warrant, a vehicle, vessel, aircraft, or other conveyance, envelope or other container, or *303 person entering or departing from the United States with respect to which the officer has reasonable cause to believe there is a monetary instrument being transported' in violation of the Currency and Foreign Transactions Requirements of Title 31. This on the spot authority of the customs service would significantly enhance the effectiveness in monitoring and apprehending persons reasonably believed to be violating the currency reporting provisions of the law. The committee is fully convinced that such authority is not only needed, but constitutional, under the line of cases holding that warrantless 'border searches' are reasonable even without probable cause under the Fourth Amendment. [FN787]

Section 901(E) of this bill adds a new 31 U.S.C. 5323 to permit the secretary of treasury to reward an individual who provides original information which leads to a recovery of a civil penalty, fine or forfeiture of more than $50,000. The reward may not exceed 25 per centum of the net amount of the civil penalty, fine, or forfeiture, or $150,000, whichever is less. The committee concurs with Senator Roth's observation that: [FN788]

**3483 This provision is a critical tool in combating drug trafficking. It is important to remember that we are dealing with a multibillion-dollar industry. Law enforcement authorities need some tool to combat the great financial attraction that remains in the drug trafficking industry. The majority of the vital investigations into major drug rings stem from informant tips-- these tips are crucial to further investigations. Additionally the amount paid to the informant will be minimal in comparison to the amount gained in fines, civil penalties and forfeitures. Without the tip there may not have been any investigation and recovery-- at all.

Section 901(F) amends the table of contents of Chapter 53 of title 31 to add the new section title on rewards.

Section 901(G) amends the 18 U.S.C. 1961(1) definition 'racketeering activity' to include 'any act which is indictable under the currency and foreign transaction reporting act', thereby making this offense a predicate offense for a RICO prosecution. This amendment is made in recognition that major currency transaction violations are inherently a part of all major drug racketeering schemes and organized crime money laundering activities.

*304 Title X-- Miscellaneous Violent Crime Amendments
TITLE X CONSISTS OF A GROUP OF MISCELLANEOUS VIOLENT CRIME AMENDMENTS DIVIDED INTO SIXTEEN PARTS. IN SUMMARY, THEY RELATE TO MURDER FOR HIRE AND VIOLENT CRIMES IN AID OF RACKETEERING (PART A); SOLICITATION TO COMMIT A FEDERAL CRIME OF VIOLENCE (PART B); THE FELONY-MURDER RULE (PART C); MANDATORY PENALTIES FOR USE OF A FIREARM DURING A FEDERAL CRIME OF VIOLENCE (PART D); USE OF ARMOR-PIERCING BULLETS TO COMMIT A CRIME OF VIOLENCE (PART E); KIDNAPPING FEDERAL OFFICIALS (PART F); CRIMES AGAINST FAMILY MEMBERS OF FEDERAL OFFICIALS (PART G); ADDITIONS TO THE MAJOR CRIMES ACT APPLICABLE IN INDIAN COUNTRY (PART H); DESTRUCTION OF MOTOR VEHICLES (PART I); DESTRUCTION OF ENERGY FACILITIES (PART J); ASSAULTS UPON FEDERAL OFFICIALS (PART K); ESCAPE FROM CUSTODY RESULTING FROM CIVIL COMMITMENT (PART L); INTERNATIONAL EXTRADITION (PART M); FEDERAL EXPLOSIVES OFFENSES (PART N); AND ROBBERY OF A PHARMACY OR OTHER REGISTERED POSSESSOR OF CONTROLLED SUBSTANCES (PART O).

PART A-- MURDER-FOR-HIRE AND VIOLENT CRIME IN AID OF RACKETEERING ACTIVITY

1. IN GENERAL

THIS PART OF TITLE X PROSCRIBES MURDER AND OTHER VIOLENT CRIMES COMMITTED FOR MONEY OR OTHER VALUABLE CONSIDERATION OR AS AN INTEGRAL ASPECT OF MEMBERSHIP IN AN ENTERPRISE ENGAGED IN RACKETEERING. IT IS SIMILAR TO A PROVISION CONTAINED IN S. 2572 AS PASSED BY THE SENATE IN THE 97TH CONGRESS. PART A CONSISTS OF TWO SECTIONS; THE FIRST DEFINES THE TERM 'CRIME OF VIOLENCE', USED HERE AND ELSEWHERE IN THE BILL, WHILE THE SECOND CREATES NEW OFFENSES AND ADDITIONAL DEFINITIONS.

**3484** THE OFFENSES SET FORTH IN THIS PART ARE RELATED BUT DISTINCT. THE FIRST IS LIMITED TO MURDER AND PUNISHES THE TRAVEL IN INTERSTATE OR FOREIGN COMMERCE OR THE USE OF THE FACILITIES OF INTERSTATE OR FOREIGN COMMERCE OR OF THE MAILS, AS CONSIDERATION FOR THE RECEIPT OF ANYTHING OF PECUNIARY VALUE, WITH THE INTENT THAT A MURDER BE COMMITTED. THE SECOND EXTENDS TO MURDER, KIDNAPPING, OR SERIOUS ASSAULT COMMITTED FOR ANYTHING OF PECUNIARY VALUE OR FOR THE PURPOSE OF GAINING ENTRANCE INTO OR MAINTAINING OR INCREASING ONE'S POSITION IN AN ORGANIZED CRIME GROUP.

COOPERATION AND COORDINATION BETWEEN FEDERAL AND STATE OFFICIALS SHOULD BE UTILIZED TO ENSURE THAT THE NEW MURDER-FOR-HIRE STATUTE IS USED IN APPROPRIATE CASES TO ASSIST THE STATES RATHER THAN TO ALLOW THE USURPATION OF SIGNIFICANT CASES BY FEDERAL AUTHORITIES THAT COULD BE HANDLED AS WELL OR BETTER AT THE LOCAL LEVEL. WITH RESPECT TO THE SECOND OFFENSE SET OUT IN PART A, THE COMMITTEE CONCLUDED THAT THE NEED FOR FEDERAL JURISDICTION IS CLEAR, IN VIEW OF THE FEDERAL GOVERNMENT'S STRONG INTEREST, AS RECOGNIZED IN EXISTING STATUTES, IN SUPPRESSING THE ACTIVITIES OF ORGANIZED CRIMINAL ENTERPRISES, AND THE FACT THAT THE FBI'S EXPERIENCE AND NETWORK OF INFORMANTS AND INTELLIGENCE WITH RESPECT TO SUCH ENTERPRISES WILL OFTEN FACILITATE A SUCCESSFUL FEDERAL INVESTIGATION WHERE LOCAL AUTHORITIES MIGHT BE STYMIED. HERE AGAIN, HOWEVER, THE COMMITTEE DOES NOT INTEND THAT ALL SUCH OFFENSES SHOULD BE PROSECUTED FEDERALLY. MURDER, KIDNAPPING, AND ASSAULT ALSO VIOLATE STATE LAW AND THE STATES WILL STILL HAVE AN IMPORTANT ROLE TO PLAY IN MANY SUCH CASES.

2. PRESENT FEDERAL LAW


3. PROVISIONS OF THE BILL, AS REPORTED

PART A ADDS TWO NEW SECTIONS, 1952A AND 1952B, TO TITLE 18, UNITED STATES CODE. SECTION 1952A FOLLOWS THE FORMAT OF PRESENT SECTION 1952. SECTION 1952A REACHES TRAVEL IN INTERSTATE OR FOREIGN COMMERCE OR THE USE OF THE MAILS OR OF A FACILITY IN INTERSTATE OR FOREIGN COMMERCE WITH THE INTENT THAT A MURDER BE COMMITTED IN VIOLATION OF STATE OR FEDERAL LAW. THE MURDER MUST BE CARRIED OUT OR PLANNED AS CONSIDERATION FOR THE RECEIPT OF 'ANYTHING OF PECUNIARY VALUE.' THIS TERM IS DEFINED TO MEAN MONEY, A NEGOTIABLE INSTRUMENT, A COMMERCIAL INTEREST, OR ANYTHING ELSE THE PRIMARY SIGNIFICANCE OF WHICH IS ECONOMIC ADVANTAGE. THE TERM 'FACILITY OF INTERSTATE COMMERCE' IS ALSO DEFINED TO INCLUDE MEANS OF TRANSPORTATION AND COMMUNICATION. AN INTERSTATE TELEPHONE CALL IS SUFFICIENT TO TRIGGER FEDERAL JURISDICTION, AS IT IS UNDER THE ITAR STATUTE. [FN793] BOTH THE PERSON WHO ORDERED THE MURDER AND THE 'HIT MAN' WOULD BE COVERED BY THE NEW SECTION PROVIDED THE INTERSTATE COMMERCE OR MAIL NEXUS IS PRESENT. FOR EXAMPLE, IF A PAYS MONEY TO B TO GO FROM STATE X TO STATE Y TO MURDER C, BOTH A AND B HAVE VIOLATED THE STATUTE. IN THIS SITUATION, B'S TRAVEL WAS CAUSED BY A. THE GIST OF THE OFFENSE IS THE TRAVEL IN INTERSTATE COMMERCE OR THE USE OF
THE FACILITIES OF INTERSTATE COMMERCE OR OF THE MAILS WITH THE REQUISITE
INTENT AND THE OFFENSE IS COMPLETE WHETHER OR NOT THE MURDER IS CARRIED
OUT OR EVEN ATTEMPTED. IN SUCH A CASE, THE PUNISHMENT **3486** EXTENDS TO
FIVE YEARS OF IMPRISONMENT AND A $5,000 FINE. IF, HOWEVER, PERSONAL INJURY
RESULTS, THE PUNISHMENT IS UP TO TWENTY YEARS OF IMPRISONMENT AND A
$20,000 FINE; AND IF DEATH RESULTS, THE PUNISHMENT CAN EXTEND TO LIFE
IMPRISONMENT AND A $50,000 FINE.

SECTION 1952B PROSCRIBES CONTRACT MURDERS AND OTHER VIOLENT CRIMES BY
ORGANIZED CRIME FIGURES. SUCH CRIMES FREQUENTLY DO NOT INVOLVE
INTERSTATE TRAVEL OR THE USE OF INTERSTATE FACILITIES AND ARE SOMETIMES
NOT PERFORMED FOR MONEY OR OTHER DIRECT PECUNIARY BENEFIT, BUT RATHER AN
AN ASPECT OF MEMBERSHIP IN A CRIMINAL ORGANIZATION. THEREFORE, THE NEW
SECTION PROSCRIBES NOT ONLY MURDER, KIDNAPPING, MAIMING, SERIOUS
ASSAULTS, AND THE OTHER ENUMERATED OFFENSES WHEN DONE AS CONSIDERATION
FOR THE RECEIPT OF OR A PROMISE OR AGREEMENT TO PAY 'ANYTHING OF PECUNIARY
VALUE' [FN794] FROM AN ENTERPRISE ENGAGED IN RACKETEERING ACTIVITY, BUT
ALSO SUCH CRIMES WHEN DONE FOR THE PURPOSE OF GAINING ENTRANCE TO OR
MAINTAINING OR INCREASING POSITION IN SUCH AN ENTERPRISE. THE TERM
'ENTERPRISE' IS DEFINED AS 'ANY PARTNERSHIP, CORPORATION, ASSOCIATION, OR
OTHER *307 LEGAL ENTITY, AND ANY UNION OR GROUP OF INDIVIDUALS ASSOCIATED
IN FACT ALTHOUGH NOT A LEGAL ENTITY, WHICH IS ENGAGED IN, OR THE ACTIVITIES
OF WHICH AFFECT, INTERSTATE OR FOREIGN COMMERCE.' THE DEFINITION IS VERY
ORGANIZATIONS (RICO) STATUTE, WHICH HAS BEEN HELD TO INCLUDE ILLEGAL
ORGANIZATIONS SUCH AS ORGANIZED CRIME 'FAMILIES' AS WELL AS LEGITIMATE
BUSINESS ORGANIZATIONS. [FN795] THE COMMITTEE INTENDS THAT THE TERM
ENTERPRISE HERE HAVE THE SAME SCOPE. RACKETEERING ACTIVITY IS DEFINED TO
INCORPORATE THE DEFINITION SET FORTH IN PRESENT SECTION 1961. ATTEMPTED
MURDER, KIDNAPPING, MAIMING AND ASSAULT ARE ALSO COVERED. WHILE SECTION
1952B ONLY COVERS THE PERSON WHO ACTUALLY COMMITS OR ATTEMPTS THE
OFFENSE AS OPPOSED TO THE PERSON WHO REQUESTED OR ORDERED IT, THE LATTER

SECTION 1952B ALSO COVERS THREATS TO COMMIT A 'CRIME OF VIOLENCE.' THE TERM
'CRIME OF VIOLENCE' IS DEFINED, FOR PURPOSES OF ALL OF TITLE 18, U.S.C. IN
SECTION 1001 OF THE BILL (THE FIRST SECTION OF PART A OF TITLE X). ALTHOUGH
THE TERM IS OCCASIONALLY USED IN PRESENT LAW, [FN796] IT IS NOT DEFINED, AND
NO BODY OF CASE LAW HAS ARISEN WITH RESPECT TO IT. HOWEVER, THE PHRASE IS
COMMONLY USED THROUGHOUT THE BILL, [FN797] AND ACCORDINGLY THE
COMMITTEE HAS CHOSEN TO DEFINE IT FOR GENERAL APPLICATION IN TITLE 18.
THE DEFINITION IS TAKEN FROM S. 1630 AS REPORTED IN THE 97TH CONGRESS.
[FN798] THE TERM MEANS AN OFFENSE-- EITHER A FELONY OR A MISDEMEANOR--
THAT HAS AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF
PHYSICAL FORCE AGAINST THE PERSON OR PROPERTY OF ANOTHER, OR ANY FELONY
THAT, BY ITS NATURE, INVOLVES THE SUBSTANTIAL **3487 RISK THAT PHYSICAL
FORCE AGAINST PERSON OR PROPERTY MAY BE USED IN THE COURSE OF ITS
COMMISSION. THE FORMER CATEGORY WOULD INCLUDE A THREATENED OR
ATTEMPTED SIMPLE ASSAULT [FN799] OR BATTERY [FN800] ON ANOTHER PERSON;
OFFENSES SUCH AS BURGLARY IN VIOLATION OF A STATE LAW AND THE ASSIMILATIVE
CRIMES ACT [FN801] WOULD BE INCLUDED IN THE LATTER CATEGORY INASMUCH AS
SUCH AN OFFENSE WOULD INVOLVE THE SUBSTANTIAL RISK OF PHYSICAL FORCE
AGAINST ANOTHER PERSON OR AGAINST THE PROPERTY.

*308 PART B-- SOLICITATION TO COMMIT A CRIME OF VIOLENCE

1. IN GENERAL AND PRESENT FEDERAL LAW
PART B OF TITLE X IS DESIGNED TO PROSCRIBE THE OFFENSE OF SOLICITATION TO COMMIT A FEDERAL CRIME OF VIOLENCE. IT IS DERIVED FROM A PROVISION IN S. 2572 AS PASSED BY THE SENATE IN THE 97TH CONGRESS. THE COMMITTEE BELIEVES THAT A PERSON WHO MAKES A SERIOUS EFFORT TO INDUCE ANOTHER PERSON TO COMMIT A CRIME OF VIOLENCE IS A CLEARLY DANGEROUS PERSON AND THAT HIS ACT DESERVES CRIMINAL SANCTIONS WHETHER OR NOT THE CRIME OF VIOLENCE IS ACTUALLY COMMITTED. THE OFFICIALS TO INTERVENE AT AN EARLY STAGE WHERE THERE HAS BEEN A CLEAR DEMONSTRATION OF AN INDIVIDUAL’S CRIMINAL INTENT AND DANGER TO SOCIETY. OF COURSE, IF THE PERSON SOLICITED ACTUALLY CARRIES OUT THE CRIME, THE SOLICITOR IS PUNISHABLE AS AN AIDER AND ABETTOR. [FN802]

AT THE PRESENT TIME THERE IS NO FEDERAL LAW THAT PROHIBITS SOLICITATION GENERALLY, ALTHOUGH THERE ARE A FEW STATUTES DEFINING SPECIFIC OFFENSES WHICH CONTAIN LANGUAGE PROHIBITING SOLICITATION. FOR EXAMPLE, THE CURRENT BRIBERY STATUTE [FN803] PROHIBITS SOLICITING THE PAYMENT OF A BRIBE. MOREOVER S. 1630, AS APPROVED BY THE COMMITTEE IN THE 97TH CONGRESS, INCLUDED A SOLICITATION OFFENSE THAT WOULD HAVE APPLIED TO A WIDE PANOPLY OF OFFENSES, [FN804] NOT JUST TO SOLICITATIONS TO COMMIT A CRIME OF VIOLENCE COVERED BY PART B.

2. PROVISIONS OF THE BILL, AS REPORTED

PART B OF TITLE X ADDS A NEW SECTION 373 OF TITLE 18 TO PROSCRIBE THE SOLICITING, COMMANDING, INDUCING, OR OTHERWISE ENDEAVORING TO PERSUADE ANOTHER PERSON TO ENGAGE IN CONDUCT CONSTITUTING A CRIME OF VIOLENCE, WITH THE INTENT THAT THE CRIME ACTUALLY BE COMMITTED. THE SOLICITATION, COMMAND, OR INDUCEMENT MUST BE UNDER CIRCUMSTANCES THAT STRONGLY CORROBORATE THE PERSON’S INTENT THAT THE OTHER PERSON ACTUALLY ENGAGE IN CONDUCT CONSTITUTING THE CRIME OF VIOLENCE. THE PENALTY IS UP TO ONE-HALF THE MAXIMUM PRISON TERM AND FINE THAT COULD BE IMPOSED FOR THE CRIME SOLICITED, AND UP TO TWENTY YEARS IF THAT CRIME CARRIES THE SENTENCE OF DEATH.

A LENGTHY DISCUSSION OF THE ELEMENTS OF THE OFFENSE, WHICH THE COMMITTEE INTENDS TO APPLY TO PART B, IS CONTAINED IN THE REPORT **3488** ON S. 1630 IN THE 97TH CONGRESS. [FN805] IN GENERAL THE SOLICITATION OR COMMAND MUST BE MADE UNDER CIRCUMSTANCES SHOWING THAT THE ACTOR IS SERIOUS THAT THE ‘CRIME OF VIOLENCE’ [FN806] BE CARRIED OUT. THUS, A PERSON *309* AT A BASEBALL GAME WHO SHOUTS ‘KILL THE UMPIRE’ WOULD NOT BE GUILTY OF THE OFFENSE SINCE THE CIRCUMSTANCES WOULD NOT BEAR OUT THE CONCLUSION THAT HE GENUINELY WANTED THE RESULT. ON THE OTHER HAND, A PERSON WHO SHOUTED ENCOURAGEMENT TO A MOB SURROUNDING A JAIL TO LYNCH A PRISONER MIGHT WELL BE FOUND TO HAVE INTENDED THAT OTHER PERSONS ENGAGE IN VIOLENT CRIMINAL CONDUCT. ADDITIONALLY, THE DEFENDANT MUST ENGAGE IN CONDUCT CHARACTERIZABLE AS COMMANDING, ENTREATING, INDUCING, OR ENDEAVORING TO PERSUADE ANOTHER PERSON TO ACT. FOR EXAMPLE, AN ORDER TO COMMIT AN OFFENSE MADE BY A PERSON TO ANOTHER WIT WHOM HE STANDS IN A RELATIONSHIP OF INFLUENCE OR AUTHORITY WOULD CONSTITUTE A COMMAND. THREATENING ANOTHER PERSON IF HE WILL NOT COMMIT A OFFENSE WOULD CONSTITUTE A FORM OF INDUCEMENT OR ENDEAVORING TO PERSUADE AS WOULD OFFERING TO PAY HIM TO COMMIT AN OFFENSE.

WHILE THE SECTION RESTS PRIMARILY ON WORDS OF INSTIGATION TO CRIME, THE COMMITTEE WISHES TO MAKE IT CLEAR THAT WHAT IS INVOLVED IS LEGITIMATELY PROSCRIBABLE CRIMINAL ACTIVITY, NOT ADVOCACY OF IDEAS THAT IS PROTECTED BY THE FIRST AMENDMENT RIGHT OF FREE SPEECH. [FN807] THE COMMITTEE AGREES WITH THE FOLLOWING SUMMARY BY A RESPECTED FIRST AMENDMENT SCHOLAR OF THE RELATIONSHIP BETWEEN THE FIRST AMENDMENT AND CRIMINAL SOLICITATION:
The problem is, indeed, no different from that involving the use of speech generally in the commission of crimes of action. Most crimes—certainly those in which more than one person participates—involves the use of speech or other communication. Where the communication is an integral part of a course of criminal action, it is treated as action and receives no protection under the First Amendment. Solicitation to crime is similar conduct, but in a situation where for some reason the contemplated crime does not take place. Solicitation involves a hiring or partnership arrangement, designed to accomplish a specific action in violation of law, where the communication is an essential link in a direct chain leading to criminal action, though the action may have been interrupted. In short, the person charged with solicitation may be seen as a particular instance of the more general category of criminal attempts. Here, also, the applicable legal doctrine undertakes to draw the line between 'expression' and 'action.' The fact that issues of this nature rarely arise indicates that establishing the division between free expression and solicitation to crime has not created a serious problem.

**3489** Subsection (B) provides an affirmative defense of renunciation under the section. For the defense to apply, the defendant must have voluntarily and completely abandoned his criminal intent and actually prevented the commission of the crime (not merely made efforts to prevent it). The subsection specifically provides that a renunciation is not complete and voluntary if it is motivated in whole or in part by a decision to postpone the commission of the crime to another time or to substitute another victim. If the defendant raises the defense of renunciation, he has the burden of proving it by a preponderance of the evidence.

Subsection (C) provides that the solicitor cannot successfully assert a defense that the solicitee could not be convicted of the crime of violence because he lacked the state of mind required or was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution. The prohibition of this defense is based on the universally acknowledged principle that one is no less guilty of the commission of a crime because he uses the overt behavior of an innocent or irresponsible agent. [FN809] On the other hand, this provision does not mean that the irresponsibility or incompetence of the solicitee is never relevant. The lack of responsibility or competence of the person solicited may be highly relevant in determining the solicitor's intent. For example, an entreaty to a young child or to an imbecile may indicate the solicitor's lack of serious purpose.

**311** Part C—Felony-Murder Rule

1. In general and present federal law

Part C of Title X expands the definition of felony murder. It is identical to a provision in S. 2572 as passed by the Senate in the 97th Congress. Under the common law, a murder committed during any felony was held to be committed with a sufficient degree of malice to warrant punishment as first degree murder. However, under present federal law, 18 U.S.C. 1111, the felony murder doctrine only applies to killings committed during an actual or attempted arson, rape, burglary, or robbery. The Committee has concluded that limiting the felony-murder rule to these four offenses is too restrictive. For example, the current statute does not cover a killing committed during the crimes of treason, espionage, or sabotage, or...
DURING A KIDNAPING OR PRISON ESCAPE, CRIMES WHICH POSE AS GREAT IF NOT A
GREATER THREAT TO HUMAN LIFE THAN THE FOUR ALREADY LISTED.

2. PROVISIONS OF THE BILL, AS REPORTED

PART C OF TITLE X AMENDS 18 U.S.C. 1111(A), WHICH PRESENTLY PROVIDES THAT
EVERY WILLFUL, DELIBERATE, MALICIOUS, AND PREMEDITATED KILLING, OR EVERY
KILLING 'COMMITTED IN THE PERPETRATION OF, OR ATTEMPT TO PERPETRATE, ANY
ARSON, RAPE, BURGLARY, OR ROBBERY' IS MURDER IN THE FIRST DEGREE. THE
AMENDMENT ADDS THE OFFENSES OF **3490 ESCAPE, MURDER, KIDNAPING,
TREASON, ESPIONAGE, AND SABOTAGE TO THE FOUR LISTED OFFENSES. THUS THE
FELONY MURDER RULE WOULD APPLY TO A KILLING OCCURRING DURING ONE OF
THESE OFFENSES AND WOULD CONSTITUTE FIRST DEGREE MURDER. MURDER IS
INCLUDED IN THE LIST TO COVER A SITUATION IN WHICH THE DEFENDANT ACTS IN
THE HEAT OF PASSION IN AN ATTEMPT TO KILL A, BUT INSTEAD KILLS B. THE
COMMITTEE BELIEVES THAT THE DANGER TO INNOCENT PERSONS PRESENTED IN THIS
TYPE OF SITUATION IS SO SEVERE THAT THE DEFENDANT SHOULD BE CHARGED WITH
FIRST DEGREE MURDER EVEN THOUGH IF HE HAD KILLED A HE COULD ONLY BE
CHARGED WITH SECOND DEGREE MURDER.

*312 PART D-- MANDATORY PENALTY FOR THE USE OF A FIREARM IN A FEDERAL CRIME
OF VIOLENCE

1. IN GENERAL AND PRESENT FEDERAL LAW

PART D OF TITLE X IS DESIGNED TO IMPOSE A MANDATORY PENALTY WITHOUT THE
POSSIBILITY OF PROBATION OR PAROLE, FOR ANY PERSON WHO USES OR CARRIES A
FIREARM DURING AND IN RELATION TO A FEDERAL CRIME OF VIOLENCE. ALTHOUGH
PRESENT FEDERAL LAW, SECTION 924(C) OF TITLE 18, APPEARS TO SET OUT A
MANDATORY MINIMUM SENTENCING SCHEME FOR THE USE OR UNLAWFUL CARRYING
OF A FIREARM DURING ANY FEDERAL FELONY, DRAFTING PROBLEMS AND
INTERPRETATIONS OF THE SECTION IN RECENT SUPREME COURT DECISIONS HAVE
GREATLY REDUCED ITS EFFECTIVENESS AS A DETERRENT TO VIOLENT CRIME.
SECTION 924(C) SETS OUT AN OFFENSE DISTINCT FROM THE UNDERLYING FELONY AND
IS NOT SIMPLY A PENALTY PROVISION. [FN810] HENCE, THE SENTENCE PROVIDED IN
SECTION 924(C) IS IN ADDITION TO THAT FOR THE UNDERLYING FELONY AND IS FROM
ONE TO TEN YEARS FOR A FIRST CONVICTION AND FROM TWO TO TWENTY-FIVE YEARS
FOR A SUBSEQUENT CONVICTION. HOWEVER, SECTION 924(C) IS DRAFTED IN SUCH A
WAY THAT A PERSON MAY STILL BE GIVEN A SUSPENDED SENTENCE OR BE PLACED ON
PROBATION FOR HIS FIRST VIOLATION OF THE SECTION, AND IT IS AMBIGUOUS AS TO
WHETHER THE SENTENCE FOR A FIRST VIOLATION MAY BE MADE TO RUN
CONCURRENTLY WITH THAT FOR THE UNDERLYING OFFENSE. SOME COURTS HAVE
HELD THAT A CONCURRENT SENTENCE MAY BE GIVEN. [FN811] MOREOVER, EVEN IF A
PERSON IS SENTENCED TO IMPRISONMENT UNDER SECTION 924(C), THE NORMAL
PAROLE ELIGIBILITY RULES APPLY.
IN ADDITION TO THESE PROBLEMS WITH PRESENT SECTION 924(C), THE SUPREME
COURT'S DECISIONS IN SIMPSON V. UNITED STATES, [FN812] AND BUSIC V. UNITED
STATES; [FN813] HAVE NEGATED THE SECTION'S USE IN CASES INVOLVING STATUTES,
SUCH AS THE BANK ROBBERY STATUTE [FN814] AND ASSAULT ON FEDERAL OFFICER
STATUTE [FN815] WHICH HAVE THEIR OWN ENHANCED, BUT NOT MANDATORY,
PUNISHMENT PROVISIONS IN SITUATIONS WHERE THE OFFENSE IS COMMITTED WITH
A DANGEROUS WEAPON. THESE ARE PRECISELY THE TYPE OF EXTREMELY DANGEROUS
OFFENSES FOR WHICH A MANDATORY PUNISHMENT FOR THE USE OF A FIREARM IS THE
MOST APPROPRIATE.
**3491 In Simpson, the defendants had been convicted of armed bank
robbery involving the use of a dangerous weapon or device in violation of
18 U.S.C. 2113(A) AND (D), AND OF USING FIREARMS TO COMMIT THE ROBBERY IN VIOLATION OF 18 U.S.C. 924(C). THEY WERE SENTENCED TO MAXIMUM TERMS OF 25 YEARS IN PRISON ON THE AGGRAVATED ROBBERY COUNT AND TO 10-YEAR CONSECUTIVE PRISON TERMS ON THE FIREARMS *313 COUNT. THE SUPREME COURT HELD THAT THE STATUTORY CONSTRUCTION AND LEGISLATIVE HISTORY OF SECTION 924(C) RENDERED IT INAPPLICABLE IN CASES WHERE THE PREDICATE FELONY STATUTE CONTAINS ITS OWN ENHANCEMENT PROVISION FOR THE USE OF A DANGEROUS WEAPON.


THE COMMITTEE HAS CONCLUDED THAT SUBSECTION 924(C) SHOULD BE COMPLETELY REVISED TO ENSURE THAT ALL PERSONS WHO COMMIT FEDERAL CRIMES OF VIOLENCE, INCLUDING THOSE CRIMES SET FORTH IN STATUTES WHICH ALREADY PROVIDE FOR ENHANCED SENTENCES FOR THEIR COMMISSION WITH A DANGEROUS WEAPON, [FN817] RECEIVE A MANDATORY SENTENCE, WITHOUT THE POSSIBILITY OF THE SENTENCE BEING MADE TO RUN CONCURRENTLY WITH THAT FOR THE UNDERLYING OFFENSE OR FOR ANY OTHER CRIME AND WITHOUT THE POSSIBILITY OF A PROBATIONARY SENTENCE OR PAROLE.

2. PROVISIONS OF THE BILL, AS REPORTED

PART D OF TITLE X REPRESENTS A COMPLETE REVISION OF SUBSECTION 924(C) OF TITLE 18 TO OVERCOME THE PROBLEMS WITH THE PRESENT SUBSECTION DISCUSSED ABOVE. AS AMENDED BY PART D, SECTION 924(C) PROVIDES FOR A MANDATORY, DETERMINATE SENTENCE FOR A PERSON WHO USES OR CARRIES A FIREARM DURING AND IN RELATION TO ANY FEDERAL 'CRIME OF VIOLENCE,' INCLUDING OFFENSES SUCH AS BANK ROBBERY OR ASSAULT ON A FEDERAL OFFICER WHICH PROVIDE FOR THEIR OWN ENHANCED PUNISHMENT IF COMMITTED BY MEANS OF A DANGEROUS WEAPON. [FN818] IN THE CASE OF A FIRST CONVICTION UNDER THE SUBSECTION, THE DEFENDANT WOULD BE SENTENCED TO IMPRISONMENT FOR FIVE YEARS. FOR A SECOND OR SUBSEQUENT **3492 CONVICTION HE WOULD RECEIVE A SENTENCE OF IMPRISONMENT FOR TEN YEARS. IN EITHER CASE, THE DEFENDANT COULD NOT BE GIVEN A SUSPENDED OR PROBATIONARY SENTENCE, NOR COULD ANY SENTENCE UNDER THE REVISED SUBSECTION BE MADE TO RUN CONCURRENTLY WITH THAT FOR THE UNDERLYING OFFENSE OR WITH THAT FOR ANY OTHER OFFENSE. IN ADDITION, THE COMMITTEE INTENDS THAT THE MANDATORY SENTENCE UNDER THE REVISED SUBSECTION 924(C) BE SERVED PRIOR TO THE START OF THE SENTENCE FOR THE UNDERLYING OR ANY OTHER OFFENSE. FOR EXAMPLE, A PERSON CONVICTED OF ARMED BANK ROBBERY IN VIOLATION OF SECTION 2113(A) AND (D) AND OF USING A GUN IN ITS COMMISSION (FOR EXAMPLE BY POINTING IT AT A TELLER OR OTHERWISE DISPLAYING IT WHETHER OR NOT IT IS FIRED) [FN819] WOULD HAVE TO SERVE FIVE YEARS (ASSUMING IT WAS HIS FIRST CONVICTION UNDER THE SUBSECTION) LESS ONLY GOOD TIME CREDIT FOR PROPER BEHAVIOR IN PRISON, BEFORE HIS SENTENCE FOR THE CONVICTION UNDER SECTION 2113(A) AND (D) COULD START TO RUN.
FINALLY, A PERSON SENTENCED UNDER THE NEW SUBSECTION 924(C) WOULD NOT BE ELIGIBLE FOR PAROLE.

**315** PART E--ARMOR-PIERCING BULLETS

1. IN GENERAL AND PRESENT FEDERAL LAW

PART E OF TITLE X PROVIDES FOR A NEW OFFENSE OF USING ARMOR-PIERCING HANDGUN AMMUNITION DURING AND IN RELATION TO A FEDERAL CRIME OF VIOLENCE. THIS SECTION IS NEW TO FEDERAL LAW BUT AN IDENTICAL PROVISION WAS INCLUDED IN S. 2572 AS PASSED BY THE SENATE IN THE LAST CONGRESS. THIS PROVISION WAS DEVELOPED IN RESPONSE TO THE PUBLICITY THAT HAS BEEN GIVEN IN RECENT YEARS TO THE EASY AVAILABILITY OF AMMUNITION THAT WILL PENETRATE THE TYPE OF BULLET-RESISTANT VESTS COMMONLY USED BY POLICE OFFICERS AND HIGH PUBLIC OFFICIALS. THE COMMITTEE IS CONCERNED THAT THIS PUBLICITY WILL HAVE A TWO-FOLD ADVERSE EFFECT. FIRST, IT MAY ENCOURAGE ASSASSINS AND OTHER CRIMINALS TO SEARCH OUT THIS PARTICULARLY DANGEROUS TYPE OF AMMUNITION FOR USE IN THEIR ENDEavors. SECOND, THE PUBLICITY MAY ENCOURAGE A FATALISTIC ATTITUDE BY POLICE OFFICERS WHO MAY DECIDE THAT THE USE OF BODY ARMOR IS NOT WORTH THE DISCOMFORT OF WEARING IT. IN THIS REGARD, IT SHOULD BE NOTED THAT THE SOFT BODY ARMOR WORN BY POLICEMEN TODAY, WHILE RELATIVELY LIGHT AND COMFORTABLE IN COMPARISON WITH OLDER **3493** TYPES, IS BY NO MEANS 'BULLET-PROOF.' IT IS DESIGNED TO DEFEAT THE MOST COMMON TYPES OF HANDGUN AMMUNITION BUT WILL NOT STOP ROUNDs DESIGNED TO PIERCE ARMOR.

THE COMMITTEE IS AWARE OF THE MANY BILLS THAT HAVE BEEN INTRODUCED IN THE HOUSE AND SENATE THAT HAVE ATTEMPTED TO PROHIBIT THE ROLE OR USE OF HANDGUN BULLETS EITHER DESIGNED TO PIERCE OR WHICH ARE OTHERWISE CAPABLE OF PIERCING COMMON POLICE BODY ARMOR. [FN820] THESE BILLS COMMONLY DEFINE BODY ARMOR IN TERMS OF PENETRATION RESISTANCE EQUAL TO A CERTAIN NUMBER OF LAYERS OF KEVLAR, A TRADE NAME FOR A SYNTHETIC FIBER USED IN MOST MODERN BODY ARMOR. THE BILLS ALSO FREQUENTLY GIVE THE SECRETARY OF THE TREASURY OR SOME OTHER OFFICIAL THE AUTHORITY TO DETERMINE THE PROCEDURES TO MEASURE THE DEGREE TO WHICH BULLETS WILL PIERCE BODY ARMOR.

THE COMMITTEE IS CONCERNED THAT ANY SUCH TEST OR PROCEDURES WOULD RESULT IN CRIMINALIZING THE USE OF A LARGE NUMBER OF BULLETS CURRENTLY ON THE MARKET AND WHICH ARE NOT INTENDED TO DEFEAT BODY ARMOR. LIKE THE DEPARTMENT OF JUSTICE, THE COMMITTEE HAS 'SERIOUS CONCERNS OVER WHETHER * * * ANY * * * TEST THAT MIGHT BE DEVISED AT THE PRESENT TIME WOULD REACH ALL HANDGUN AMMUNITION ROUNDS CAPABLE OF PENETRATING SOFT BODY ARMOR WITHOUT INCLUDING A NUMBER OF POPULAR HANDGUN BULLETS WHICH HAVE LONG BEEN WIDELY USED FOR LEGITIMATE SPORTING AND RECREATIONAL PURPOSES. THE SIMPLE FACT IS THAT SOME BULLETS WITH A LEGITIMATE USE WILL DEFEAT SOFT BODY ARMOR.' [FN821]

**316** ACCORDINGLY, THE COMMITTEE BELIEVES THAT THE MOST EFFECTIVE WAY TO DEAL WITH THE PROBLEM OF ARMOR-PIERCING BULLETS IS TO DISCOURAGE THE CARRYING DURING A FEDERAL CRIME OF VIOLENCE OF A HANDGUN LOADED WITH ANY BULLET WHICH, IF FIRED FROM THAT HANDGUN, WOULD PIERCE THE MOST COMMONLY WORN TYPE OF POLICE BODY ARMOR. SINCE THE AMMUNITION MUST BE USED WITH A HANDGUN IN A CRIME OF VIOLENCE THE NEW PROVISION WILL IN NO WAY CRIMINALIZE THE LEGITIMATE SPORTING, RECREATIONAL, OR SELF-DEFENSE USE OF ANY TYPE OF HANDGUN OR AMMUNITION.

2. PROVISIONS OF THE BILLS, AS REPORTED

PART E OF TITLE X ADDS A NEW SECTION 929 TO TITLE 18 TO PROVIDE FOR A

HANDGUN IS DEFINED AS 'ANY FIREARM, INCLUDING A PISTOL OR REVOLVER, ORIGINALLY DESIGNED TO BE FIRED BY THE USE OF A SINGLE HAND.' THUS, THE DEFINITION WOULD NOT INCLUDE A SAWED-OFF RIFLE, BUT WOULD INCLUDE A PISTOL OR REVOLVER THAT HAD BEEN CUSTOMIZED BY THE ADDITION OF AN EXTRA LONG BARREL.

THE NEW SECTION PROVIDES THAT A PERSON SENTENCED UNDER IT SHALL NOT BE GIVEN A SUSPENDED SENTENCE OR PLACED ON PROBATION. MOREOVER, HE IS NOT ELIGIBLE FOR PAROLE. THE SENTENCE CANNOT BE SERVED CONCURRENTLY WITH ANY OTHER SENTENCE, INCLUDING A SENTENCE FOR THE UNDERLYING CRIME OF VIOLENCE OR FOR A CONVICTION UNDER SECTION 924(C) [FN824] FOR USING OR CARRYING THE GUN ITSELF IN CONNECTION WITH THE CRIME OF VIOLENCE. IN SHORT THE COMMITTEE INTENDS THAT THE MANDATORY PUNISHMENT FOR THE USE OF THE ARMOR-PIERCING AMMUNITION *317 UNDER SECTION 929 BE IN ADDITION TO THE MANDATORY PUNISHMENT FOR THE USE OR CARRYING OF THE FIREARM UNDER THE AMENDED SECTION 924(C). THUS, A PERSON WHO ROBBED A BANK WITH A HANDGUN LOADED WITH ARMOR-PIERCING AMMUNITION WOULD, IF CHARGED WITH AND CONVICTED OF A VIOLATION OF 18 U.S.C. 924 AND 929, BE SENTENCED TO A MANDATORY TERM OF AT LEAST TEN YEARS-- FIVE FOR CARRYING THE GUN AND AT LEAST FIVE FOR THE BULLETSS-- WITHOUT PAROLE ELIGIBILITY BEFORE HE BEGAN TO SERVE ANY SENTENCE IMPOSED FOR A CONVICTION OF THE UNDERLYING BANK ROBBERY. AS IN THE CASE WITH SECTION 924(C), SECTION 929 SETS OUT A SEPARATE OFFENSE, NOT JUST A PUNISHMENT PROVISION. THEREFORE, IT IS NOT NECESSARY TO CHARGE THE DEFENDANT WITH A VIOLATION OF THE UNDERLYING OFFENSE TO CHARGE HIM WITH A VIOLATION OF SECTION 929.

**318** PART F-- KIDNAPING OF FEDERAL OFFICIALS

1. IN GENERAL AND PRESENT FEDERAL LAW

PART F OF TITLE X AMENDS THE FEDERAL KIDNAPING STATUTE TO COVER THE KIDNAPING OF FEDERAL OFFICERS AND EMPLOYEES WHILE THEY ARE ENGAGED IN, OR ON ACCOUNT OF, THE PERFORMANCE OF THEIR OFFICIAL DUTIES. THE PRESENT FEDERAL KIDNAPING STATUTE, 18 U.S.C. 1201, COVERS KIDNAPING IF THE VICTIM IS TRANSPORTED IN INTERSTATE OR FOREIGN COMMERCE, **3495 IF DONE WITHIN THE SPECIAL MARITIME OR TERRITORIAL JURISDICTION OF THE UNITED STATES, IF DONE WITHIN THE SPECIAL AIRCRAFT JURISDICTION OF THE UNITED STATES, OR IF THE PERSON IS A FOREIGN OFFICIAL, AN INTERNATIONALLY PROTECTED PERSON, OR AN OFFICIAL GUEST. THUS, THE KIDNAPING OF A FEDERAL OFFICER WOULD NOT BE COVERED EXCEPT IN THE UNLIKELY EVENT THAT THE VICTIM OFFICER WAS TRANSPORTED IN INTERSTATE OR FOREIGN COMMERCE OR THE EVENT TOOK PLACE IN THE SPECIAL MARITIME, TERRITORIAL, OR AIRCRAFT JURISDICTION. AT THE PRESENT TIME THE ONLY PERSONAL CRIMES DIRECTED AT MOST FEDERAL OFFICERS AND
employees because of their status are murder [fn825] and assault. [fn826]
the kidnaping of members of congress, cabinet officers and their
principal deputies, the director and deputy director of the cia, and
supreme court justices is covered by 18 u.s.c. 351, and the kidnaping of the
president, the vice president and approximately 20 of the top echelon
presidential and vice presidential staff members is covered by 18 u.s.c.
1751.
the committee has concluded that the kidnaping of any of the federal
officers and employees listed in 18 u.s.c. 1114 should be a federal crime.
these persons are generally engaged in law enforcement or similar work
which can bring them into hostile encounters with the public solely
because of their work as federal employees. moreover, their status could
make them a target for a hostage-taking by a terrorist or subversive
group.

2. provisions of the bill, as reported

part f of title x adds a new subsection (5) to 18 u.s.c. 1201(a), the federal
kidnaping statute, so that the kidnaping of any of the officers and
employees designated in section 1114 of title 18 is covered, provided the
act is committed while the federal employee victim is engaged in, or on
account of, the performance of his official duties. the 'engaged in or on
account of the performance of official duties' limitation is identical to
that in 18 u.s.c. 111 and 18 u.s.c. 1114, which proscribe assaults on federal
officers and murder of federal officers, respectively. the committee
intends that the body of case law that has developed concerning the
meaning of the term in reference to these two statutes apply here. for
example, in united states v. reid [fn827] an off duty dea agent was in
a barbershop getting a haircut when he heard a commotion indicating a
robbery in progress next door in a liquor store. he was shot and
wounded when he intervened to try to apprehend the defendants. the
assault on federal officers statute was held to apply to the defendant
because of a written dea policy that off duty agents were expected to
take reasonable action as law enforcement officers to prevent state
felonies and violent misdemeanors and apprehend the violators.

*319* *320* part g-- crimes against family members of federal officials

1. in general and present federal law

part g of title x is a new provision designed to protect the close
relatives of certain high level officials, such as the president, vice-
president, members of congress, cabinet officers, and federal judges, as
well as federal law enforcement officers, from assaults, kidnapings, or
murders committed with intent to impede, intimidate, interfere with or
re retaliate against the federal official, judge, or law enforcement officer
while engaged in or on account of his official duties. it would add a
section 115 to title 18 to make assaults, kidnapings, or murders of the
immediate family members of these persons federal crimes, if committed
with the requisite intent. threats or attempts to commit these offenses
with the requisite intent would also be covered.
at the present time the only federal statute that covers any of these
offenses is 18 u.s.c. 879, a section added in the last congress [fn828]
which proscribes threats to kill, kidnap, or inflict bodily harm upon a
member of the immediate family of the president or vice president. the
penalty for a violation of this section is only three years of imprisonment
AND A $1,000 FINE, EVEN IF THE THREAT IS CARRIED OUT. THIS SECTION'S CHIEF UTILITY IS IN ALLOWING THE SECRET SERVICE TO INVESTIGATE SUCH THREATS AND IF NECESSARY TO INTERVENE BEFORE THE THREAT CAN BE IMPLEMENTED. THE COMMITTEE BELIEVES THAT SERIOUS CRIMES AGAINST FAMILY MEMBERS OF HIGH LEVEL FEDERAL OFFICIALS, FEDERAL JUDGES, AND FEDERAL LAW ENFORCEMENT OFFICERS, WHICH ARE COMMITTED BECAUSE OF THEIR RELATIVES' JOBS ARE, GENERALLY SPEAKING, PROPER MATTERS OF FEDERAL CONCERN. CLEARLY IT IS A PROPER FEDERAL FUNCTION TO RESPOND TO TERRORISTS AND OTHER CRIMINALS WHO WOULD SEEK TO INFLUENCE THE MAKING OF FEDERAL POLICIES AND INTERFERE WITH THE ADMINISTRATION OF JUSTICE BY ATTACKING CLOSE RELATIVES OF THOSE ENTRUSTED WITH THESE TASKS. THE COMMITTEE DOES NOT INTEND, HOWEVER, THAT FEDERAL JURISDICTION OVER THESE CRIMES SHOULD BE EXCLUSIVE. IN MANY INSTANCES, A CRIME AGAINST, FOR EXAMPLE, THE CHILD OF A CABINET OFFICER, EVEN THOUGH COMMITTED BECAUSE OF THE DEFENDANT'S OPPOSITION TO THE POLICIES OF THE CHILD'S PARENT, COULD BE ADEQUATELY HANDLED BY STATE INVESTIGATORS AND PROSECUTORS.

2. PROVISIONS OF THE BILL, AS REPORTED

PART G OF TITLE X ADDS A NEW SECTION 115 TO TITLE 18. SUBSECTION (A) PROVIDES THAT ANYONE WHO ASSAULTS, KIDNAPS, OR MURDERS, OR ATTEMPTS TO KIDNAP OR MURDER, OR THREATENS TO ASSAULT, KIDNAP OR MURDER A MEMBER OF THE IMMEDIATE FAMILY OF A UNITED STATES OFFICIAL, OF A UNITED STATES JUDGE, OF A FEDERAL LAW ENFORCEMENT OFFICER, *321 **3497 OR OF AN OFFICIAL LISTED UNDER 18 U.S.C. 1114, WITH INTENT TO IMPEDE, INTIMIDATE, INTERFERE WITH, OR RETALIATE AGAINST THE OFFICIAL, JUDGE, OR LAW ENFORCEMENT OFFICER WHILE HE IS ENGAGED IN, OR ON ACCOUNT OF THE PERFORMANCE OF HIS OFFICIAL DUTIES, SHALL BE PUNISHED AS PROVIDED IN SUBSECTION (B). SUBSECTION (B), IN TURN, PROVIDES THAT AN ASSAULT IS TO BE PUNISHED AS SET FORTH IN SECTION 111 WHICH PROVIDES FOR A $5,000 FINE AND THREE YEARS OF IMPRISONMENT FOR A SIMPLE ASSAULT, AND TEN YEARS OF IMPRISONMENT AND A $10,000 FINE FOR ASSAULT WITH A DANGEROUS WEAPON; [FN829] A KIDNAPING OR ATTEMPTED KIDNAPING IS TO BE PUNISHED AS SET FORTH IN SECTION 1201 WHICH PROVIDES FOR UP TO LIFE IMPRISONMENT FOR KIDNAPING AND UP TO TWENTY YEARS OF IMPRISONMENT FOR AN ATTEMPT; [FN830] A MURDER OR ATTEMPTED MURDER IS TO BE PUNISHED AS SET FORTH IN SECTIONS 1111 AND 1113, WHICH PROVIDE FOR UP TO LIFE IMPRISONMENT AND UP TO THREE YEARS OF IMPRISONMENT [FN831] RESPECTIVELY; AND A THREAT TO KIDNAP OR MURDER IS TO BE PUNISHED BY UP TO FIVE YEARS OF IMPRISONMENT AND A $5,000 FINE, WHILE A THREATENED ASSAULT IS TO BE PUNISHED BY UP TO THREE YEARS OF IMPRISONMENT AND A $3,000 FINE. THE TERM 'IMMEDIATE FAMILY MEMBER' IS DEFINED IN SUBSECTION (C) TO MEAN THE FEDERAL OFFICIAL'S SPOUSE, PARENT, BROTHER OR SISTER, CHILD OR PERSON TO WHOM HE STANDS IN LOCO PARENTIS, OR ANY OTHER PERSON LIVING IN HIS HOUSEHOLD AND RELATED TO HIM BY BLOOD OR MARRIAGE. THE TERM 'FEDERAL LAW ENFORCEMENT OFFICER' IS ALSO DEFINED IN SUBSECTION (C) AS MEANING ANY OFFICER, AGENT, OR EMPLOYEE OF THE UNITED STATES AUTHORIZED BY LAW OR BY A GOVERNMENT AGENCY TO ENGAGE IN OR SUPERVISE THE PREVENTION, DETECTION, INVESTIGATION, OR PROSECUTION OF ANY FEDERAL CRIMINAL LAW. IT SHOULD BE NOTED THAT THE NEW SECTION COVERS ATTACKS ON FAMILY MEMBERS OF ALL THE PERSONS LISTED IN 18 U.S.C. 1114 AS WELL AS ON FAMILY MEMBERS OF OTHER LAW ENFORCEMENT OFFICERS NOT THERE LISTED. [FN832] INCLUDED IN THIS LATTER CATEGORY WOULD BE, FOR EXAMPLE, THE INSPECTORS GENERAL AND THEIR STAFFS, AND DEPARTMENT OF JUSTICE STRIKE FORCE ATTORNEYS.

*322 **3498 PART H-- ADDITION OF MAIMING AND INVOLUNTARY SODOMY TO THE
MAJOR CRIMES ACT

1. IN GENERAL AND PRESENT FEDERAL LAW

PART H OF TITLE X ADDS TWO NEW OFFENSES TO THOSE PRESENTLY INCLUDED IN 18 U.S.C. 1153, THE MAJOR CRIMES ACT, WHICH APPLIES TO OFFENSES COMMITTED BY INDIANS IN THE INDIAN COUNTRY. [FN833] THE SIGNIFICANCE OF SECTION 1153 CAN BEST BE UNDERSTOOD BY REFERENCE TO SECTION 1152. UNDER SECTION 1152, THE 'GENERAL LAWS OF THE UNITED STATES,' I.E., THOSE APPLICABLE IN THE SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES, ARE MADE APPLICABLE TO THE INDIAN COUNTRY. HOWEVER, THE SECOND PARAGRAPH OF SECTION 1152 PROVIDES AN EXCEPTION FOR OFFENSES COMMITTED BY ONE INDIAN AGAINST THE PERSON OR PROPERTY OF ANOTHER INDIAN. THESE OFFENSES CAN GENERALLY ONLY BE PROSECUTED IN TRIBAL COURT WHERE THE MAXIMUM PUNISHMENT IS CURRENTLY SIX MONTHS OF IMPRISONMENT AND A $500 FINE. [FN834] SINCE TRIBAL COURT PUNISHMENT HAS LONG BEEN FELT TO BE INADEQUATE FOR THE MOST SEVERE OFFENSES COMMITTED BY ONE INDIAN AGAINST ANOTHER, THE MAJOR CRIMES ACT WAS ENACTED AS AN EXCEPTION TO THE SECOND PARAGRAPH OF 18 U.S.C. 1152. [FN835] SECTION 1153 HAS BEEN AMENDED FROM TIME TO TIME AND NOW INCLUDES FOURTEEN SERIOUS OFFENSES. NOT INCLUDED, HOWEVER, ARE MAIMING AND INVOLUNTARY SODOMY. AN INDIAN WHO COMMIT ONE OF THESE OFFENSES AGAINST ANOTHER INDIAN IS ONLY SUBJECT TO PROSECUTION IN TRIBAL COURT. [FN836] THE COMMITTEE BELIEVES THAT BOTH MAIMING AND INVOLUNTARY SODOMY SHOULD BE INCLUDED IN THE MAJOR CRIMES ACT. MAIMING IS ONE OF THE OLDEST OF FEDERAL CRIMES, HAVING BEEN FIRST PROSCRIBED IN 1790. [FN837] ALTHOUGH Seldom prosecuted, the offense as currently defined is among the most heinous of crimes against the person. 18 U.S.C. 114 PROVIDES FOR SEVEN YEARS OF IMPRISONMENT AND A $1,000 FINE FOR WHOEVER IN THE SPECIAL MARITIME AND TERRITORIAL JURISDICTION 'WITH INTENT TO MAIM OR DISFIGURE, CUTS, BITES OR SLITS THE NOSE, EAR, OR LIP, OR CUTS OUT OR DISABAND THE TONGUE, OR PUTS OUT OR DESTROYS AN EYE, OR CUTS OFF OR DISABANDS A LIMB OR ANY MEMBER OF ANOTHER PERSON ', OR 'THROWS OR POURS UPON ANOTHER PERSON, ANY SCALDING WATER, CORROSIVE ACID, OR CAUSTIC SUBSTANCE.' THERE SEEMS NO REASON WHY THIS OFFENSE, PRESENTLY APPLICABLE WITHIN THE SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES, IS NOT INCLUDED WITHIN THE MAJOR CRIMES ACT, THE *323 **3499 PURPOSE OF WHICH IS TO EXTEND FEDERAL JURISDICTION OVER ALL SERIOUS OFFENSES 'AGAINST THE PERSON OR PROPERTY OF ANOTHER' THAT ARE COMMITTED BY AN INDIAN IN INDIAN COUNTRY. WHILE AN OFFENSE CONSTITUTING MAIMING COULD USUALLY BE PROSECUTED UNDER THE MAJOR CRIMES ACT AS AN 'ASSAULT RESULTING IN SERIOUS BODILY INJURY' UNDER 18 U.S.C. 113(F), THE COMMITTEE BELIEVES IT IS APPROPRIATE TO AMEND THE MAJOR CRIMES ACT TO PERMIT A PROSECUTION FOR THE MORE SPECIFIC AND SERIOUS OFFENSE OF MAIMING, IF SUCH AN OPPORTUNITY ARISES, RATHER THAN USING THE GENERAL ASSAULT PROVISIONS IN 18 U.S.C. 113. THE CRIME OF FORCIBLE OR INVOLUNTARY SODOMY, ALTHOUGH ONE OF THE MOST SERIOUS SEXUAL OFFENSES KNOWN TO OUR LAW, IS NOT NOW WITHIN THE MAJOR CRIMES ACT. [FN838] ITS ABSENCE REPRESENTS A SERIOUS GAP IN FELONY COVERAGE MAKING IT IMPOSSIBLE TO PROSECUTE AND PUNISH (EXCEPT BY A TRIBAL COURT AT A PETTY VICTIM BY AN INDIAN IN INDIAN COUNTRY. IN AT LEAST ONE CASE OF WHICH THE COMMITTEE IS AWARE, PROSECUTION OF AN INDIAN FOR FORCIBLY SODOMIZING HIS THREE-YEAR OLD GRANDSON HAD TO BE DECLINED FOR FAILURE OF THE MAJOR CRIMES ACT TO PROSCRIBE SODOMY. CLEARLY, IN A CASE WHERE THE VICTIM AND THE OFFENDER ARE OF THE SAME FAMILY, SUCH A RESULT MAY HAVE CONTINUING TRAGIC CONSEQUENCES SINCE THERE MAY BE NO OTHER PRACTICAL WAY TO REMOVE THE OFFENDER FROM THE SITUATION AND TO PROTECT THE VICTIM.
FROM HIS UNWANTED SEXUAL ATTENTION.

2. PROVISIONS OF THE BILL, AS REPORTED

PART H OF TITLE X AMENDS 18 U.S.C. 1153 BY INSERTING THE WORDS 'MAIMING' AND 'IN VOLUNTARY SODOMY' INTO THE LIST OF OFFENSES THERE SET OUT FOR THE REASONS EXPLAINED ABOVE. [FN839] IN ADDITION, THE COMMITTEE STRUCK OUT THE WORK 'LARCENY' THAT APPEARS IN PRESENT SECTION 1153 AND REPLACED IT WITH THE TERM 'A FELONY UNDER SECTION 661 OF THIS TITLE.' 18 U.S.C. 661 HAS BEEN HELD TO DEFINE 'LARCENY' FOR PURPOSES OF SECTION 1153. [FN840] SECTION 661 MAKES LARCENIES OF $100 OR LESS A MISDEMEANOR PUNISHABLE BY A FINE OF UP TO $1,000 AND UP TO A YEAR IN PRISON AND MAKES ALL OTHER LARCENIES FELONIES PUNISHABLE BY UP TO FIVE YEARS OF IMPRISONMENT AND A $5,000 FINE. FEDERAL JURISDICTION OVER AN INDIAN FOR COMMITTING PETTY LARCENY [FN841] IS ANOMALOUS IN LIGHT OF THE FACT THAT THE PURPOSE OF THE MAJOR CRIMES ACT IS TO COVER ONLY CERTAIN ENUMERATED MAJOR OFFENSES AND THAT ALL OF THE OTHER OFFENSES IN SECTION 1153 ARE SERIOUS FELONIES SUCH AS MURDER, RAPE, AND ARSON. MOREOVER, JURISDICTION OVER PETTY LARCENY IS UNNECESSARY AND VIRTUALLY NEVER ASSERTED IN LIGHT OF TRIBAL COURT JURISDICTION OVER THIS OFFENSE. THE COMMITTEE THEREFORE BELIEVES IT IS APPROPRIATE TO LIMIT MAJOR CRIMES ACT JURISDICTION OVER LARCENIES TO THOSE LARCENIES THAT ARE FELONIES.

*324 **3500 PART I-- DESTRUCTION OF MOTOR VEHICLES

1. IN GENERAL AND PRESENT FEDERAL LAW

PART I OF TITLE X IS DESIGNED TO DEAL WITH THE OFFENSE OF DESTRUCTION OF TRUCKS. IT IS IDENTICAL TO A PROVISION IN S. 2572 AS PASSED BY THE SENATE IN THE 97TH CONGRESS. PRESENT FEDERAL LAW, 18 U.S.C. 33, COVERS THE DESTRUCTION OR DAMAGE OF MOTOR VEHICLES IF DONE WITH THE INTENT TO ENDANGER THE SAFETY OF ANYONE ON BOARD. THE TERM MOTOR VEHICLE IS DEFINED [FN842] AS A CONVEYANCE USED ON THE HIGHWAYS FOR COMMERCIAL PURPOSES IN THE 'TRANSPORTATION OF PASSENGERS OR PASSENGERS AND PROPERTY.' THUS, SECTION 33 DOES NOT REACH THE DESTRUCTION OR DAMAGE OF A TRUCK WHICH CARRIERS ONLY CARGO, NOT PASSENGERS. ANOTHER STATUTE [FN843] PROSCRIBES THE ACTUAL OR ATTEMPTED DESTRUCTION OF CARGO MOVING IN INTERSTATE COMMERCE, BUT IS LIMITED TO THE CARGO ITSELF, NOT THE TRUCK. THUS, THERE IS NO FEDERAL STATUTE PROSCRIBING, FOR EXAMPLE, THE SHOOTING AT A TRUCK AND DAMAGING IT WITH INTENT TO HURT OR KILL THE DRIVER, AN OCCASIONAL OCCURRENCE DURING CERTAIN LABOR DISPUTES AND AT OTHER TIMES. THE COMMITTEE BELIEVES THERE IS A FEDERAL INTEREST IN VINDICATING THESE OFFENSES WHICH OFTEN TAKE PLACE IN REMOTE AREAS WHERE STATE LAW ENFORCEMENT MAY NOT BE EFFECTIVE. MOREOVER, THERE IS A DEFINITE FEDERAL INTEREST IN KEEPING OPEN THE CHANNELS OF INTERSTATE COMMERCE IN WHICH TRUCKS PLAY A CRITICAL ROLE.

2. PROVISIONS OF THE BILL, AS REPORTED

PART I OF TITLE X AMENDS THE DEFINITION OF THE TERM 'MOTOR VEHICLE' IN THE SECOND PARAGRAPH OF 18 U.S.C. 31 TO INCLUDE A VEHICLE USED FOR COMMERCIAL PURPOSES ON THE HIGHWAYS IN THE TRANSPORTATION OF 'PASSENGERS, PASSENGERS AND PROPERTY, OR PROPERTY OR CARGO.' THE PHRASE 'PROPERTY OR CARGO' IS ADDED TO COVER TRUCKS. THUS, A PERSON WHO DESTROYS OR DAMAGES
A truck with intent to endanger the safety of the driver or any other person on board could be prosecuted under 18 U.S.C. 33. However, the committee does not intend that federal prosecution be the sole means of dealing with such a crime. Damaging a truck with the intent of injuring the driver would violate any of a number of state laws, and the committee intends that state authorities continue to play a major role in this area.

**325 **3501 PART J-- DESTRUCTION OF ENERGY FACILITIES

1. IN GENERAL AND PRESENT FEDERAL LAW

Part J of Title X adds a new provision to federal law to provide concurrent federal jurisdiction over crimes involving serious damage to energy facilities. Included in the term energy facilities are facilities involved in the production, transmission, or distribution of electricity, fuel, or another form or source of energy, except a facility subject to the jurisdiction of the Nuclear Regulatory Commission. Electrical transmission lines and gas pipelines are examples of the type of property that would be covered. The provision is very similar to one included in S. 2572 as passed by the Senate in the 97th Congress and to S. 388, introduced in the present Congress by Senator Heflin.

Historically, damage to utility facilities has been a matter of concern for state and local law enforcement authorities. In recent years, however, acts of violence and sabotage against these facilities have been so widespread that some states have not been able to mount an adequate response. Moreover, the destruction of expensive facilities, such as electrical transmission towers, can occur in rural areas where law enforcement authorities are unable to deal with the situation and where the crime can affect the transmission of power into several other states. As Senator Heflin stated in introducing S. 388: 'On one project alone in Minnesota, some 10,000 insulators were shot out and over 15 towers toppled. The total cost of the damages was over $7 million, which translates into higher electric rates for the consumer.' [FN844] The committee has concluded that there is a role for the federal government in assisting to investigate and prosecute certain particularly serious crimes against energy facilities.

2. PROVISIONS OF THE BILL, AS REPORTED

Part J of Title X adds a new Section 1365 to Title 18. It contains two offenses. The first, set out in Subsection (A), covers whoever knowingly and willfully damages the property of an energy facility in an amount that exceeds $100,000 or damages the property of an energy facility so as to cause a significant interruption or impairment of the facility. The punishment for a violation of this subsection can extend to a fine of up to $50,000 and imprisonment for up to ten years.

Subsection (B) sets out an offense that is essentially a lesser included offense of that in Subsection (A). It proscribes the knowing and willful destruction of an energy facility in an amount that exceeds $5,000, whether or not a significant impairment or interruption of its function occurs. The penalty for a violation of this subsection **326 **3502 can extend to a fine of up to $25,000 and imprisonment for up to five years. No definition is provided for the term 'significant interruption or impairment of a function of an energy facility,' but the committee intends that the term extend only to major disruptions, for example, damaging cables or pipelines so as to cause an outage or reduction of power to...
CONSUMERS OF SEVERAL HOURS DURATION. IN GENERAL, THE COMMITTEE DOES NOT ANTICIPATE THAT FEDERAL AUTHORITIES WILL BECOME INVOLVED IN AN INVESTIGATION OR PROSECUTION OF A CASE UNDER THE NEW SECTION UNLESS THE AMOUNT OF DAMAGE EXCEEDS THE $5,000 BASE LINE AMOUNT SET OUT IN SUBSECTION (B), AND THAT FEDERAL INVOLVEMENT IN THIS AREA WILL BE ON A SELECTIVE, CASE-BY-CASE BASIS.

SUBSECTION (C) SETS OUT A DEFINITION OF THE TERM 'ENERGY FACILITY '. IT MEANS 'A FACILITY THAT IS INVOLVED IN THE PRODUCTION, STORAGE, TRANSMISSION, OR DISTRIBUTION OF ELECTRICITY, FUEL, OR ANOTHER FORM OR SOURCE OF ENERGY, OR RESEARCH, DEVELOPMENT, OR DEMONSTRATION FACILITIES RELATING THERETO, REGARDLESS OF WHETHER SUCH FACILITY IS STILL UNDER CONSTRUCTION OR IS OTHERWISE NOT FUNCTIONING, EXCEPT A FACILITY SUBJECT TO THE JURISDICTION, ADMINISTRATION, OR IN THE CUSTODY OF THE NUCLEAR REGULATORY COMMISSION IS DUE TO THE FACT THAT DAMAGING SUCH FACILITIES IS ALREADY PROSCRIBED BY ANOTHER FEDERAL STATUTE. [FN845] MOREOVER IT IS NOT THE PURPOSE OF THE NEW SECTION TO INVOLVE THE FEDERAL GOVERNMENT IN THE DEMONSTRATIONS AND DISPUTES THAT OCCASIONALLY OCCUR NEAR NUCLEAR POWER PLANTS.

*327 **3503 PART K-- ASSAULTS UPON FEDERAL OFFICERS

1. IN GENERAL AND PRESENT FEDERAL LAW

PART K OF TITLE X IS SIMILAR TO S. 2552, INTRODUCED BY SENATOR BIDEN IN THE 97TH CONGRESS, TO A PROVISION IN S. 2572 AS PASSED BY THE SENATE IN THAT CONGRESS AND TO S. 779 ORDERED REPORTED BY THE COMMITTEE ON JUNE 16, 1983. IT MAKES THREE AMENDMENTS TO 18 U.S.C. 1114, THE PRESENT FEDERAL STATUTE WHICH PROSCRIBES THE MURDER OF A LONG LIST OF FEDERAL OFFICIALS WHILE ENGAGED IN OR ON ACCOUNT OF THE PERFORMANCE OF THEIR OFFICIAL DUTIES. BECAUSE OF THE CROSS-REFERENCE IN 18 U.S.C. 111 TO THE PERSONS DESIGNATED IN SECTION 1114, ASSAULTS ON ALL OF THE PERSONS COVERED IN SECTION 1114 ARE ALSO COVERED. [FN846] THE FIRST AMENDMENT IS THE ADDITION OF AN ATTEMPT PROVISION TO SECTION 1114. AT PRESENT, THERE IS NO ATTEMPT PROVISION IN FEDERAL LAW APPLICABLE TO THE OFFENSES OF MURDER OR ASSAULT OF THE COVERED OFFICIALS. THE LACK OF AN ATTEMPT PROVISION FOR SECTION 1114 IS PARTICULARLY ANOMALOUS IN LIGHT OF THE FACT THAT THE OTHER PRINCIPAL SECTIONS IN CHAPTER 51 OF TITLE 18 DEALING WITH HOMICIDE HAVE ATTEMPT PROVISIONS. [FN847] THE SECOND AMENDMENT TO SECTION 1114 MADE BY PART K IS THE INCLUSION OF PROBATION OFFICERS, PRETRIAL SERVICES OFFICERS, AND INTELLIGENCE AGENCY EMPLOYEES IN THE LIST OF THE PERSONS COVERED. THE COMMITTEE IS OF THE VIEW THAT THERE IS A STRONG NEED TO GIVE INTELLIGENCE PERSONNEL THE SAME TYPE OF PROTECTION AGAINST MURDER AND ASSAULT AS IS PRESENTLY AFFORDED TO MANY OTHER TYPES OF FEDERAL EMPLOYEES. BOTH SENIOR INTELLIGENCE OFFICIALS AND LOWER LEVEL EMPLOYEES ARE THE OCCASIONAL TARGETS OF TERRORISTS AND OTHERS WHO LEARN OF THEIR INTELLIGENCE AFFILIATION. HOWEVER, UNDER PRESENT LAW THERE IS NO BASIS FOR FEDERAL PROSECUTION OF SUCH CRIMES. MOREOVER, COUPLED WITH THE ADDITION OF THE ATTEMPT PROVISION TO SECTION 1114, THE ADDITION OF INTELLIGENCE EMPLOYEES TO THE LIST OF THOSE COVERED WOULD ALLOW FEDERAL CRIMINAL INVESTIGATION IN CASES WHERE EVIDENCE IS RECEIVED INDICATING THAT AN ASSAULT ON OR MURDER OF SUCH A PERSON IS ABOUT TO OCCUR. SIMILARLY, PROBATION AND PRETRIAL SERVICES OFFICERS ARE ROUTINELY EXPOSED TO DANGEROUS SITUATIONS AND HOSTILE CIRCUMSTANCES THAT JUSTIFY FEDERAL HOMICIDE AND ASSAULT COVERAGE. THE THIRD CHANGE IN SECTION 1114 MADE BY PART K IS TO GIVE AUTHORITY TO THE ATTORNEY GENERAL TO DESIGNATE BY REGULATION OTHER CLASSES OF FEDERAL OFFICERS AND EMPLOYEES FOR COVERAGE UNDER THE SECTION. THIS CHANGE,
WHICH WAS ALSO PROPOSED IN S. 1630, THE CRIMINAL CODE REFORM BILL REPORTED BY THE COMMITTEE IN THE 97TH CONGRESS, *328 **3504 WOULD PROVIDE A WORKABLE MECHANISM FOR EXTENDING FEDERAL PROTECTION TO MISCELLANEOUS CLASSES OF PERSONS AS CHANGING NEEDS DICTATE WITHOUT THE NECESSITY OF HAVING TO AMEND THE STATUTE.

2. PROVISIONS OF THE BILL, AS REPORTED


PART K ALSO ADDS A PROVISION TO SECTION 1114 ALLOWING THE ATTORNEY GENERAL TO DESIGNATE OTHER CLASSES OF PERSONS FOR COVERAGE UNDER THE SECTION PURSUANT TO REGULATIONS AS THE NEED ARISES. THE COMMITTEE INTENDS THAT THE ATTORNEY GENERAL WILL DESIGNATE ONLY THOSE PERSONS WHO PERFORM DUTIES SIMILAR TO THOSE OF THE PERSONS ALREADY LISTED OR ADDED BY PART K WHOSE JOBS BRING THEM INTO SITUATIONS OF POSSIBLE HOSTILE ENCOUNTERS WITH THE PUBLIC, [FN851] OR WHOSE WORK COULD RESULT IN VIOLENT RETALIATION OR COULD SUBJECT THEM TO AN ATTACK BECAUSE OF ITS SYMBOLIC NATURE. [FN852] FINALLY, PART K ALSO MAKES A TECHNICAL CORRECTION IN SECTION 1114 BY REMOVING THE PHRASE 'WHILE ENGAGED IN THE PERFORMANCE OF HIS OFFICIAL DUTIES, OR ON ACCOUNT OF THE PERFORMANCE OF HIS OFFICIAL DUTIES,' WHICH APPEARS ABOUT THREE QUARTERS OF THE WAY DOWN THE LIST OF PROTECTED PERSONS. THE PHRASE IS REDUNDANT BECAUSE IT IS REPEATED *329 **3505 AT THE END OF THE SECTION AND APPLIES TO ALL THE PERSONS LISTED AND ADDED BY PART K. AS INDICATED, THE COMMITTEE DOES NOT INTEND TO ELIMINATE THE OFFICIAL DUTY NEXUS PRESENTLY APPLICABLE. [FN853]

*330 PART L-- ESCAPE FROM CUSTODY RESULTING FROM CIVIL COMMITMENT

1. IN GENERAL AND PRESENT FEDERAL LAW
PART L OF TITLE X CREATES A NEW OFFENSE OF ESCAPE FROM CIVIL CONFINEMENT ORDERED EITHER FOR A REFUSAL TO TESTIFY BEFORE A COURT OR GRAND JURY OR AS A RESULT OF A FINDING OF NOT GUILTY BY REASON OF INSANITY. [FN854] UNDER PRESENT LAW, 28 U.S.C. 1826, A JUDGE MAY ORDER CONFINED ANY PERSON WHO, WITHOUT JUST CAUSE, REFUSES TO TESTIFY BEFORE A FEDERAL COURT OR GRAND JURY. SUCH CONFINEMENT MAY EXTEND FOR THE LIFE OF THE COURT PROCEEDING OR THE TERM OF THE GRAND JURY. UNDER PRESENT LAW, PERSONS WHO ESCAPE OR WHO ATTEMPT TO ESCAPE FROM CONFINEMENT AS A RESULT OF SUCH AN ORDER CANNOT BE PROSECUTED, INASMUCH AS THE GENERAL FEDERAL ESCAPE STATUTE, 18 U.S.C. 751, IS LIMITED TO ESCAPES FROM CUSTODY OR CONFINEMENT BY VIRTUE OF AN ARREST OR CONVICTION. THIS FREEDOM FROM ANY CRIMINAL SANCTION AGAINST AN ESCAPE ATTEMPT EVEN EXTENDS TO PERSONS ALREADY SERVING FEDERAL PRISON SENTENCES WHO ARE CALLED TO TESTIFY AT A TRIAL OR GRAND JURY. IF SUCH A PRISONER REFUSES TO TESTIFY AND IS ORDERED CIVILLY COMMITTED THE CRIMINAL SENTENCE IS SUSPENDED FOR THE DURATION OF THE CIVIL COMMITMENT TO ENSURE THAT THE CIVIL COMMITMENT EXTENDS THE PERIOD OF CONFINEMENT PURSUANT TO THE CRIMINAL SENTENCE. [FN855] IN EFFECT A RECALCITRANT PRISONER WITNESS WHO IS CONFINED FOR HIS REFUSAL TO TESTIFY IS GIVEN A ‘FREE SHOT’ AT MAKING AN ESCAPE WHILE CONFINED PURSUANT TO 28 U.S.C. 1826. [FN856] SINCE SUCH CONFINEMENT IS OFTEN IN A LOCAL JAIL FACILITY WHICH MAY NOT BE AS SECURE AS A FEDERAL PRISON, THE INCENTIVE TO TRY TO ESCAPE IS STRONG.

UNDER PRESENT FEDERAL LAW THERE IS NO PROVISION FOR A VERDICT OF NOT GUILTY BY REASON OF INSANITY AND, OUTSIDE OF THE DISTRICT OF COLUMBIA, NO PROVISION FOR THE AUTOMATIC CIVIL COMMITMENT OF A PERSON WHO SUCCESSFULLY RAISES AN INSANITY DEFENSE. THESE DEFECTS WILL BE CORRECTED BY TITLE IV OF THE BILL AS REPORTED, AND A PERSON ACQUITTED BY REASON OF INSANITY WILL BE AUTOMATICALLY COMMITTED TO A MENTAL HEALTH FACILITY FOR AN EXAMINATION PRIOR TO A HEARING WITHIN FORTY DAYS TO DETERMINE WHETHER HE IS PRESENTLY SUFFERING FROM A MENTAL DISEASE OR DEFECT AND IS PRESENTLY DANGEROUS. IF THE COURT MAKES A FINDING THAT DUE TO MENTAL DISEASE OR DEFECT THE PERSON’S RELEASE WOULD POSE A DANGER TO ANOTHER PERSON OR TO THE COMMUNITY, THE COURT MUST COMMIT THE PERSON TO THE CUSTODY OF THE ATTORNEY GENERAL, WHO MUST THEN ATTEMPT TO HAVE THE APPROPRIATE STATE ASSUME RESPONSIBILITY FOR THE PERSON’S CUSTODY. THE COMMITTEE**3506 *331 BELIEVES THAT THERE IS A NEED TO PROVIDE A CRIMINAL SANCTION FOR PERSONS WHO ARE CONFINED FOR AN EXAMINATION PURSUANT TO A VERDICT OF NOT GUILTY BY REASON OF INSANITY WHO ESCAPE EITHER BEFORE THE HEARING TO DETERMINE PRESENT MENTAL ILLNESS AND DANGEROUSNESS, OR WHO ESCAPE AFTER THE HEARING BUT BEFORE TRANSFER TO STATE AUTHORITIES OR AFTER AN ULTIMATE ORDER OF DETENTION BY THE ATTORNEY GENERAL IF NO STATE WILL ASSUME RESPONSIBILITY FOR A DANGEROUSLY INSANE ACQUITTEE.

2. PROVISIONS OF THE BILL, AS REPORTED

PART L OF TITLE X ADDS A NEW SUBSECTION (C) TO SECTION 1826 OF TITLE 28. IT PROVIDES THAT ANYONE WHO ESCAPES OR ATTEMPTS TO ESCAPE FROM THE CUSTODY OF ANY FACILITY OR FROM ANY PLACE IN WHICH, OR TO WHICH, HE IS CONFINED PURSUANT TO THAT SECTION OR NEW SECTION 4243 OF TITLE 18, ADDED BY TITLE IV OF THIS BILL, IS SUBJECT TO IMPRISONMENT FOR UP TO THREE YEARS AND A FINE OF UP TO $10,000. THE NEW SUBSECTION ALSO COVERS PERSONS WHO RESCUE, OR ATTEMPT TO RESCUE, PERSONS CONFINED PURSUANT TO SECTION 1826 OR NEW SECTION 4243 OR WHO AID OR ASSIST THE ESCAPE OR ATTEMPTED ESCAPE OF SUCH PERSONS. ALL SUCH WOULD BE SUBJECT TO THREE YEARS OF IMPRISONMENT AND A $10,000 FINE.

*358 **3507 PART N— ARSON AMENDMENTS

1. IN GENERAL AND PRESENT FEDERAL LAW

PART N OF TITLE X MAKES TECHNICAL AMENDMENTS TO SUBSECTIONS (D), (F), AND (I) OF \textit{18 U.S.C. 844}. SUBSECTION (D) PROHIBITS THE TRANSPORTATION OR RECEIPT, OR ATTEMPTED TRANSPORTATION OR RECEIPT, OF ANY EXPLOSIVE IN INTERSTATE COMMERCE WITH THE KNOWLEDGE OR INTENT THAT IT WILL BE USED TO KILL, INJURE, OR INTIMIDATE ANOTHER INDIVIDUAL OR DAMAGE PROPERTY. SUBSECTION (F) PROSCRIBES THE MALICIOUS DAMAGE OR ATTEMPT TO DAMAGE BY MEANS OF FIRE OR AN EXPLOSIVE, ANY PROPERTY OWNED, POSSESSED OR USED BY THE UNITED STATES, OR BY ANY INSTITUTION OR ORGANIZATION RECEIVING FEDERAL FINANCIAL ASSISTANCE. SUBSECTION (I) PROHIBITS THE MALICIOUS DAMAGE OR ATTEMPTED DAMAGE BY MEANS OF FIRE OR EXPLOSIVE OF ANY BUILDING OR OTHER REAL OR PERSONAL PROPERTY USED IN OR AFFECTING INTERSTATE OR FOREIGN COMMERCE. SUBSECTIONS (F) AND (I) WERE AMENDED IN THE LAST CONGRESS BY THE INSERTION OF THE WORD 'FIRE' IN THE PHRASE 'BY MEANS OF FIRE OR AN EXPLOSIVE' TO ENSURE THAT THESE SECTIONS COULD BE USED IN ALL ARSON CASES, ESPECIALLY THOSE ARSONS CAUSED BY GASOLINE. [FN859]

ALL OF THESE SUBSECTIONS CONTAIN ENHANCED PENALTY PROVISIONS THAT APPLY IF PERSONAL INJURY [FN860] OR DEATH [FN861] RESULTS THAT REPRESENT A SUBSTANTIAL INCREASE OVER THE TEN YEARS OF IMPRISONMENT AND $10,000 FINE AUTHORIZED AS THE MAXIMUM PUNISHMENT FOR THEIR VIOLATION IF NO INJURY OR DEATH RESULTS. ON THEIR FACE, THESE ENHANCED PENALTY PROVISIONS WOULD APPEAR TO APPLY TO THE DEATH OR INJURY OF A FIREMAN OR POLICE OFFICER WHO RESPONDED TO AN ARSON OR OTHER OFFENSE COMMITTED IN VIOLATION OF SUBSECTION (D), (F), OR (I). HOWEVER, A FEDERAL DISTRICT COURT HAS RECENTLY HELD THAT THE ENHANCED PENALTY PROVISIONS DID NOT APPLY TO INJURIES TO OR DEATHS OF FIREFIGHTERS THAT OCCURRED WHILE FIGHTING AN ARSON FIRE SET IN VIOLATION OF SUBSECTION 844(I). [FN862]

PART N IS DESIGNED TO CLARIFY CONGRESSIONAL INTENT IN THIS REGARD TO ENSURE THAT THE ENHANCED PUNISHMENT PROVISIONS OF SUBSECTIONS (D), (F),
AND (I) APPLY IF PERSONAL INJURY OR DEATH RESULTS TO ANY PERSON INCLUDING A FIREMAN, POLICEMAN OR OTHER PUBLIC SAFETY OFFICER, BECAUSE OF A VIOLATION.

2. PROVISIONS OF THE BILL, AS REPORTED

PART N OF TITLE X AMENDS SUBSECTIONS (D), (F), AND (I) OF SECTION 844 OF TITLE 18 BY DELETING THE PHRASE 'PERSONAL INJURY RESULTS' IN EACH ONE AND SUBSTITUTING THE PHRASE 'PERSONAL INJURY RESULTS TO ANY PERSON, INCLUDING ANY PUBLIC SAFETY OFFICER PERFORMING DUTIES AS A DIRECT OR PROXIMATE RESULT OF CONDUCT PROHIBITED BY THIS SUBSECTION.' IT ALSO AMENDS THE THREE SUBSECTIONS BY DELETING THE PRESENT PHRASE 'DEATH RESULTS' IN EACH ONE AND SUBSTITUTING THE PHRASE, 'DEATH RESULTS TO ANY PERSON, INCLUDING ANY PUBLIC SAFETY OFFICER PERFORMING DUTIES AS A DIRECT PROXIMATE RESULT OF CONDUCT PROHIBITED BY THIS SUBSECTION.' AS DISCUSSED, THE PURPOSE OF THESE AMENDMENTS IS TO MAKE CLEAR THE CONGRESSIONAL INTENT THAT ANY PERSON WHO VIOLATES ONE OF THE SUBSECTIONS IN A MANNER THAT RESULTS IN A PUBLIC SAFETY OFFICER'S INJURY OR DEATH IS SUBJECT TO THE ENHANCED PUNISHMENTS PROVIDED IN THE SUBSECTION. THE COMMITTEE INTENDS THAT THE TERM 'PUBLIC SAFETY OFFICER' INCLUDE SUCH PERSONS AS FIREMEN AND POLICEMEN (AND THEIR EQUIVALENT OF SHERIFFS AND DEPUTIES), AS WELL AS AMBULANCE DRIVERS AND LABORATORY TECHNICIANS EMPLOYED IN A 'CIVILIAN' CAPACITY BY A POLICE OR FIRE DEPARTMENT. ALSO INCLUDED WOULD BE EMPLOYEES OF A STATE OR MUNICIPAL FIRE MARSHAL'S OFFICE OR COMPARABLE ORGANIZATION CHARGED WITH INVESTIGATING FIRES OR EXPLOSIONS. THE COMMITTEE INTENDS THAT A DEATH OR INJURY IS A DIRECT OR PROXIMATE RESULT OF CONDUCT PROSCRIBED IN SUBSECTION 844(D), (F), OR (I) IF IT IS REASONABLY FORESEEABLE. FOR EXAMPLE, INCLUDED IN THE REASONABLY FORESEEABLE CONSEQUENCES OF THE BURNING OR DESTRUCTION BY AN EXPLOSIVE OF A BUILDING AFFECTING INTERSTATE COMMERCE IN VIOLATION OF SUBSECTION 844(I) WOULD BE A RESPONSE BY FIREMEN AND OTHERS (INCLUDING HIGH SPEED DRIVING OF FIRE EQUIPMENT AND AMBULANCES), CROWD CONTROL BY POLICEMEN, AND THE EXAMINATION OF THE REMAINS OF THE BUILDING AND UNDETONATED EXPLOSIVES BY ANY ONE OF A NUMBER OF LAW ENFORCEMENT OFFICERS AND TECHNICIANS. INCLUDED IN THE REASONABLY FORESEEABLE CONSEQUENCES OF TRANSPORTING OR RECEIVING AN EXPLOSIVE IN INTERSTATE COMMERCE IN VIOLATION OF SUBSECTION 844(D) WOULD BE THE INTERCEPTION OR DISCOVERY OF THE EXPLOSIVE BY LAW ENFORCEMENT OFFICERS, AND ITS SUBSEQUENT EXAMINATION, NO MATTER HOW CLEVERLY THE EXPLOSIVE WAS CONCEALED.

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*363* TITLE XI-- SERIOUS NONVIOLENT OFFENSES

TITLE XI CONSISTS OF A GROUP OF MISCELLANEOUS NONVIOLENT CRIME AMENDMENTS DIVIDED INTO NINE PARTS. IN SUMMARY, THEY RELATE TO CHILD ORNOGRAPHY (PART A); WARNING THE SUBJECT OF A SEARCH (PART B); FEDERAL PROGRAM FRAUD AND BRIBERY (PART C); COUNTERFEITING OF STATE AND CORPORATE SECURITIES AND FORGING OF ENDORSEMENTS OR SIGNATURES ON UNITED STATES SECURITIES AND FORGING OF ENDORSEMENTS OR SIGNATURES ON UNITED STATES SECURITIES (PART D); RECEIPT OF STOLEN BANK PROPERTY (PART E); BANK BRIBERY (PART F); BANK FRAUD (PART G); POSSESSION OF CONTRABAND IN PRISON (PART H); AND LIVESTOCK FRAUD IN INTERSTATE COMMERCE (PART I).

* * * *
PART B-- WARNING THE SUBJECT OF A SEARCH

1. IN GENERAL AND PRESENT FEDERAL LAW

This Part of Title XI provides for a new type of obstruction of justice offense. Under current 18 U.S.C. 2232, it is a misdemeanor to impair an authorized search by a law enforcement officer by removing, concealing, or destroying the property that is the object of the search in order to prevent its seizure. However, neither this section nor the general obstruction of justice offenses, [FN863] prohibits one person from warning another person that his property is about to be the subject of a search so that the latter person can himself remove or destroy it. Recently a local policeman attempted to warn a narcotics dealer that a federal warrant to search his house had been issued. This reprehensible conduct could not be successfully prosecuted. [FN864] It is the purpose of Part B to close this unwarranted gap in present statutory law.

2. PROVISIONS OF THIS BILL, AS REPORTED

Part B of Title XI adds a new paragraph to 18 U.S.C. 2232 making it an offense for a person, having knowledge that a search or seizure has been authorized or is likely to occur, to give notice or attempt to give notice of the possible search or seizure to any person in order to prevent the authorized seizing or securing of any person, goods, or other property. A violation is made a felony punishable by up to five years in prison and a fine of $10,000. This penalty level is higher than the existing misdemeanor offense in 18 U.S.C. 2232 for impeding a search by destroying or removing the property, but is consistent with the general obstruction of justice statutes, 18 U.S.C. 1503, 1505, covering analogous conduct.

PART C-- PROGRAM FRAUD AND BRIBERY

1. IN GENERAL

This Part of Title XI is designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving federal monies that are disbursed to private organizations or state and local governments pursuant to a federal program. The proposal is derived from S. 1630, the Criminal Code Reform Act of 1981 approved by the Committee in the 97th Congress. [FN865]

2. PRESENT FEDERAL LAW

As indicated, this Part of Title XI covers both theft and bribery type offenses. With respect to theft, 18 U.S.C. 665 makes theft or embezzlement by an officer or employee of an agency receiving assistance under the Job Training Partnership Act a federal offense. However, there is no statute of general applicability in this area, and thefts from other organizations or governments receiving federal financial assistance can be prosecuted under the general theft of federal property statute, 18 U.S.C. 641, only if it can be shown that the property stolen is property of the United States. In many cases, such prosecution is impossible because title has passed to the recipient before the property is stolen, or the funds are so commingled that the federal character of the funds cannot be shown. This situation gives rise to a serious gap in the law, since even though title to the monies may have passed, the federal government clearly
RETAINS A STRONG INTEREST IN ASSURING THE INTEGRITY OF SUCH PROGRAM FUNDS. INDEED, A RECURRING PROBLEM IN THIS AREA (AS WELL AS IN THE RELATED AREA OF BRIBERY OF THE ADMINISTRATORS OF SUCH FUNDS) HAS BEEN THAT STATE AND LOCAL PROSECUTORS ARE OFTEN UNWILLING TO COMMIT THEIR LIMITED RESOURCES TO PURSUE SUCH THEFTS, DEEMING THE UNITED STATES THE PRINCIPAL PARTY AGGRIEVED.

WITH RESPECT TO BRIBERY, 18 U.S.C. 201 GENERALLY PUNISHES CORRUPT PAYMENTS TO FEDERAL PUBLIC OFFICIALS, BUT THERE IS SOME DOUBT AS TO WHETHER OR UNDER WHAT CIRCUMSTANCES PERSONS NOT EMPLOYED BY THE FEDERAL GOVERNMENT MAY BE CONSIDERED AS A 'PUBLIC OFFICIAL' UNDER THE DEFINITION IN 18 U.S.C. 201(A) AS ANYONE 'ACTING FOR OR ON BEHALF OF THE UNITED STATES, OR ANY DEPARTMENT, AGENCY OR BRANCH OF GOVERNMENT THEREOF, INCLUDING THE DISTRICT OF COLUMBIA, IN ANY OFFICIAL FUNCTION.' THE COURTS OF APPEALS HAVE DIVIDED ON THE QUESTION WHETHER A PERSON EMPLOYED BY A PRIVATE ORGANIZATION RECEIVING FEDERAL MONIES PURSUANT TO A PROGRAM IS A 'PUBLIC OFFICIAL' FOR PURPOSES OF SECTION 201. THE ISSUE IS DUE TO BE DECIDED SOON BY THE SUPREME COURT, [FN866] AT LEAST IN THE CONTEXT OF THE PARTICULAR HUD PROGRAM INVOLVED IN THAT CASE. [FN867]

3. PROVISIONS OF THE BILL, AS REPORTED

PART C ADDS A NEW SECTION 666 TO TITLE 18, UNITED STATES CODE. SUBSECTION (A) MAKES IT A FEDERAL CRIME FOR AN OFFICER, EMPLOYEE OR AGENT OF AN ORGANIZATION OR OF A STATE OR LOCAL GOVERNMENT AGENCY THAT RECEIVES BENEFITS IN EXCESS OF $10,000 PER CALENDAR YEAR PURSUANT TO A FEDERAL PROGRAM TO STEAL, EMBEZZLE, OBTAIN BY FRAUD, WILLFULLY MISAPPLY OR OTHERWISE KNOWINGLY CONVERT WITHOUT AUTHORITY PROPERTY VALUED AT $5,000 OR MORE. THE OFFENSE IS PUNISHABLE BY UP TO TEN YEARS IN PRISON AND A FINE OF UP TO $100,000 OR TWICE THE VALUE OF THE PROPERTY OBTAINED IN VIOLATION OF THIS SECTION, WHICHEVER IS GREATER. THE TERMS 'AGENT', 'ORGANIZATION', 'GOVERNMENT AGENCY', AND 'LOCAL' ARE DEFINED IN SUBSECTION (D) AND REQUIRE NO FURTHER EXPLANATION. THE COMMITTEE INTENDS THAT THE TERM 'FEDERAL PROGRAM INVOLVING A GRANT, A CONTRACT, A SUBSIDY, A LOAN, A GUARANTEE, INSURANCE, OR ANOTHER FORM OF FEDERAL ASSISTANCE' BE CONSTRUED BROADLY, CONSISTENT WITH THE PURPOSE OF THIS SECTION TO PROTECT THE INTEGRITY OF THE VAST SUMS OF MONEY DISTRIBUTED THROUGH FEDERAL PROGRAMS FROM THEFT, FRAUD, AND UNDUE INFLUENCE BY BRIBERY. HOWEVER, THE CONCEPT IS NOT UNLIMITED. THE TERM 'FEDERAL PROGRAM' MEANS THAT THERE MUST EXIST A SPECIFIC STATUTORY SCHEME AUTHORIZING THE FEDERAL ASSISTANCE IN ORDER TO PROMOTE OR ACHIEVE CERTAIN POLICY OBJECTIVES. THUS, NOT EVERY FEDERAL CONTRACT OR DISBURSEMENT OF FUNDS WOULD BE COVERED. FOR EXAMPLE, IF A GOVERNMENT AGENCY LAWFULLY PURCHASES MORE THAN $10,000 IN EQUIPMENT FROM A SUPPLIER, IT IS NOT THE INTENT OF THIS SECTION TO MAKE A THEFT OF $5,000 OR MORE FROM THE SUPPLIER A FEDERAL CRIME. IT IS, HOWEVER, THE INTENT TO REACH THEFTS AND BRIBERY IN SITUATIONS OF THE TYPES INVOLVED IN THE DEL TORO, HINTON, AND MOSLEY CASES CITED HEREIN.

**370 **3511 PART D-- COUNTERFEITING OF STATE AND CORPORATE SECURITIES AND FORGING OF ENDORSEMENTS OF SIGNATURES ON UNITED STATES SECURITIES

1. IN GENERAL AND PRESENT FEDERAL LAW

SECOND WOULD REMEDY A GAP IN EXISTING STATUTES RELATING TO THE FORGING OF ENDORSEMENTS ON UNITED STATES SECURITIES. PRESENT FEDERAL LAW IS INADEQUATE TO COMBAT WIDESPREAD FRAUD SCHEMES INVOLVING THE USE OF COUNTERFEIT STATE AND CORPORATE SECURITIES. AS WAS FIRST DOCUMENTED SEVERAL YEARS AGO IN HEARINGS BEFORE THE SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, [FN869] THE USE OF THESE SECURITIES AS COLLATERAL FOR LOANS AND OTHER ILLEGAL PURPOSES IS WIDESPREAD AND HAS A SERIOUS DETRIMENTAL EFFECT ON INTERSTATE COMMERCE. MOREOVER, THESE CRIMES COMMONLY REACH ACROSS STATE BORDERS, AND THUS LOCAL OFFICIALS ARE GENERALLY UNABLE TO COPE WITH THEM.

WITH RESPECT TO THE FORGING OF ENDORSEMENTS ON UNITED STATES SECURITIES, VIOLATIONS INVOLVING FORGERY OF ENDORSEMENT OR FRAUDULENT NEGOTIATION OF A TREASURY CHECK OR BOND OR OTHER SECURITY OF THE UNITED STATES ARE SOMETIMES SUCCESSFULLY PROSECUTED UNDER 18 U.S.C. 495. THAT STATUTE WAS NOT, HOWEVER, DRAFTED TO DEAL SPECIFICALLY WITH GOVERNMENT OBLIGATIONS, BUT INSTEAD EXPRESSLY COVERS DEEDS, POWERS OF ATTORNEY, AND CONTRACTS. THE BASIS FOR USING SECTION 495 TO PROSECUTE VIOLATIONS WITH RESPECT TO GOVERNMENT SECURITIES IS THE PROVISION THEREIN WHICH PUNISHES THE FORGERY OR ALTERATION OF 'OTHER WRITINGS'. 18 U.S.C. 471 AND 472 ARE CONCERNED SPECIFICALLY WITH FORGERY AND UTTERING FORGED OBLIGATIONS OR SECURITIES OF THE UNITED STATES. HOWEVER, THESE SECTIONS APPLY TO FORGERY OF THE SECURITY, NOT FORGERY OF ENDORSEMENTS. BECAUSE SECTION 495 WAS NOT DRAFTED TO DEAL WITH OBLIGATIONS OF THE UNITED STATES, MANY OF THE VARIATIONS OF OFFENSES INVOLVED WITH THE FORGERY OF OBLIGATIONS ARE NOT INCLUDED WITHIN THAT SECTION AND CANNOT OTHERWISE BE PROSECUTED UNDER FEDERAL LAW. FOR EXAMPLE, IT IS CURRENTLY POSSIBLE FOR A THIEF TO STEAL A TREASURY CHECK ENDORSED BY A PAYEE, ENDORSE HIS OWN NAME AND OBTAIN THE PROCEEDS, AND NOT VIOLATE SECTION 495. IN ADDITION, IT IS POSSIBLE FOR A THIEF TO STEAL ONE OR MORE GOVERNMENT CHECKS OR BONDS FROM THE RIGHTFUL OWNER AND SELL THEM TO A MIDDLE MAN AND NOT VIOLATION SECTION 495.

*372 **3513 2. PROVISIONS OF THE BILL, AS REPORTED

PART D WOULD ADD A NEW SECTION 510 TO TITLE 18, U.S.C. PROSCRIBING THE MAKING, UTTERING, OR POSSESSION OF A COUNTERFEITED OR FORGED SECURITY OF A STATE OR POLITICAL SUBDIVISION THEREOF, OR OF AN ORGANIZATION, WITH INTENT TO DECEIVE ANOTHER PERSON, ORGANIZATION, OR GOVERNMENT. IT WOULD ALSO PENALIZE THE MAKING, RECEIPT, POSSESSION, SALE OR TRANSFER OF AN IMPLEMENT DESIGNED OR PARTICULARLY SUITED FOR THE MAKING OF A COUNTERFEIT OR FORGED SECURITY WITH THE INTENT THAT IT BE SO USED. IN EITHER CASE, A CONVICTED OFFENDER WOULD BE LIABLE FOR IMPRISONMENT OF UP TO TEN YEARS AND A $250,000 FINE.


PART D WOULD ALSO ADD A NEW SECTION 511 TO TITLE 18, U.S.C. TO PROSCRIBING THE FORGING OF ANY ENDORSEMENT OR SIGNATURE ON A SECURITY OF THE UNITED STATES, OR THE PASSING, UTTERING OR PUBLISHING OF ANY SUCH SECURITY BEARING A FORGED ENDORSEMENT OR SIGNATURE, WITH INTENT TO DEFRAUD. SECTION 511 WOULD ALSO PENALIZE WHOEVER BUYS, SELLS, EXCHANGES, RECEIVES, DELIVERS, RETAINS, OR CONCEALS A STOLEN UNITED STATES SECURITY OR ONE THAT BEARS A FORGED ENDORSEMENT OR SIGNATURE KNOWING THAT THE SECURITY IS
STOLEN OR BEARS SUCH AN ENDORSEMENT. VIOLATIONS WOULD BE PUNISHABLE BY UP TO TEN YEARS IN PRISON AND A $250,000 FINE, EXCEPT THAT IF THE FACE VALUE OF THE SECURITY DID NOT EXCEED $500, THE OFFENSE WOULD BE PUNISHABLE AS A MISDEMEANOR BY IMPRISONMENT OF UP TO ONE YEAR AND A FINE OF $1,000. THE TERM 'FORGE' IS DEFINED IN A MANNER SUBSTANTIPLY IDENTICAL TO ITS DEFINITION IN THE PRECEDING SECTION. THE TERM 'SECURITY' IS DEFINED TO INCORPORATE THE DEFINITION IN THE PRECEDING SECTION AS WELL AS AN 'OBLIGATION OF THE UNITED STATES', A TERM DEFINED IN 18 U.S.C. 8. THIS PROPOSAL WOULD MAKE IT POSSIBLE TO PROSECUTE BOTH FORGERIES OF ENDORSEMENT AND RELATED CRIMES INVOLVING OBLIGATIONS OF THE UNITED STATES UNDER ONE SECTION. IT WOULD GREATLY ASSIST THE SECRET SERVICE, WHICH HAS THE PRIMARY JURISDICTION TO INVESTIGATE CRIMES INVOLVING SECURITIES OF THE UNITED STATES AND WHICH WOULD HAVE JURISDICTION WITH REGARD TO NEW SECTION 511 BY VIRTUE OF THAT SECTION'S AMENDMENT OF 18 U.S.C. 3056(A) TO INCLUDE SUCH VIOLATIONS IN THE LIST OF ENUMERATED SECTIONS FOR WHICH THE SECRET SERVICE HAS PRIMARY RESPONSIBILITY. [FN870] HOWEVER, THIS PROVISION IS NOT INTENDED TO REDISTRIBUTE INVESTIGATIVE RESPONSIBILITIES IN ANY WAY. SPECIFICALLY, FOR EXAMPLE, THE UNITED STATES POSTAL SERVICE WOULD RETAIN PRIMARY JURISDICTION TO INVESTIGATE THEFTS OF UNITED STATES SECURITIES FROM THE MAILS.

*373 **3514 PART E-- RECEIPT OF STOLEN BANK PROPERTY

1. IN GENERAL AND PRESENT FEDERAL LAW

THIS PART OF TITLE XI IS DESIGNED TO REMEDY A FLAW IN CURRENT 18 U.S.C. 2113(C). THAT STATUTE PUNISHES WHOEVER RECEIVES, POSSESSES, CONCEALS, SELLS, OR DISPOSES OF ANY PROPERTY 'KNOWING THE SAME TO HAVE BEEN TAKEN FROM A BANK, CREDIT UNION, OR ANY SAVINGS AND LOAN ASSOCIATION' IN VIOLATION OF THE PRECEDING SUBSECTION WHICH PROSCRIBES THEFT FROM SUCH FINANCIAL INSTITUTIONS. THE PROBLEM IS THAT, IN REQUIRING KNOWLEDGE THAT THE PROPERTY WAS TAKEN 'FROM A BANK' OR OTHER FEDERALLY INSURED INSTITUTION, THE SECTION IS UNDULY GENEROUS TO WRONGDOERS. IT DOES NOT PERMIT A SUCCESSFUL PROSECUTION IN CASES IN WHICH THE PROOF IS OVERWHELMING THAT THE DEFENDANT ACTED CULPABLY IN THAT HE POSSESSED PROPERTY HE KNEW HAD BEEN STOLEN BUT WHERE NO EVIDENCE EXISTS TO SHOW THAT HE KNEW IT HAD BEEN STOLEN 'FROM A BANK'. NORMALLY, IT SHOULD NOT BE NECESSARY TO PROVE SCIENTER AS TO WHAT IS ESSENTIALLY A JURISDICTIONAL FACT-- HERE, THAT THE PROPERTY WAS STOLEN FROM A BANK; AND THE INCLUSION OF THIS GRATUITOUS ELEMENT IN SECTION 2113(C) HAS OCCASIONALLY RESULTED IN THE UNWARRANTED EXONERATION OF THE KNOWING RECEIVERS OF STOLEN PROPERTY. [FN871]

2. PROVISIONS OF THE BILL, AS REPORTED

PART E REWRITES 18 U.S.C. 2113(C) MAKING ONLY ONE SUBSTANTIVE CHANGE. IN PLACE OF THE EXISTING REQUIREMENT OF KNOWLEDGE THAT PROPERTY WAS TAKEN 'FROM A BANK', THE BILL REQUIRES ONLY PROOF OF KNOWLEDGE THAT THE PROPERTY 'HAS BEEN STOLEN'. THUS, IT CLOSES THE LOOPHOLE UNDER WHICH CERTAIN KNOWING RECEIVERS OF PROPERTY STOLEN FROM A BANK HAVE ESCAPED CONVICTION.

*374 **3515 PART F-- BANK BRIBERY

1. IN GENERAL
This part revises and modernizes the statutory law dealing with bribery of bank officers. Sections 215 and 216 of Title 18 presently cover the receipt of commissions or gifts by bank employees for procuring loans, but they are inadequate, unduly complex, and obsolete in many respects. For example, these sections do not reach bribery of employees of federally insured credit unions, or member banks of the Federal Home Loan Bank System, such as savings and loan associations, or of bank holding companies. The bill combines existing Sections 215 and 216 to bring up to date the list of covered institutions and to make other improvements, including the prohibition of indirect as well as direct payments and an increase in applicable penalties. The proposal was contained in S. 1630, the Criminal Code Reform Bill approved by the Committee last Congress, [FN872] and derives from legislation introduced a decade ago. [FN873]

2. Present Federal Law
As noted, the commercial bribery aspects of federal regulation of the banking industry are currently covered in 18 U.S.C. 215 and 216. Under 18 U.S.C. 215, the officers, employees, and agents of banks the deposits of which are insured by the Federal Deposit Insurance Corporation, as well as certain other specified financial institutions, [FN874] are prohibited from stipulating for, receiving, or agreeing to receive anything of value from any person, firm, or corporation 'for procuring or endeavoring to procure,' for the giver or for anyone else, 'any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by' any such bank or financial institution. The penalty is imprisonment for up to one year.

Significantly, this statute does not reach the bribe offeror, but only the recipient of the bribe, although the offering party can be punished by means of the aiding and abetting or conspiracy statutes. This statute has been held to punish receipt of a gift for procuring a loan even though the loan was completed before the gift or fee was received. [FN875] Because of the inclusion of the term 'stipulates for,' it has also been construed to proscribe the action of a bank officer who stipulated that a commission for obtaining loan from the bank be paid to a third party. The court found that Congress' purpose *375 **3516 under this statute was to protect the deposits of federally insured banks by preventing unsound and improvident loans to be made from such banks and that it was thus immaterial who received the commission. [FN876]

18 U.S.C. 216 is a somewhat broader statute that reaches payments made to employees and officials of federal land bank institutions and small business investment companies. It punishes by up to one year in prison whoever, being an employee or official of the type described above, 'is a beneficiary of or receives any fee * * * or other consideration for or in connection with any transaction or business of such association or bank, other than the usual salary or director's fee paid to such officer-- or employee for services rendered.' This statute also penalizes whoever causes or procures a federal land bank institution or small business investment company to charge or receive any consideration not specifically authorized.

Experience under this statutory scheme has led to the conclusion that the above laws are inadequate and obsolete because they neither cover all of the individuals or institutions that should be covered nor all of the activities that should be illegal. As a result the Committee has endorsed the instant legislation that would combine 18 U.S.C. 215 and 216
INTO A SINGLE STATUTE, PUNISHING BOTH BRIBE OFFERORS OR GIVERS AND BRIBE RECEPIENTS, AND EXPANDING THE INSTITUTIONS COVERED TO INCLUDE EVERY FINANCIAL INSTITUTION THE TRANSACTIONS OF WHICH THE FEDERAL GOVERNMENT HAS A SUBSTANTIAL INTEREST IN PROTECTING AGAINST UNDUE INFLUENCE BY BRIBERY (E.G., IN ADDITION TO THOSE PRESENTLY COVERED UNDER 18 U.S.C. 215 AND 216, ANY MEMBER OF THE FEDERAL HOME LOAN BANK SYSTEM AND ANY FEDERAL HOME LOAN BANK; ANY INSTITUTION THE DEPOSITS OF WHICH ARE INSURED BY THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION; ANY CREDIT UNION THE DEPOSITS OF WHICH ARE INSURED UNDER THE FEDERAL CREDIT UNION ACT OF 1934, AS AMENDED, ETC.).

3. PROVISIONS OF THE BILL, AS REPORTED

PART F REWRITES 18 U.S.C. 215 AND REPEALS 18 U.S.C. 216. NEW SECTION 215(A) IS RECAST BROADLY TO PROHIBIT WHOEVER, BEING AN OFFICER, DIRECTOR, EMPLOYEE, AGENT, OR ATTORNEY OF ANY FINANCIAL INSTITUTION, BANK HOLDING COMPANY, OR SAVINGS AND LOAN HOLDING COMPANY, DIRECTLY OR INDIRECTLY ASKS, DEMANDS, EXACTS, SOLICITS, SEEKS, ACCEPTS, RECEIVES, OR AGREES TO RECEIVE ANYTHING OF VALUE, FOR HIMSELF OR ANY OTHER PERSON OTHER THAN SUCH FINANCIAL INSTITUTION, FROM ANY PERSON FOR OR IN CONNECTION WITH ANY TRANSACTION OR BUSINESS OF SUCH FINANCIAL INSTITUTION. THE PHRASE 'IN CONNECTION WITH ANY TRANSACTION,' ETC. ADOPTS THE COMPREHENSIVE STYLE OF CURRENT 18 U.S.C. 216 RATHER THAN THE NARROWER METHOD USED IN PRESENT 18 U.S.C. 215 TO LIST THE SPECIFIC KINDS OF TRANSACTIONS REACHED. ALSO, THE NEW SECTION CLEARLY PROSCRIBES THE RECEIPT OF ANYTHING OF VALUE FOR A THIRD PERSON, THUS CARRYING FORWARD THE INTERPRETATION IN THE LANE CASE, SUPRA. SUBSECTION (C) DEFINES THE TERMS 'FINANCIAL INSTITUTION,' 'BANK HOLDING COMPANY' AND 'SAVINGS AND LOAN HOLDING COMPANY' TO INCLUDE ALL THE TYPES OF FEDERAL FINANCIAL INSTITUTIONS AS TO WHICH THERE EXISTS A STRONG FEDERAL INTEREST TO SAFEGUARD THE TRANSACTIONS AGAINST UNDUE INFLUENCE BY BRIBERY. SUBSECTION (B) PROSCRIBES ACTIVITIES OF THE SAME SCOPE AS SUBSECTION (A), BUT WITH RESPECT TO THE BRIBE OFFEROR OR GIVER RATHER THAN THE BRIBE TAKER OR SOLICITOR. SUBSECTION (D), LIKE PRESENT 18 U.S.C. 216, INCLUDES AN EXPLICIT EXEMPTION FOR PAYMENTS BY THE FINANCIAL INSTITUTION OF THE USUAL SALARY OR DIRECTOR'S FEE PAID TO AN OFFICER, DIRECTOR, EMPLOYEE, AGENT, OR ATTORNEY THEREOF, OR FOR A REASONABLE FEE PAID BY THE FINANCIAL INSTITUTION TO SUCH PERSONS FOR SERVICES RENDERED. THE PENALTY FOR A VIOLATION OF SUBSECTION (A) OR (B) IS UP TO FIVE YEARS IN PRISON AND A FINE OF $5,000 OR THREE TIMES THE VALUE OF THE BRIBE OFFERED, ASKED, GIVEN, RECEIVED, OR AGREED TO BE GIVEN OR RECEIVED, WHICHEREVER IS GREATER, EXCEPT THAT IF SUCH VALUE IS $100 OR LESS THE OFFENSE IS PUNISHABLE BY UP TO ONE YEAR IN PRISON AND A $1,000 FINE. THIS GRADING HAS THE EFFECT GENERALLY OF INCREASING THE LEVEL OF THE KIND OF OFFENSES NOW COVERED BY 18 U.S.C. 215 AND 216 FROM A MISDEMEANOR TO A FELONY. THE COMMITTEE CONSIDERS THIS INCREASE JUSTIFIED IN RECOGNITION OF THE STRONG FEDERAL INTEREST IN DETERRING SUCH CRIMES AS THEY AFFECT THE BANKING INDUSTRY AND IN VIEW OF THE SERIOUSLY CULPABLE NATURE OF THE CONDUCT INVOLVED. NOTABLY, VIOLATIONS OF OTHER ANALOGOUS STATUTES, SUCH AS 41 U.S.C. 54 PROSCRIBING COMMERCIAL BRIBERY WITH REGARD TO GOVERNMENT CONTRACTORS, CARRY FELONY PENALTIES. AN EXCEPTION FROM FELONY TREATMENT IS, HOWEVER, PROVIDED FOR AN OFFENSE WHERE THE BRIBE IS RELATIVELY INSIGNIFICANT IN AMOUNT AND THUS IS LESS LIKELY TO HAVE AFFECTED THE RECIPIENT'S CONDUCT.

*377 PART G-- BANK FRAUD

1. IN GENERAL AND PRESENT FEDERAL LAW
THE OFFENSE OF BANK FRAUD IN THIS PART IS DESIGNED TO PROVIDE AN EFFECTIVE VEHICLE FOR THE PROSECUTION OF FRAUDS IN WHICH THE VICTIMS ARE FINANCIAL INSTITUTIONS THAT ARE FEDERALLY CREATED, CONTROLLED OR INSURED. RECENT SUPREME COURT DECISIONS HAVE UNDERScoreD THE FACT THAT SERIOUS GAPS NOW EXIST IN FEDERAL JURISDICTION OVER FRAUDS AGAINST BANKS AND OTHER CREDIT INSTITUTIONS WHICH ARE ORGANIZED OR OPERATING UNDER FEDERAL LAW OR WHOSE DEPOSITS ARE FEDERALLY INSURED. CLEARLY, THERE IS A STRONG FEDERAL INTEREST IN PROTECTING THE FINANCIAL INTEGRITY OF THESE INSTITUTIONS, AND THE LEGISLATION IN THIS PART WOULD ASSURE A BASIS FOR FEDERAL PROSECUTION OF THOSE WHO VICTIMIZE THESE BANKS THROUGH FRAUDULENT SCHEMES.


APPEARS TO BE AN ABSENCE OF COVERAGE WITH RESPECT TO SOME TYPES OF FRAUD IN THE GENERAL BANK THEFT STATUTE, 18 U.S.C. 2113. ALTHOUGH THE SUPREME COURT RECENTLY HELD THAT SECTION 2113 IS NOT LIMITED TO COMMON LAW LARCENY AND REACHES ALSO CERTAIN OFFENSES INVOLVING THE OBTAINING OF PROPERTY FROM BANKS BY FALSE PRETENSES, [FN879] THE COURT NOTED THAT, BY ITS CLEAR TERMS, SECTION 2113 'DOES NOT APPLY TO A CASE OF FALSE PRETENSES IN WHICH THERE IS NOT A TAKING AND CARRYING AWAY' OF THE PROPERTY. THESE VARIOUS GAPS IN EXISTING STATUTES, AS WELL AS THE LACK OF A UNITARY PROVISION AIMED DIRECTLY AT THE PROBLEM OF BANK FRAUD, IN THE COMMITTEE'S VIEW CREATE A PLAIN NEED FOR **3519 ENACTMENT OF THE GENERAL BANK FRAUD STATUTE SET FORTH IN THIS PART OF TITLE XI.

2. PROVISIONS OF THE BILL, AS REPORTED

PART G WOULD CREATE A NEW SECTION 1344 OF TITLE 18, UNITED STATES CODE. SUBSECTION (A) PROHIBITS WHOEVER KNOWINGLY EXECUTES, OR ATTEMPTS TO EXECUTE, A SCHEME OR ARTIFICE (1) TO DEFRAUD A FEDERALLY CHARTERED OR INSURED FINANCIAL INSTITUTION, OR (2) TO OBTAIN ANY OF THE MONEYS, FUNDS, CREDITS, ASSETS, SECURITIES, OR OTHER PROPERTY OWNED BY OR UNDER THE CUSTODY OR CONTROL OF A FEDERALLY CHARTERED OR INSURED FINANCIAL INSTITUTION BY MEANS OF FALSE OR FRAUDULENT PRETENSES, REPRESENTATIONS, OR PROMISES. THE PENALTY FOR A VIOLATION IS IMPRISONMENT OF UP TO FIVE YEARS AND A FINE OF $10,000.

THE PROPOSED BANK FRAUD STATUTE IS MODELED ON THE PRESENT WIRE AND MAIL FRAUD STATUTES WHICH HAVE BEEN CONSTRUED BY THE COURTS TO REACH A WIDE RANGE OF FRAUDULENT ACTIVITY. LIKE THESE EXISTING FRAUD STATUTES, THE PROPOSED BANK FRAUD OFFENSE PROSCRIBES THE CONDUCT OF EXECUTING OR ATTEMPTING TO EXECUTE 'A SCHEME OR ARTIFICE TO DEFRAUD' OR TO TAKE THE PROPERTY OF ANOTHER 'BY MEANS OF FALSE OR FRAUDULENT PRETENSES, REPRESENTATIONS, OR PROMISES.' WHILE THE BASIS FOR FEDERAL JURISDICTION IN THESE EXISTING GENERAL FRAUD STATUTES IS THE USE OF THE MAILS OR WIRE COMMUNICATIONS, IN THE PROPOSED OFFENSE, JURISDICTION IS BASED ON THE FACT THAT THE VICTIM OF THE OFFENSE IS A FEDERALLY CONTROLLED OR INSURED INSTITUTION DEFINED *379 AS A 'FEDERALLY CHARTERED OR INSURED FINANCIAL INSTITUTION' IN SUBSECTION (B) OF THE PROPOSAL. THIS TERM IS DEFINED TO INCLUDE ALL FINANCIAL INSTITUTIONS WHOSE DEPOSITS OR ACCOUNTS ARE INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION, THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, OR THE ADMINISTRATOR OF THE NATIONAL CREDIT UNION ADMINISTRATION, FEDERAL HOME LOAN BANKS OR MEMBER BANKS OF THE FEDERAL HOME LOAN BANK SYSTEM, AND ANY BANKS OR OTHER FINANCIAL INSTITUTIONS ORGANIZED OR OPERATING UNDER THE LAWS OF THE UNITED STATES. SINCE THE USE OF BOGUS OR 'SHELL' OFFSHORE BANKS HAS INCREASINGLY BECOME A MEANS OF PERPETRATING MAJOR FRAUDS ON DOMESTIC BANKS AND THE CONSIDERABLE DELAY IN COLLECTIONS BETWEEN DOMESTIC AND FOREIGN BANKS MAKES MANIPULATION OF FOREIGN FINANCIAL TRANSACTIONS AN ATTRACTIVE MODE OF DEFRAUDING BANKS WITHIN THE UNITED STATES, IT IS INTENDED THAT THERE EXIST EXTRATERRITORIAL JURISDICTION OVER THE OFFENSE. THIS MEANS THAT EVEN IF THE CONDUCT CONSTITUTING THE OFFENSE OCCURS OUTSIDE THE UNITED STATES, ONCE THE OFFENDER IS PRESENT WITHIN THE COUNTRY, HE MAY NONETHELESS BE SUBJECT TO FEDERAL PROSECUTION.

IN SUM, THE SCOPE OF PRESENT FEDERAL STATUTES IS NOT SUFFICIENT TO ASSURE EFFECTIVE PROSECUTION OF THE RANGE OF FRAUDULENT CRIMES COMMONLY COMMITTED TODAY AGAINST FEDERALLY CONTROLLED OR INSURED FINANCIAL INSTITUTIONS. THE LEGISLATIVE PROPOSAL CONTAINED IN THIS PART WOULD MEET THE NEED FOR A STATUTORY BASIS FOR ASSERTING FEDERAL JURISDICTION OVER
SUCH OFFENSES AND WOULD THEREBY BETTER ASSURE THE INTEGRITY OF THE FEDERAL BANKING SYSTEM.

**PART H-- POSSESSION OF CONTRABAND IN PRISON**

1. IN GENERAL AND PRESENT FEDERAL LAW

THIS PART IS PRIMARILY DESIGNED TO CURE A DEFECT IN PRESENT LAW UNDER WHICH THE INTRODUCTION INTO, OR MOVEMENT FROM PLACE TO PLACE WITHIN, A PRISON FACILITY OF A PROHIBITED OBJECT BY AN INMATE IS AN OFFENSE, BUT POSSESSION OF SUCH AN OBJECT IS ITSELF NOT COVERED. THE OFFENSE PROPOSED IN THIS PART WOULD CLOSE THIS GAP, BY ADDING A NEW SECTION TO TITLE 18, UNITED STATES CODE. THE NEW SECTION IS NOT DESIGNED TO, AND DOES NOT, REPLACE THE CURRENT STATUTES IN THIS AREA, 18 U.S.C. 1791 AND 1792. RATHER, IT CREATES A SUPPLEMENTAL OFFENSE, LIMITED TO THE POSSESSION OF PARTICULARLY DANGEROUS TYPES OF CONTRABAND SUCH AS WEAPONS, NARCOTICS, AND MATERIALS THAT MAY AID ESCAPES.

UNDER 18 U.S.C. 1791 IT IS ILLEGAL FOR ANYONE, CONTRARY TO ANY RULE OR REGULATION PROMULGATED BY THE ATTORNEY GENERAL, TO INTRODUCE OR TO ATTEMPT TO INTRODUCE INTO OR UPON THE GROUNDS OF A FEDERAL PENAL FACILITY 'ANYTHING WHATSOEVER.' FURTHERMORE, IT IS UNLAWFUL 'TO TAKE OR ATTEMPT TO TAKE OR SEND ' FROM SUCH FACILITY ANYTHING WHATSOEVER CONTRARY TO ANY RULE OR REGULATION PROMULGATED BY THE ATTORNEY GENERAL. TO IMPLEMENT THIS PROHIBITION, THE ATTORNEY GENERAL IS GRANTED AUTHORITY UNDER 18 U.S.C. 4001 TO PROMULGATE RULES FOR THE REGULATION OF FEDERAL PENAL FACILITIES. PURSUANT TO SUCH AUTHORITY, THE ATTORNEY GENERAL HAS PROMULGATED 28 C.F.R. 6.1 WHICH PROVIDES THAT THE INTRODUCTION OF 'ANYTHING WHATSOEVER ' INTO ANY FEDERAL PENAL FACILITY OR THE TAKING OR ATTEMPTING TO TAKE OR SEND ANYTHING THEREFROM 'WITHOUT THE KNOWLEDGE OR CONSENT OF THE WARDEN OR SUPERINTENDENT' OF THE FACILITY IS PROHIBITS ANYTHING AT ALL FROM INTRODUCTION OR REMOVAL WITHOUT THE KNOWLEDGE OR CONSENT OF THE WARDEN.

18 U.S.C. 1792 MAKES IT ILLEGAL TO TAKE INTO A PRISON 'OR FROM PLACE TO PLACE THEREIN' ANY FIREARM, WEAPON, EXPLOSIVE, OR ANY LETHAL OR POISONOUS GAS, OR ANY OTHER SUBSTANCE OR THING DESIGNED TO KILL, INJURE, OR DISABLE ANY PRISON EMPLOYEE OR INMATE.

BOTH 18 U.S.C. 1791 AND 1792 CARRY A MAXIMUM PENALTY OF TEN YEARS IN PRISON. BECAUSE THERE IS NO DIFFERENTIATION WITH RESPECT TO DIFFERENT CLASSES OF CONTRABAND, THIS TEN-YEAR MAXIMUM APPLIES WHETHER THE CONTRABAND IS A WEAPON OR MERELY A PACKAGE OF CIGARETTES.

THE CONSTITUTIONALITY OF CURRENT SECTIONS 1791, 1792, ADN 4001 AND 28 C.F.R. 6.1 HAS BEEN CONSISTENTLY SUSTAINED AGAINST VAGUENESS AND OVERBREADTH ATTACK. [FN880]

2. PROVISIONS OF THE BILL, AS REPORTED

THIS PART OF TITLE XI ADDS A NEW SECTION, 1793, TO THE TWO PRECEDING SECTIONS DESCRIBED ABOVE. THE NEW SECTION CREATES TWO OFFENSES, SET FORTH IN SUBSECTIONS (A) AND (B). SUBSECTION (A) PROVIDES THAT WHOEVER, BEING AN INMATE IN A FEDERAL PENAL OR CORRECTIONAL INSTITUTION, MAKES, POSSESSES, PROCURES, RECEIVES, OR OTHERWISE PROVIDES HIMSELF WITH ANY OBJECT 'THAT MAY BE USED AS A MEANS OF FACILITATING ESCAPE' CONTRARY TO ANY RULE OR REGULATION PROMULGATED BY THE ATTORNEY GENERAL, MAY BE PUNISHED BY UP TO ONE YEAR IN PRISON AND A $1,000 FINE.

SUBSECTION (B) REACHES THE IDENTICAL PERSONS (I.E. INMATES IN A FEDERAL
PENAL INSTITUTION) AND PROHIBITS THE IDENTICAL CONDUCT (I.E. MAKING, POSSESSING, ETC. CERTAIN ITEMS PROSCRIBED IN REGULATIONS ISSUED BY THE ATTORNEY GENERAL) AS DESCRIBED IN SUBSECTION (A), BUT COVERS A MORE SERIOUS CLASS OF PROHIBITED ITEMS--NAMELY ANY FIREARM (AS DEFINED IN SECTION 921 OF THIS TITLE), ANY OTHER WEAPON OR OBJECT INTENDED FOR USE AS A WEAPON, OR A NARCOTIC DRUG' AS DEFINED IN 21 U.S.C. 802. THE MAXIMUM PENALTY IS IMPRISONMENT FOR UP TO TEN YEARS AND A FINE OF $10,000. 

MOREOVER, THE SECTION PROVIDES THAT, IF IMPRISONMENT IS IMPOSED, THE SENTENCE SHALL NOT BE SUSPENDED, SHALL NOT RUN CONCURRENTLY WITH ANY OTHER PRISON SENTENCE INCLUDING THAT BEING SERVED AT THE TIME OF THE OFFENSE, AND SHALL NOT BE SUBJECT TO PAROLE.

BOTH OFFENSES THUS FOLLOW THE FORMAT OF EXISTING 18 U.S.C. 1791 IN DELEGATING AUTHORITY TO THE ATTORNEY GENERAL TO ISSUE REGULATIONS ENUMERATING OR DESCRIBING THE KINDS OF OBJECTS THAT MAY BE THE SUBJECT OF CRIMINAL SANCTIONS UNDER THIS SECTION. WITH RESPECT TO WEAPONS, CURRENTLY COVERED IN 18 U.S.C. 1792, THIS ADDS AN ELEMENT OF PROOF SINCE UNDER THAT STATUTE THERE IS NO PROOF REQUIRED THAT A DANGEROUS WEAPON WAS PROHIBITED BY ANY REGULATION. HOWEVER, THIS ADDED REQUIREMENT SHOULD POSE NO PRACTICAL PROBLEM BECAUSE 28 C.F.R. 6.1 NEED ONLY BE AMENDED TO TRACK THE LANGUAGE AND PROHIBITIONS OF NEW SECTION 1793 AS IT DOES NOW FOR SECTION 1791.

AN EXAMPLE OF THE TYPE OF CONDUCT TO BE REACHED BY THESE PROVISIONS CAN BE FOUND IN UNITED STATES V. BEDWELL. [FN881] THERE THE DEFENDANT WAS OBSERVED BY A SHOP FOREMAN SHARPENING A PIECE OF METAL ON A BELT SANDER IN AN APPARENT ATTEMPT TO MANUFACTURE A KNIFE. HE SUSPICIOUSLY DROPPED THE OBJECT UPON BEING APPROACHED. PROSECUTION UNDER 18 U.S.C. 1792 FAILED BECAUSE THERE WAS NO PROOF THAT THE DEFENDANT HAD MOVED THE OBJECT FROM PLACE TO PLACE IN THE FACILITY. PROSECUTION UNDER 18 U.S.C. 1791 PROBABLY WOULD NOT HAVE BEEN SUCCESSFUL BECAUSE ALL THE PARTS OF THE HOME-MADE KNIFE APPEARED TO HAVE BEEN BROUGHT INTO THE PRISON PROPERLY. UNDER PROPOSED SECTION 1793, HOWEVER, CONVICTION WOULD BE POSSIBLE IF FROM THE FACTS IT COULD BE SHOWN THAT, CONTRARY TO A STATUTE, RULE, REGULATION, OR ORDER, THE DEFENDANT WAS KNOWINGLY MAKING OR POSSESSING AN OBJECT WHICH WAS INTENDED FOR USE AS A WEAPON OR WHICH COULD BE USED AS A MEANS OF FACILITATING ESCAPE.

WITH RESPECT TO THE TYPES OF THINGS REACHED BY SECTION 1793, THERE IS OBVIOUSLY NO PURPOSE TO COVER THE ENTIRE RANGE OF PROHIBITED ITEMS NOW WITHIN THE AMBIT OF SECTION 1791. HOWEVER, IT SHOULD BE +382 +3522 NOTED THAT SUBSECTION (A) STATES AN OBJECTIVE TEST AND IS QUITE BROAD. THUS, UNDER THAT SUBSECTION, THE CLASS OF OBJECTS THAT MAY BE PROSCRIBED BY REGULATION EXTENDS TO ANYTHING 'THAT MAY BE USED AS A MEANS OF FACILITATING ESCAPE'. BY CONTRAST, SUBSECTION (B) IN PART SETS FORTH A SUBJECTIVE STANDARD, EXTENDING TO ANY OBJECT 'INTENDED FOR USE AS A WEAPON'. SUBSECTION (A) THEREFORE SHOULD COVER SEEMINGLY INNOCUOUS ITEMS THAT COULD BE USED TO FACILITATE ESCAPE. FOR EXAMPLE, YEAST CAN BE USED AS AN INGREDIENT IN AN EXPLOSIVE DEVICE; TIN CANS OF FOOD CAN BE CONVERTED INTO KNIVES AND KEYS; AND LETTERS THAT DO NOT PASS THROUGH PRISON CENSORSHIP CAN BE USED TO PLAN ESCAPES. IT IS EXPECTED THAT THE REGULATIONS ISSUED BY THE ATTORNEY GENERAL WILL SPECIFY A LIST OF PROHIBITED ITEMS, SUCH AS FIREARMS, DRUGS, OR LETTERS NOT PASSED THROUGH CENSORSHIP, OR WILL DEFINE THE PROHIBITION IN TERMS OF CIRCUMSTANCES SURROUNDING THE CONDUCT. FOR EXAMPLE, WITH RESPECT TO KITCHEN TABLE KNIVES OR FORKS, THE REGULATION COULD PROHIBIT THE POSSESSION OF SUCH ITEMS OUTSIDE THE DINING AREA, OR REGARDING PIECES OF METAL IN A WORKSHOP, THE REGULATIONS COULD PROHIBIT THE CONCEALMENT OF SUCH ITEMS.

UNLIKE SECTIONS 1791 AND 1792, THIS SECTION CREATES A GRADING DISTINCTION...
DEPENDING ON THE POTENTIAL HARMFULNESS OF THE OBJECT PROHIBITED. THE COMMITTEE BELIEVES THAT AN OVERHAUL OF EXISTING SECTIONS 1791 AND 1792 TO CREATE RATIONAL PENALTY DISTINCTIONS IS APPROPRIATE BUT HAS NOT UNDERTAKEN THIS TASK HERE. [FN882] THIS SECTION PUNISHES AT A TEN-YEAR FELONY LEVEL THE POSSESSION BY AN INMATE OF A PROHIBITED FIREARM, DESTRUCTIVE DEVICE OR OTHER OBJECT INTENDED FOR USE AS A WEAPON, OR A NARCOTIC DRUG. THESE ARE THE ITEMS THAT ARE THE MOST DANGEROUS TO BE FOUND WITHIN A PRISON. THE DRUGS INCLUDED ARE CONSIDERED THE MOST DANGEROUS CONTROLLED SUBSTANCES—HEROIN, COCAINE, AND THE LIKE—WHOSE PRESENCE IN A PRISON WHICH OFTEN HOUSES NUMEROUS FORMER ADDICTS IS MOST DISRUPTIVE OF PRISON SAFETY AND DISCIPLINE. PUNISHMENT AT A ONE-YEAR LEVEL IS RESERVED FOR OTHER OBJECTS THAT MAY BE USED TO FACILITATE ESCAPE BUT THAT ARE NOT WEAPONS OR INTENDED FOR USE AS WEAPONS. FINALLY, IT SHOULD BE MENTIONED THAT THE OFFENSE IN SECTION 1793, LIKE THAT IN SECTION 1791, WAS DELIBERATELY WRITTEN TO APPLY ONLY TO INMATES (WHETHER CONVICTED IN A FEDERAL OR STATE COURT) IN A FEDERAL PENAL INSTITUTION. THE COMMITTEE HAS NOT SOUGHT TO EXTEND COVERAGE TO FEDERAL DEFENDANTS INCARCERATED IN STATE INSTITUTIONS, BELIEVING THAT THE PRIMARY INTEREST IN BARRING CONTRABAND FROM THOSE INSTITUTIONS LIES WITH STATE OR LOCAL OFFICIALS.

*383 **3523 PART I-- LIVESTOCK FRAUD

1. IN GENERAL AND PRESENT FEDERAL LAW

THE PURPOSE OF THIS PART OF TITLE XI IS TO CREATE SPECIFIC OFFENSES RELATING TO THEFT AND FRAUD INVOLVING LIVESTOCK AND THEREBY TO ESTABLISH THE BASIS FOR A STRONG FEDERAL RESPONSE TO INTERSTATE LIVESTOCK CRIMES. THE PROVISIONS OF THIS PART WERE ADDED TO S. 1762 IN COMMITTEE THROUGH AN AMENDMENT OFFERED BY SENATOR BAUCUS AND ARE IDENTICAL TO LEGISLATION INTRODUCED BY SENATOR BAUCUS IN THE 97TH CONGRESS, [FN883] WHICH WAS ALSO EMBODIED IN SUBSTANCE IN S. 1630, THE CRIMINAL CODE REFORM LEGISLATION APPROVED LAST CONGRESS BY THE COMMITTEE. [FN884] LIVESTOCK TRANSACTIONS IN THIS COUNTRY CONSTITUTE A SUBSTANTIAL INDUSTRY, AMOUNTING TO APPROXIMATELY FIFTY BILLION DOLLARS PER YEAR. UNFORTUNATELY, HOWEVER, THE COMMITTEE HAS RECEIVED INDICATIONS THAT THEFTS AND FRAUDS WITH RESPECT TO LIVESTOCK HAVE INCREASED IN RECENT YEARS AND THAT OFTEN LOCAL LAW ENFORCEMENT CANNOT SUCCESSFULLY COPE WITH THESE CRIMES, THE INVESTIGATION AND PROSECUTION OF WHICH IS FREQUENTLY A COMPLEX MATTER INVOLVING INTERSTATE COMMERCE AND VARIOUS FINANCIAL INSTRUMENTS USED TO PERPETRATE FRAUDS. [FN885] ALTHOUGH SOME FEDERAL STATUTES EXIST WHICH MAY BE UTILIZED TO PROSECUTE SOME TYPES OF LIVESTOCK OFFENSES, THERE IS NO SINGLE STATUTE OF SUFFICIENT BREADTH DIRECTED EXPRESSLY TO THIS SPECIES OF CRIME. THE PROPOSAL IN THIS PART IS DESIGNED TO PROVIDE SUCH COVERAGE THUS FACILITATING FEDERAL EFFORTS TO COMBAT LIVESTOCK FRAUD. THE ONLY SPECIFIC FEDERAL OFFENSES ON THE BOOKS AIMED AT CERTAIN LIVESTOCK CRIMES ARE FOUND IN SECTIONS 2316 AND 2317 OF TITLE 18, UNITED STATES CODE. THESE STATUTES, ENACTED IN 1948, DEAL WITH CATTLE. THEY PUNISH BY UP TO FIVE YEARS IN PRISON AND A $5,000 FINE WHOEVER TRANSPORTS CATTLE IN INTERSTATE OR FOREIGN COMMERCE KNOWING THE CATTLE TO HAVE BEEN STOLEN, OR WHOEVER RECEIVES, CONCEALS, STORES, BUYS, SELLS, OR DISPOSES OF CATTLE MOVING IN OR CONSTITUTING A PART OF INTERSTATE OR FOREIGN COMMERCE, KNOWING THE SAME TO HAVE BEEN STOLEN.

IN ADDITION, 18 U.S.C. 2314 PUNISHES GENERALLY WHOEVER TRANSPORTS IN INTERSTATE OR FOREIGN COMMERCE 'ANY GOODS, WARES, (OR) MERCHANDISE' OF THE VALUE OF $5,000 OR MORE, KNOWING THE SAME TO HAVE BEEN STOLEN,
CONVERTED OR TAKEN BY FRAUD. SECTION 2314 ALSO PROHIBITS, IN LANGUAGE SIMILAR TO THAT EMPLOYED IN THE MAIL AND WIRE FRAUD STATUTES, [FN886] WHOEVER, HAVING DEVISED OR INTENDING TO DEVISE ANY SCHEME OR ARTIFICE TO DEFRAUD, OR FOR OBTAINING MONEY OR PROPERTY BY MEANS OF FALSE OR FRAUDULENT PRETENSES, REPRESENTATIONS **384 **3524 OR PROMISES, TRANSPORTS OR CAUSES TO BE TRANSPORTED, OR INDUCES ANY PERSON TO TRAVEL, IN INTERSTATE COMMERCE 'IN THE EXECUTION OR CONCEALMENT' OF A SCHEME OR ARTIFICE TO DEFRAUD INVOLVING PROPERTY HAVING A VALUE OF $5,000 OR MORE. THE PENALTY IS UP TO TEN YEARS IN PRISON AND A $10,000 FINE.

WITH RESPECT TO THE FIRST BRANCH OF SECTION 2314, IT IS NOT YET CLEAR FROM THE DECIDED CASES WHETHER ITS SCOPE REACHES ANIMATE PROPERTY SUCH AS LIVESTOCK. IN WHAT IS APPARENTLY THE ONLY COMPREHENSIVE RULING ON THIS ISSUE, A DISTRICT COURT IN 1959, AFTER EXTENSIVELY ANALYZING THE LEGISLATIVE HISTORY, HELD THAT ANIMALS (IN THAT CASE A SHETLAND PONY) ARE INCLUDED WITHIN THE MEANING OF THE TERMS 'GOODS, WARES, (OR) MERCHANDISE'. [FN887] WHILE THIS INTERPRETATION SEEMS CORRECT, THIS FACT DOES NOT ELIMINATE THE NEED FOR ADDITIONAL LEGISLATION COVERING LIVESTOCK EXPLICITLY, IN VIEW OF THE LACK OF DEFINITIVE APPELLATE COURT HOLDINGS. MOREOVER, INVESTIGATORS AND PROSECUTORS MIGHT NOT ALWAYS APPRECIATE, FROM THE LANGUAGE USED IN SECTION 2314, THE POSSIBILITY OF APPLYING ITS PROVISIONS AS A MEANS OF VINDICATING LIVESTOCK THEFTS.

THE SECOND BRANCH OF SECTION 2314, BY CONTRAST, SEEMS CLEARLY TO EMBRACE FRAUD INVOLVING LIVESTOCK. HOWEVER, ITS REACH IS LIMITED BY THE CIRCUMSTANCES THAT (1) IT PROSCRIBES ONLY FRAUDULENT-TYPE CONDUCT, NOT OUTRIGHT THEFT, AND (2) IT REQUIRES THAT A PERSON TRAVEL IN INTERSTATE COMMERCE (NOT FOREIGN COMMERCE) 'IN THE EXECUTION OR CONCEALMENT' OR THE CRIME. [FN888] THUS, MANY KINDS OF CRIMES INVOLVING LIVESTOCK IN WHICH THERE MIGHT EXIST A SUBSTANTIAL FEDERAL INTEREST COULD NOT BE PURSUED UNDER THIS STATUTE. [FN889]

2. PROVISIONS OF THE BILL, AS REPORTED

PART I BOTH EXPANDS EXISTING 18 U.S.C. 2316 AND 2317 AND CREATES A NEW OFFENSE THAT MORE BROADLY PROSCRIBES LIVESTOCK CRIMES. THE BILL AMENDS SECTIONS 2316 AND 2317 BY STRIKING THE WORD 'CATTLE' AND SUBSTITUTING 'LIVESTOCK'. THIS HAS THE EFFECT OF ENLARGING THE SCOPE OF THOSE CURRENT STATUTES TO REACH ANY CRIMES INVOLVING THE INTERSTATE TRANSPORTATION, RECEIPT, OR DISPOSITION OF LIVESTOCK KNOWN TO HAVE BEEN STOLEN. THE COMMITTEE INTENDS TO PERPETUATE THE CONSTRUCTION OF THE TERM 'STOLEN' AS EXTENDING TO ALL MANNER OF FELONIOUS TAKINGS, WITHOUT REGARD TO WHETHER THE THEFT CONSTITUTES COMMON LAW LARCENY. [FN890] THE TERM 'LIVESTOCK' IS INTENDED TO CARRY ITS USE OR PROFIT, SUCH AS HORSES, SHEEP, PIGS, AND GOATS.

THE BILL ALSO ADDS A NEW SECTION 666, TO TITLE 18, UNITED STATES CODE. THE WORDING OF THIS OFFENSE IS DERIVED CLOSELY FROM THE GENERAL THEFT OFFENSE (SECTION 1731) IN THE CRIMINAL CODE REFORM BILL, S. 1630, APPROVED BY THE COMMITTEE IN THE 97TH CONGRESS. IT PUNISHES WHOEVER 'OBTAINS OR USES THE PROPERTY OF ANOTHER WHICH HAS A **385 **3525 VALUE OF $10,000 OR MORE IN CONNECTION WITH THE MARKETING OF LIVESTOCK IN INTERSTATE OR FOREIGN COMMERCE WITH INTENT TO DEPRIVE THE OTHER OF A RIGHT TO THE PROPERTY OR A BENEFIT OF THE PROPERTY OR TO APPROPRIATE THE PROPERTY TO HIS OWN USE OR THE USE OF ANOTHER'. THE PENALTY IS UP TO FIVE YEARS IN PRISON AND A $10,000 FINE.

THE COMMITTEE INTENDS THAT THE DISCUSSION OF THE PHRASES 'OBTAINS OR USES', 'PROPERTY', 'PROPERTY OF ANOTHER', AND 'WITH INTENT TO DEPRIVE', ETC., IN THE REPORT ON SECTION 1731 OF S. 1630 [FN891] BE DEEMED APPLICABLE HERE. THUS, FOR EXAMPLE, 'OBTAINS OR USES' IS INTENDED TO INCLUDE ANY MANNER OF THEFT,
STEALING, LARCENY, EMBEZZLEMENT, MISAPPLICATION, CONVERSATION, OBTAINING PROPERTY BY FALSE PRETENSES, FRAUD, DECEPTION, AND ALL OTHER CONDUCT SIMILAR IN NATURE. ‘WITH INTENT TO DEPRIVE THE OTHER OF A RIGHT TO THE PROPERTY’ IS INTENDED NOT TO INCORPORATE THE RESTRICTIVE COMMON LAW LARCENY CONCEPT OF AN INTENT TO APPROPRIATE OR DEPRIVE ANOTHER OF PROPERTY PERMANENTLY; AN INTENT TO CAUSE A TEMPORARY DEPRIVATION OR APPROPRIATION IS ALSO COVERED. UNDER THIS OFFENSE, HOWEVER, UNLIKE THE AMENDED 18 U.S.C. 2316 AND 2317, ONLY CRIMES OF THE MAGNITUDE OF $10,000 OR MORE ARE WITHIN THE STATUTE. THIS JURISDICTIONAL FLOOR (LIKE THE $5,000 FLOOR IN THE FIRST BRANCH OF 18 U.S.C. 2314) IS DESIGNED TO CONFINE FEDERAL JURISDICTION TO SUBSTANTIAL VIOLATIONS. MINOR LIVESTOCK CRIMES THAT DID NOT INVOLVE INTERSTATE TRANSPORTATION OF THE STOLEN LIVESTOCK (SO AS TO BE REACHABLE UNDER SECTION 2316 AND 2317) WOULD BE LEFT FOR LOCAL PROSECUTION. FINALLY, CONSIDERING THE $10,000 FLOOR IN THE NEW OFFENSE, THE PHRASE ‘IN CONNECTION WITH THE MARKETING OF LIVESTOCK IN INTERSTATE OR FOREIGN COMMERCE’ IS INTENDED TO HAVE A SCOPE ENABLING FEDERAL PROSECUTION OF CRIMES IN SITUATIONS THAT GO BEYOND INTERSTATE OR FOREIGN TRANSPORTATION OF THE LIVESTOCK. FOR EXAMPLE, THE NEW SECTION WOULD REACH A FRAUD IN WHICH A CONTRACT TO ‘MARKET’ (I.E. SELL OR DISPOSE OF) LIVESTOCK WAS ENTERED INTO, IN WHOLE OR PART, ON THE BASIS OF INTERSTATE TRAVEL OR COMMUNICATIONS BUT WHERE THE LIVESTOCK REMAINED INTRASTATE.

*386 **3526 TITLE XII-- PROCEDURAL AMENDMENTS

TITLE XII CONSISTS OF A NUMBER OF PROCEDURAL AMENDMENTS TO IMPROVE THE OPERATION OF THE FEDERAL CRIMINAL JUSTICE SYSTEM. IN SUMMARY, THEY RELATE TO PROSECUTION OF CERTAIN JUVENILES AS ADULTS (PART A); WIRETAP AMENDMENTS (PART B); EXPANSION OF VENUE FOR THREAT OFFENSES (PART C); INJUNCTIONS AGAINST FRAUD (PART D); GOVERNMENT APPEAL OF POST-CONVICTION NEW TRIAL ORDERS (PART E); CLARIFICATION OF CHANGE OF VENUE FOR CERTAIN TAX OFFENSES (PART G); AND AMENDMENTS TO 18 U.S.C. 951 (PART H).

PART A-- PROSECUTION OF CERTAIN JUVENILES AS ADULTS

INTRODUCTION

PART A OF TITLE XII AMENDS 18 U.S.C. 5032 AND 5038, PROVISIONS OF THE JUVENILE JUSTICE AND DELINQUENCY ACT OF 1974, PASSED BY THE NINETY-THIRD CONGRESS. [FN892] THE ESSENTIAL CONCEPTS OF THE 1974 ACT ARE THAT JUVENILE DELINQUENCY MATTERS SHOULD GENERALLY BE HANDLED BY THE STATES AND THAT CRIMINAL PROSECUTION OF JUVENILE OFFENDERS SHOULD BE RESERVED FOR ONLY THOSE CASES INVOLVING PARTICULARLY SERIOUS CONDUCT BY OLDER JUVENILES. THE COMMITTEE CONTINUES TO ENDORSE THESE CONCEPTS, BUT HAS DETERMINED THAT CERTAIN MODIFICATIONS IN CURRENT LAW ARE NECESSARY TO ALLOW AN ADEQUATE FEDERAL RESPONSE TO SERIOUS CRIMINAL CONDUCT ON THE PART OF JUVENILES. JUVENILES ACCOUNT FOR NEARLY HALF OF OUR VIOLENT CRIMES. THE COMMITTEE'S GOAL IS TO IDENTIFY, CONVICT, AND INCARCERATE THE SMALL NUMBER OF JUVENILES WHO COMMIT THE MOST VIOLENT CRIMES.

PRESENT FEDERAL LAW ESTABLISHES FIVE SPECIFIC CRITERIA WHICH MUST BE CONSIDERED BY THE COURT IN MAKING THE DETERMINATION TO TREAT A JUVENILE AS AN ADULT ON MOTION OF THE ATTORNEY GENERAL. THE COMMITTEE BELIEVES THAT ADDITIONAL, MANDATORY PROVISIONS FOR TREATING JUVENILES AS ADULTS ARE NEEDED.


CONFIDENTIALITY OF JUVENILE RECORDS HAS BEEN PROTECTED AT THE EXPENSE OF INFORMED DECISION-MAKING BY FEDERAL JUDGES IN CASES INVOLVING JUVENILES. THE COMMITTEE DETERMINED THAT THE INTEREST TO SOCIETY IN IDENTIFYING AND TRACKING YOUTHFUL OFFENDERS UNDER SOME CIRCUMSTANCES MUST TAKE PRECEDENCE OVER THE JUVENILE OFFENDER'S INTEREST IN CONFIDENTIALITY. IN ADDITION, FINGERPRINTS, PHOTOGRAPHS, AND RECORDS OF PRIOR CONVICTIONS MUST BE MAINTAINED ON JUVENILES CHARGED WITH AN OFFENSE THAT IF COMMITTED BY AN ADULT WOULD BE A CRIME OF VIOLENCE.

THE COMMITTEE BELIEVES THESE AMENDMENTS WILL EQUIP THE JUVENILE JUSTICE SYSTEM WITH TOOLS ADAPTED TO MEET THE CHALLENGES POSED BY TODAY'S VIOLENT YOUTHS. SUBJECTING THESE YOUTHS TO CLOSER SCRUTINY BY THE COURTS, WHILE SUBJECTING THE COURTS TO CLOSER SCRUTINY BY THE PUBLIC, WILL LEAD TO A FAIRER, MORE EFFECTIVE JUVENILE JUSTICE SYSTEM.

SECTION 1201

1. IN GENERAL

SECTION 1201 OF TITLE XII AMENDS 18 U.S.C. 5032, THE PROVISION OF CURRENT LAW WHICH GOVERNS PROCEEDINGS AGAINST JUVENILE OFFENDERS. THE MOST SIGNIFICANT OF THESE AMENDMENTS ARE THOSE WHICH WOULD ALLOW RETENTION OF FEDERAL JURISDICTION OVER A JUVENILE OFFENDER ON THE BASIS OF A SUBSTANTIAL FEDERAL INTEREST IN THE OFFENSE CHARGED AND WHICH WOULD EXPAND THE AUTHORITY TO PROCEED AGAINST OLDER JUVENILES CHARGED WITH PARTICULARLY SERIOUS OFFENSES IN A CRIMINAL PROSECUTION RATHER THAN A JUVENILE DELINQUENCY ADJUDICATION.

2. PRESENT FEDERAL LAW


3. PROVISIONS OF THE BILL, AS REPORTED

SUBSECTION (A) OF SECTION 1201 AMENDS THE FIRST PARAGRAPH OF 18 U.S.C. 5032, WHICH DEFINES THE CIRCUMSTANCES IN WHICH A JUVENILE [FN895] CHARGED WITH A FEDERAL OFFENSE MUST BE SURRENDERED TO STATE AUTHORITIES. AS NOTED ABOVE, SUCH A SURRENDER PRESENTLY MUST OCCUR UNLESS THE ATTORNEY GENERAL CERTIFIES THAT THE STATE IS UNWILLING OR UNABLE TO EXERCISE JURISDICTION OR HAS NO ADEQUATE JUVENILE PROGRAMS OR SERVICES. SECTION 1201(A) CARRIES FORWARD THE CURRENT CERTIFICATION REQUIREMENT, BUT ADDS TWO ADDITIONAL CIRCUMSTANCES UNDER WHICH SURRENDER TO STATE AUTHORITIES IS NOT REQUIRED.

FIRST, A GENERAL EXCEPTION IS MADE FOR THOSE JUVENILES CHARGED WITH OFFENSES COMMITTED WITHIN THE SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES THAT ARE MISDEMEANORS PUNISHABLE BY NO MORE THAN SIX MONTHS OF IMPRISONMENT. IN SUCH CASES, THE CERTIFICATION PROCEDURE NEED NOT BE USED ALTHOUGH DIVERSION TO STATE AUTHORITIES IS STILL PREFERRED WHERE POSSIBLE. THIS CHANGE IN CURRENT LAW IS DESIGNED TO CURE A PRACTICAL PROBLEM THAT HAS ARisen. STATUTORY AUTHORITY EXISTS FOR CREATION OF PETTY OFFENSES, BY MEANS OF REGULATIONS, THAT GOVERN CONDUCT IN NATIONAL PARKS AND LANDS. [FN896] IN LARGE MEASURE, THESE OFFENSES, WHICH CARRY A SIX-MONTH MAXIMUM TERM OF IMPRISONMENT, COVER SUCH MATTERS AS DRIVING REGULATIONS, LITTERING ORDINANCES, AND THE LIKE. WHEN A JUVENILE IS CHARGED WITH ONE OF THESE OFFENSES COMMITTED IN A NATIONAL PARK, HE IS USUALLY INTERESTED IN SPEEDY DISPOSITION AND, IN MOST CASES, THE STATES ARE RELUCTANT TO ASSUME JURISDICTION OVER THE JUVENILE. THE DELAY ATTENDANT IN MEETING THE CURRENT CERTIFICATION AFTER 'INVESTIGATION' REQUIREMENT FOR A JUVENILE FAR FROM HIS HOME CHARGED WITH A PETTY OFFENSE SUCH AS A DRIVING VIOLATION, CREATES A SIZABLE AND AN UNREASONABLE BURDEN FOR BOTH THE JUVENILE AND THE COURT. IN THESE CASES, SUMMARY DISPOSITION IS IN EVERYONE'S INTEREST. ACCORDINGLY, THE COMMITTEE HAS DECIDED TO ELIMINATE THE CERTIFICATION REQUIREMENT FOR SUCH PETTY OFFENSES WHEN COMMITTED WITHIN THE SPECIAL TERRITORIAL JURISDICTION OF THE UNITED STATES. A SIMILAR PROVISION HAS BEEN INCORPORATED IN PAST CRIMINAL CODE REFORM LEGISLATION APPROVED BY THE COMMITTEE. [FN897]

REFORM LEGISLATION APPROVED BY THE COMMITTEE IN THE LAST CONGRESS, S. 1630. [FN900] THE COMMITTEE HAS LIMITED THE PROVISION TO SERIOUS VIOLENT FELONIES AND DRUG OFFENSES SO THAT THE FEDERAL GOVERNMENT WILL CONTINUE TO DEFER TO STATE AUTHORITIES FOR LESS SERIOUS JUVENILE OFFENSES. MOREOVER, THE COMMITTEE INTENDS THAT A DETERMINATION THAT THERE IS A 'SUBSTANTIAL FEDERAL INTEREST' BE BASED ON A FINDING THAT THE NATURE OF THE OFFENSE OR THE CIRCUMSTANCES OF THE CASE GIVE RISE TO SPECIAL FEDERAL CONCERNS. EXAMPLES OF SUCH CASES COULD INCLUDE AN ASSAULT ON, OR ASSASSINATION OF, A FEDERAL OFFICIAL, AN AIRCRAFT HIJACKING, A KIDNAPING WHERE STATE BOUNDARIES ARE CROSSED, A MAJOR ESPIONAGE OR SABOTAGE OFFENSE, PARTICIPATION IN LARGE-SCALE DRUG TRAFFICKING, OR SIGNIFICANT AND WILLFUL DESTRUCTION OF PROPERTY BELONGING TO THE UNITED STATES.

SUBSECTION (B) OF SECTION 1201 AMENDS THE FOURTH PARAGRAPH OF 18 U.S.C. §5032, WHICH GOVERNS THE CIRCUMSTANCES IN WHICH A JUVENILE MAY BE PROSECUTED AS AN ADULT. [FN901] THE COMMITTEE IS AWARE OF THE EXTENSIVE CONTROVERSY IN RECENT YEARS OVER THE APPROPRIATE AGE SEPARATING THE JUVENILE DELINQUENT FROM THE ADULT OFFENDER. [FN902] ON THE ONE HAND, IT IS ARGUED THAT JUVENILE OFFENDERS ARE DIFFERENT IN KIND FROM ADULT OFFENDERS, AND THAT REHABILITATION SHOULD BE THE PRIMARY GOAL IN DETERMINING HOW YOUNG OFFENDERS SHOULD BE TREATED. ON THE OTHER HAND, THERE IS GROWING CONCERN ABOUT THE HIGH PERCENTAGE OF VIOLENT CRIME COMMITTED BY JUVENILES WHO HAVE RECORDS OF CRIMINAL ACTIVITY, AND GROWING RECOGNITION THAT FOR SOME OF THESE JUVENILES, THE REHABILITATION THEORY UPON WHICH THE CURRENT JUVENILE JUSTICE SYSTEM IS BASED IS NOT ALWAYS ADEQUATE TO PROTECT THE PUBLIC INTEREST. PRESENTLY, APPROXIMATELY 20 PERCENT OF VIOLENT CRIMES AND 44 PERCENT OF SERIOUS PROPERTY CRIMES ARE COMMITTED BY PERSONS UNDER EIGHTEEN, AND SUCH SERIOUS CRIMINAL ACTIVITY IS NOT CONFINED TO OLDER JUVENILES; IN 1979, JUVENILES UNDER FIFTEEN ACCOUNTED FOR MORE THAN 5 PERCENT OF VIOLENT CRIMES AND 16 PERCENT OF SERIOUS PROPERTY CRIMES. [FN903]


THE COMMITTEE SHARES MANY OF THE CONCERNS ABOUT THE JUVENILE CRIME PROBLEM THAT HAVE LED TO INCREASED AUTHORITY TO PROSECUTE YOUNG OFFENDERS IN THE STATES. ACCORDINGLY, WHILE THE COMMITTEE CONTINUES TO BELIEVE THAT CRIMINAL PROSECUTION IS NOT APPROPRIATE FOR MOST JUVENILE OFFENDERS, IT HAS DETERMINED THAT IN SOME RESPECTS THE BASES FOR FEDERAL PROSECUTION OF YOUTHS COMMITTING PARTICULARLY SERIOUS OFFENSES IS TOO LIMITED AND THAT SOME EXPANSION OF THE BASES FOR PROSECUTION IS NECESSARY.


SUBSECTION (C) OF SECTION 1201 ADDS THREE NEW PARAGRAPHS TO 18 U.S.C. 5032. THE FIRST ADDRESSES THE SITUATION IN WHICH A JUVENILE IS TRANSFERRED FOR PROSECUTION AND IS CONVICTED, BUT NOT ON THE CHARGE ON WHICH THE TRANSFER FOR PROSECUTION WAS BASED, BUT ON A LESSER CHARGE WHICH COULD NOT HAVE SUPPORTED THE PROSECUTION TRANSFER. THE FIRST NEW PARAGRAPH ADDED BY SECTION 1202(C) PROVIDES THAT IN SUCH A CASE, THE DISPOSITION OF THE JUVENILE IS TO PROCEED IN THE SAME MANNER AS IF HE HAD BEEN ADJUDICATED DELINQUENT RATHER THAN CRIMINALLY CONVICTED. IF A JUVENILE IS CONVICTED OF A CHARGE THAT COULD NOT HAVE SUPPORTED THE ORIGINAL TRANSFER OF HIS CASE, HE SHOULD NOT BE HELD TO THE CONSEQUENCES OF CRIMINAL CONVICTION BUT RATHER SHOULD BE TREATED AS THOUGH HE HAD BEEN ADJUDICATED DELINQUENT. THE SECOND NEW PARAGRAPH ADDED TO 18 U.S.C. 5032 PROVIDES THAT PROCEEDINGS WITH RESPECT TO A JUVENILE ARE NOT TO COMMENCE UNTIL ANY PRIOR JUVENILE COURT RECORDS OF THE JUVENILE HAVE BEEN RECEIVED BY THE COURT, OR THE CLERK OF THE COURT CERTIFIES THAT THE JUVENILE HAS NO PRIOR RECORD OR THAT THE RECORDS ARE UNAVAILABLE AND WHY. IN MANY RESPECTS, DETERMINATION OF WHETHER A YOUNG OFFENDER IS TO BE TREATED AS A JUVENILE OR AN ADULT AND OF THE APPROPRIATE DISPOSITION OF JUVENILES ADJUDICATED DELINQUENT DEPENDS ON THE NATURE OF THE JUVENILE'S PRIOR RECORD. TOO OFTEN, HOWEVER, JUVENILE PROCEEDINGS ARE UNDERTAKEN WITHOUT THE BENEFIT OF SUCH INFORMATION. THIS NEW PARAGRAPH STRESSES THAT THESE RECORDS BE OBTAINED BEFOREHAND WHENEVER POSSIBLE. THE COMMITTEE INTENDS, HOWEVER, THAT THIS NEW PROVISION'S REQUIREMENTS ARE TO BE UNDERSTOOD IN THE CONTEXT OF A STANDARD OF REASONABLENESS. THUS, IF REASONABLE EFFORTS TO OBTAIN A JUVENILE'S RECORDS HAVE BEEN MADE, CERTIFICATION OF THEIR UNAVAILABILITY IS PERMISSIBLE. ALSO, THE COMMITTEE INTENDS THAT THIS NEW REQUIREMENT BE APPLIED WITH A DEGREE OF FLEXIBILITY SO THAT STAGES OF PROCEEDINGS TO WHICH SUCH RECORDS ARE NOT RELEVANT ARE NOT DELAYED PENDING ARRIVAL OF THE RECORDS. THUS, IT IS APPROPRIATE THAT A HEARING CONCERNING A TRANSFER FOR PROSECUTION AWAIT THE ARRIVAL OF A JUVENILE'S COURT RECORDS, SINCE THEY ARE HIGHLY RELEVANT TO THE TRANSFER DECISION. HOWEVER, IT WOULD ALSO BE APPROPRIATE TO COMMENCE DELINQUENCY PROCEEDINGS (PROVIDED THE GOVERNMENT HAD NOT MOVED FOR A TRANSFER FOR

SECTION 1202

1. IN GENERAL AND PRESENT FEDERAL LAW


2. PROVISIONS OF THE BILL, AS REPORTED


THE SECOND AMENDMENT TO 18 U.S.C. 5038 CLARIFIES THE CURRENT PROHIBITION ON MAKING THE NAME OR PICTURE OF A JUVENILE PUBLIC IN CONNECTION WITH A JUVENILE DELINQUENCY PROCEEDING 'BY ANY MEDIUM OF PUBLIC INFORMATION.' THE QUOTED PHRASE, WHICH IMPLIES THAT A NEWSPAPER COULD NOT PUBLISH THE NAME OR PHOTOGRAPH OF A JUVENILE IT HAD LEGITIMATELY OBTAINED, HAS BEEN DELETED. THE SUPREME *393 **3533 COURT HAS HELD, IN INTERPRETING A WEST VIRGINIA STATUTE THAT MADE SUCH PUBLICATION ILLEGAL, THAT THE FIRST AMENDMENT WILL NOT PERMIT THE STATE TO PUNISH THE TRUTHFUL PUBLICATION OF AN ALLEGED

UNDER CURRENT TITLE III, THE ATTORNEY GENERAL, OR ANY ASSISTANT ATTORNEY GENERAL SPECIFICALLY DESIGNATED BY THE ATTORNEY GENERAL, MAY AUTHORIZE AN APPLICATION TO A FEDERAL JUDGE FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS BY FEDERAL LAW ENFORCEMENT OFFICERS AS PROVIDED THEREUNDER. [FN919] THE INVESTIGATIVE OR LAW ENFORCEMENT OFFICER TO CONDUCT AN EMERGENCY SURVEILLANCE UNDER THE CIRCUMSTANCES SPECIFIED FOR SUCH SITUATIONS. [FN920] IN 1974, THE SUPREME COURT HELD THAT CONGRESS INTENDED THAT THE OFFICIAL SPECIFICALLY DESIGNATED BY THE STATUTE MUST PERSONALLY AUTHORIZE LAW ENFORCEMENT OFFICERS TO MAKE APPLICATIONS FOR WIRETAP ORDERS. [FN921] THE PURPOSE OF THE STATUTE AS CONSTRUED BY THE COURT WAS TO CENTRALIZE IN A PUBLICLY RESPONSIBLE OFFICIAL SUBJECT TO THE POLITICAL PROCESS THE FORMULATION OF LAW ENFORCEMENT POLICY ON USE OF ELECTRONIC SURVEILLANCE TECHNIQUES. [FN922] THIS RESTRICTION PROVIDED IN CURRENT LAW PRESENTS SERIOUS PROBLEMS WHEN THE STATUTORILY DESIGNATED INDIVIDUALS-- WHICH AS A PRACTICAL MATTER ARE OR SHOULD BE **3534 LIMITED TO THE ATTORNEY GENERAL OR THE ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION-- ARE NOT AVAILABLE FOR ONE REASON OR ANOTHER.

WITH RESPECT TO EMERGENCY SURVEILLANCES, TITLE III CURRENTLY PERMITS EMERGENCY INTERCEPTIONS IN SITUATIONS WHICH RELATE TO 'CONSPIRATORIAL *395 ACTIVITIES THREATENING THE NATIONAL SECURITY' [FN923] AND 'CONSPIRATORIAL ACTIVITIES CHARACTERISTIC OF ORGANIZED CRIME.' [FN924] IN THESE SITUATIONS, HOWEVER, GROUNDS MUST EXIST FOR OBTAINING A COURT ORDER UNDER TITLE III, AND AN APPLICATION FOR SUCH AN ORDER MUST BE MADE WITHIN 48 HOURS AFTER THE INTERCEPTION HAS OCCURRED. [FN925] THESE EXCEPTIONS HAVE BEEN INVOKED BY THE ATTORNEY GENERAL IN VERY FEW INSTANCES SINCE THE PASSAGE OF TITLE III, AND THESE INSTANCES HAVE USUALLY INVOLVED SERIOUS THREATS TO LIFE. [FN926]

EXPECTATION OF PRIVACY ON THE PART OF THE CRIMINAL, [FN929] IT WAS SUGGESTED THAT THE STATUTE SHOULD BE AMENDED TO AUTHORIZE SUCH NECESSARY INVESTIGATIVE EFFORTS. AS STATED BY THE DEPARTMENT OF JUSTICE: [FN930] IN LIGHT OF THE EXIGENCY OF THOSE SITUATIONS IN WHICH HUMAN LIFE IS THREATENED, THERE SEEMS TO BE NO REASON WHY TITLE III SHOULD OMIT A SPECIFIC PROVISION FOR EMERGENCY AUTHORIZATION IN THESE INSTANCES. WHILE WE BELIEVE THAT IN THOSE RELATIVELY INFREQUENT OCCASIONS IN WHICH EMERGENCY INTERCEPTIONS IN LIFE-ENDANGERING SITUATIONS HAVE BEEN AUTHORIZED BY THE DEPARTMENT, THERE HAS BEEN A LEGAL BASIS FOR SUCH ACTION, THE STATUTE IS NOT AS CLEAR AS IT SHOULD BE THAT LIFE-ENDANGERING SITUATIONS AS A DISTINCT CATEGORY, ARE COVERED. CERTAINLY, IT SHOULD NOT BE NECESSARY TO HAVE TO STRAIN THE PRESENT LANGUAGE TO ACT IN THE INTEREST OF SAVING HUMAN LIFE, BY MAKING A DETERMINATION THAT THE SITUATION INVOLVES, E.G., 'CONSPIRATORIAL ACTIVITIES CHARACTERISTIC OF ORGANIZED CRIME.' TITLE III, WHICH IN ALL OTHER RESPECTS FULLY ADDRESSES IN A STRAIGHTFORWARD MANNER THOSE ISSUES WHICH MAY ARISE INVOLVING ELECTRONIC SURVEILLANCE, SHOULD SPEAK CLEARLY TO AUTHORIZE THE USE OF EMERGENCY SURVEILLANCE POWER IN THIS MOST COMPELLING SITUATION.


SECTION 1203(A) AND (C)(4) OF THE BILL AMEND 18 U.S.C. 2518(7) (EMERGENCY SURVEILLANCE) AND 2516 (APPLICATION TO COURT FOR SURVEILLANCE), RESPECTIVELY, TO ADD THE DEPUTY ATTORNEY GENERAL AND THE ASSOCIATE ATTORNEY GENERAL TO THE SPECIFIC STATUTORY LIST OF INDIVIDUALS WITHIN THE DEPARTMENT OF JUSTICE AUTHORIZED TO APPROVE APPLICATIONS TO THE COURTS FOR A SURVEILLANCE ORDER AND TO AUTHORIZE AN EMERGENCY SURVEILLANCE. THIS PERMITS A BROADER SHARING OF THE BURDEN FOR REVIEWING POTENTIAL SURVEILLANCE CASES, THEREBY PROMOTING A MORE THOROUGH CONSIDERATION WITHOUT DIMINISHING THE CONGRESSIONAL INTENT TO HAVE A POLITICALLY RESPONSIBLE HIGH OFFICIAL PERSONALLY APPROVE SURVEILLANCE APPLICATIONS OR EMERGENCY INTERCEPTIONS.

SECTION 1203(B) OF THE BILL AMENDS 18 U.S.C. 2518(7) TO PROVIDE THAT A SURVEILLANCE MAY BE AUTHORIZED WITHOUT A COURT ORDER IN AN EMERGENCY SITUATION INVOLVING 'IMMEDIATE DANGER OF DEATH OR SERIOUS PHYSICAL INJURY TO ANY PERSON ', IF THE OTHER CRITERIA FOR AN EMERGENCY INTERCEPTION EXISTS. THE LIFE-ENDANGERING EXCEPTION IS GROUNDED IN SOUND CONSTITUTIONAL DOCTRINE AND FOURTH AMENDMENT CASE LAW. [FN933] IT HAS BEEN RECOMMENDED BY THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE [FN934] AND ENDORSED BY THE LAST TWO ADMINISTRATIONS, VARIOUS FEDERAL LAW ENFORCEMENT AGENCIES, AND THE AMERICAN BAR ASSOCIATION, [FN935] AND WOULD HAVE THE EFFECT OF HAVING TITLE III WHICH 'IS INTENDED TO COVER THE WATERFRONT OF ELECTRONIC SURVEILLANCE' [FN936] REFLECT CURRENT LAW AND MEET A DEMONSTRATED NEED. SINCE NO ONE CHALLENGES THE LEGALITY OR IMPORTANCE OF AN EXCEPTION IN A LIFE-ENDANGERING SITUATION, TITLE III SHOULD BE AMENDED TO REFLECT CLEARLY THAT THIS AUTHORITY EXISTS.

THE TYPE OF SITUATIONS INTENDED TO BE INCLUDED WITHIN THIS EXCEPTION GENERALLY WOULD RELATE TO THOSE INVOLVING THE TAKING OF A HOSTAGE, THE
KIDNAPPING OF A VICTIM, OR THE PLANNING OF AN EXECUTION. [FN937] THESE AND SIMILAR SITUATIONS INVOLVE SERIOUS AND IMMEDIATE THREATS TO THE LIFE OF INNOCENT VICTIMS, AND THE USE OF ELECTRONIC SURVEILLANCE WOULD FOCUS MORE ON THE PREVENTION OF SERIOUS INJURY OR DEATH TO THAT VICTIM THAN IT WOULD ON THE COLLECTION OF EVIDENCE WHICH WOULD BE OF SECONDARY IMPORTANCE AT THE TIME. AS ONE WITNESS TESTIFIED: [FN938]

IN ADDITION TO OBTAINING THE EVIDENCE OF A PLANNED CRIME OR CRIME IN PROGRESS, THE PROPOSED PROVISION WOULD ALLOW **3536 US TO REACT IMMEDIATELY IN A WAY TO BETTER ASSURE THE SAFETY OF THE VICTIM. FOR EXAMPLE, WE COULD IDENTIFY THE *397 KIDNAPPER, THE INTENTIONS OF THE KIDNAPPER, THE LOCATION OF THE VICTIM, OR BETTER NEGOTIATE THE SAFE RELEASE OF HOSTAGES. THE FBI COULD MORE EFFECTIVELY ANTICIPATE THE SUBJECT’S MOVES AND BE IN A BETTER POSITION TO RESOLVE THE CRISIS WITHOUT LOSS OF LIFE. SUCH INFORMATION WOULD BE ACQUIRED THROUGH A TAP ON A PHONE, A MICROPHONE SECURED IN A HOUSE OR IN A GETAWAY CAR.

A SPOKESMAN FOR THE DEPARTMENT OF JUSTICE TESTIFIED ABOUT PAST AND FUTURE SITUATIONS IN WHICH THE NEED FOR SUCH EMERGENCY AUTHORITY WAS AND WOULD BE NECESSARY: [FN939]

SITUATIONS HAVE ARISEN AND MAY ARISE IN WHICH TERRORISTS OR FELONS, WHILE HOLDING HOSTAGES, USE AN AVAILABLE TELEPHONE TO ARRANGE WITH ASSOCIATES A STRATEGY TO FORCE ACTION ON THEIR DEMANDS OR A PLAN OF ESCAPE. SIMILARLY, THERE MAY BE SITUATIONS IN WHICH PLANS FOR AN IMMINENT MURDER ARE LEARNED, BUT THE LOCATION OR IDENTITY OF THE VICTIM IS UNKNOWN OR LAW ENFORCEMENT AUTHORITIES ARE OTHERWISE UNABLE TO TAKE MEASURES TO ASSURE HIS SAFETY. IN SUCH SITUATIONS, THE INTERCEPTION OF COMMUNICATIONS MAY BE NECESSARY TO PROTECT THE LIVES OF THE HOSTAGES OR VICTIMS, YET TIME FOR OBTAINING A COURT ORDER MAY NOT BE AVAILABLE.

IN PREPARATION FOR HEARINGS ON THE PREDECESSOR LEGISLATION, THE COMMITTEE REQUESTED A NUMBER OF FEDERAL LAW ENFORCEMENT AGENCIES TO REVIEW THEIR INVESTIGATIVE FILES FOR INSTANCES IN WHICH SUCH EMERGENCY INTERCEPTION WOULD HAVE BEEN A VALUABLE INVESTIGATIVE TOOL. CASE STUDIES WERE RECEIVED FROM THE FEDERAL BUREAU OF INVESTIGATION [FN940] AND THE UNITED STATES SECRET SERVICE [FN941] WHICH UNDERSCORED THE CRITICAL NEED FOR THIS EMERGENCY EXCEPTION.


IN 1978, THE CONGRESS ENACTED TWO NEW OFFENSES, 18 U.S.C. 2251 AND 2252, TO ADDRESS SPECIFICALLY THE ALARMING PROBLEM OF CHILD PORNOGRAPHY. THESE STATUTES MAKE IT A FEDERAL OFFENSE, PUNISHABLE BY UP TO TEN YEARS'
IMPRISONMENT, TO USE CHILDREN IN THE PRODUCTION OF FILMS AND PHOTOGRAPHS DEPICTING SEXUAL ACTIVITIES, AS WELL AS TO DISTRIBUTE SUCH MATERIALS. THE DEPARTMENT OF JUSTICE HAS DIRECTED ITS INVESTIGATORS AND PROSECUTORS TO GIVE PRIORITY TO THESE CASES.

DESPITE THE EMPHASIS WE HAVE PLACED ON CHILD PORNOGRAPHY CASES, PROSECUTION OF THOSE WHO VIOLATE 18 U.S.C. 2251 OR 2252 HAS BEEN DIFFICULT. IN CASES INVOLVING THE SEXUAL EXPLOITATION OF CHILDREN, AS IS TRUE WITH MANY OTHER TYPES OF CRIMINAL OFFENSES, THE BEST MEANS OF INVESTIGATING AND PROSECUTING THESE VIOLATIONS WOULD BE THROUGH INTERVIEWING THE VICTIMS AND SECURING THEIR TESTIMONY BEFORE GRAND JURIES, AND ULTIMATELY, AT TRIAL. HOWEVER, IN CHILD PORNOGRAPHY CASES, BECAUSE OF THE AGE OF THE VICTIMS AND THE UNDERSTANDABLE RELUCTANCE OF PARENTS TO PERMIT THEIR CHILDREN'S INVOLVEMENT IN JUDICIAL PROCEEDINGS REGARDING THEIR SEXUAL EXPLOITATION, PURSUING THESE TRADITIONAL METHODS WHICH FOCUS ON THE ABILITY OF THE VICTIM TO PROVIDE SUBSTANTIAL EVIDENCE CONCERNING THE OFFENSE IS OFTEN NOT POSSIBLE. NOT ONLY ARE THE VICTIMS OF CHILD PORNOGRAPHY OFTEN SO YOUTHFUL OR SO EMOTIONALLY DISTRESSED AS A RESULT OF THEIR EXPERIENCES THAT THEY CANNOT PROVIDE EXTENSIVE INFORMATION AND TESTIMONY ABOUT THEIR EXPLOITATION, BUT ALSO, BECAUSE OF OUR RESPONSIBILITY TO PROTECT THE INTERESTS OF THESE CHILD VICTIMS, WE MUST AT TIMES DECIDE AGAINST REQUIRING THEM TO RECOUNT IN COURT THE BRUTAL DEGRADATION THEY HAVE ALREADY EXPERIENCED AND TO BE SUBJECT TO EXTENSIVE CROSS EXAMINATION.

FOR THESE REASONS, IT WOULD BE EXTREMELY ADVANTAGEOUS IF 18 U.S.C. 2516 WERE AMENDED TO PERMIT ELECTRONIC INTERCEPTION WHEN THE UNDERLYING OFFENSE IS A VIOLATION OF 18 U.S.C. 2251 OR 2252. MUCH OF THE BUSINESS OF CHILD PORNOGRAPHY TAKES PLACE IN OFFICES AND OVER THE TELEPHONE. BEING ABLE TO CONDUCT ELECTRONIC SURVEILLANCE OF SUCH CONVERSATIONS WOULD GREATLY ENHANCE OUR ABILITY TO OBTAIN CONVICTIONS IN THIS AREA. IN ADDITION, WE ARE AWARE OF THE INVOLVEMENT OF ORGANIZED CRIME IN THESE OFFENSES, PARTICULARLY IN THE DISTRIBUTION OF CHILD PORNOGRAPHY, AND TITLE III HAS TRADITIONALLY PERMITTED THE USE OF WIRETAPS TO OBTAIN EVIDENCE OF OFFENSES IN WHICH THERE IS SIGNIFICANT ORGANIZED CRIME INVOLVEMENT.


*400 PART C-- VENUE FOR THREAT OFFENSES

1. IN GENERAL AND PRESENT FEDERAL LAW

PART C OF TITLE XII IS DESIGNED TO REMOVE AN UNNECESSARILY RESTRICTIVE CHOICE OF VENUE PRESENTLY PLACED ON THE GOVERNMENT IN IMPORTATION CASES INVOLVING MAILING OR TELEPHONING THREATENING COMMUNICATIONS AND TO CLARIFY VENUE FOR CERTAIN IMPORTATION CASES. IT IS BASED ON A PROVISION IN S. 1630, THE CRIMINAL CODE REFORM LEGISLATION APPROVED BY THE COMMITTEE IN THE 97TH CONGRESS. [FN944] UNDER 18 U.S.C. 3239, VENUE WITH RESPECT TO THE OFFENSES OF TRANSMITTING IN
INTERSTATE OR FOREIGN COMMERCE OR MAILING THREATS IN VIOLATIONS OF 18 U.S.C. 875, 876, OR 877 LIES ONLY IN THE DISTRICT WHERE THE THREAT WAS FIRST PLACED IN MOTION SUCH AS THE DISTRICT IN WHICH THE LETTER WAS SENT OR IN WHICH THE CALL WAS MADE. THIS STATUTE IS AN EXCEPTION TO THE GENERAL RULE CONTAINED IN 18 U.S.C. 3237 THAT AN OFFENSE INVOLVING THE USE OF THE MAILS OR TRANSPORTATION IN INTERSTATE OR FOREIGN COMMERCE IS A CONTINUING OFFENSE AND MAY BE PROSECUTED IN ANY DISTRICT FROM, THROUGH, OR INTO WHICH THE COMMERCE OR MAIL MATTER MOVES.

2. PROVISIONS OF THE BILL, AS REPORTED

PART C REPEALS 18 U.S.C. 3239 SO AS TO MAKE THE OFFENSES IN 18 U.S.C. 875-877 SUBJECT TO THE GENERAL RULE OF 18 U.S.C. 3237 AND PERMIT VENUE TO LIE IN THE DISTRICT IN WHICH THE THREAT WAS RECEIVED AS WELL AS THE DISTRICT IN WHICH IT WAS MADE. IT IS DIFFICULT TO DISCERN ANY REASON TO TREAT VENUE IN THREAT CASES DIFFERENTLY FROM OTHER CONTINUING OFFENSES, AS A MATTER OF RIGHT. FOR INSTANCE, THERE APPEARS TO BE NO REASON TO MANDATE THAT A DEFENDANT WHO MAILED A THREAT BE TRIED ONLY WHERE HE MAILED IT, BUT TO ALLOW PROSECUTION OF A DEFENDANT WHO MAILED AN EXPLOSIVE IN THE DISTRICT OF MAILING, THE DISTRICT OF RECEIPT, OR ANY DISTRICT THROUGH WHICH IT PASSED. IN ADDITION, THIS PART AMENDS 18 U.S.C. 3237 TO ADD OFFENSES INVOLVING THE IMPORTATION OF A PERSON OR AN OBJECT INTO THE UNITED STATES AND THEREBY TO CLASSIFY SUCH OFFENSES AS CONTINUING OFFENSES FOR WHICH VENUE IS APPROPRIATE IN ANY DISTRICT IN WHICH THE IMPORTED OBJECT OR PERSON MOVES. THIS IS DESIGNED TO OVERCOME THE DECISION IN UNITED STATES V. LEMBER, [FN945] WHICH LIMITED VENUE IN IMPORTATION CASES TO THE DISTRICT OF ENTRY RATHER THAN OF FINAL DESTINATION. SUCH A CONSTRUCTION IS UNJUSTIFIED AND WOULD CREATE DIFFICultIES SINCE THE WITNESSES ARE USUALLY LOCATED IN THE PLACE OF DESTINATION. MOREOVER, THE DISTRICT OF DESTINATION RATHER THAN FIRST ENTRY NORMALLY HAS THE GREATER INTEREST IN VINDICATING THE OFFENSE.

*401 **3539 PART D-- INJUNCTIONS AGAINST FRAUD

1. IN GENERAL AND PRESENT FEDERAL LAW

PART D OF TITLE XII IS DESIGNED TO ALLOW THE ATTORNEY GENERAL IN APPROPRIATE CASES TO ENJOIN A VIOLATION OF CHAPTER 63 OF TITLE 18, U.S.C. DEALING WITH MAIL FRAUD, WIRE FRAUD, AND, AS AMENDED BY SECTION 1108 OF THIS BILL, WITH BANK FRAUD. A SIMILAR PROVISION WAS CONTAINED IN S. 1630, THE CRIMINAL CODE REFORM LEGISLATION APPROVED BY THE COMMITTEE IN THE 97TH CONGRESS. [FN946]


EXCEPTIONS, HOWEVER, SOON DEVELOPED TO THIS GENERAL RULE. THUS, IF AN ACT ENDANGERED PROPERTY RIGHTS OR WAS INIMICAL TO PUBLIC HEALTH OR SAFETY, EQUITY COULD ENJOIN SUCH ACT REGARDLESS OF WHETHER THE ACT WAS ALSO MADE CRIMINAL BY A STATUTE. [FN949] TODAY IT IS GENERALLY CONCEDED THAT A LEGISLATURE HAS THE AUTHORITY TO AUTHORIZE THE ENFORCEMENT OF A CRIMINAL STATUTE BY INJUNCTION. [FN950]

CONGRESS HAS NOT, AS A GENERAL PRACTICE, PROVIDED INJUNCTIVE RELIEF FOR THE PREVENTION OF CRIMES ABOUT TO TAKE PLACE. IN CERTAIN FIELDS, HOWEVER,

ANOTHER AREA WHERE THERE IS A GREAT NEED FOR INJUNCTIVE RELIEF IS IN FRAUDULENT SCHEME CASES. WHILE PRESENT LAW PROVIDES LIMITED INJUNCTIVE RELIEF, [FN953] THIS RELIEF IS INADEQUATE. FIRST, THE RELIEF IS RESTRICTED TO THE DETENTION OF INCOMING MAIL. IT DOES NOT REACH THE SITUATION WHERE LETTERS CONTINUE TO BE SENT TO FURTHER A SCHEME AND REMITTANCES ARE COLLECTED PERSONALLY FROM THE CUSTOMER OR TO FRAUDULENT SCHEMES WHICH DO NOT ENTAIL THE USE OF THE MAILS. SECOND, THE REQUIRED ADMINISTRATIVE PROCEEDINGS ENTAIL CONSIDERABLE DELAY WHICH IS COMPOUNDED BY THE EXTRA TIME AND ENERGY NECESSARY TO BRING AN INJUNCTIVE SUIT IN THE DISTRICT COURT WHILE THE ADMINISTRATIVE PROCEEDINGS ARE PENDING. SINCE THE INVESTIGATION OF FRAUDULENT SCHEMES OFTEN TAKES MONTHS, IF NOT YEARS, BEFORE THE CASE IS READY FOR CRIMINAL PROSECUTION, INNOCENT PEOPLE CONTINUE TO BE VICTIMIZED WHILE THE INVESTIGATION IS IN PROGRESS.

EXPERIENCE HAS SHOWN THAT EVEN AFTER INDICTMENT OR THE OBTAINING OF A CONVICTION, THE PERPETRATORS OF FRAUDULENT SCHEMES CONTINUE TO VICTIMIZE THE PUBLIC. FOR THESE REASONS, THE COMMITTEE HAS CONCLUDED THAT WHENEVER IT APPEARS THAT A PERSON IS ENGAGED OR IS ABOUT TO ENGAGE IN A CRIMINAL FRAUD OFFENSE PROSCRIBED BE CHAPTER 63, THE ATTORNEY GENERAL SHOULD BE EMPOWERED TO BRING SUIT TO ENJOIN THE FRAUDULENT ACTS OR PRACTICES.

2. PROVISIONS OF THE BILL, AS REPORTED

PART D OF TITLE XII ADDS A NEW SECTION, 1345, TO TITLE 18 TO ALLOW THE ATTORNEY GENERAL TO PUT A SPEEDY END TO A FRAUD SCHEME BY SEEKING AN INJUNCTION IN FEDERAL DISTRICT COURT WHENEVER HE DETERMINES HE HAS RECEIVED SUFFICIENT EVIDENCE OF A VIOLATION OF CHAPTER 63 TO INITIATE SUCH AN ACTION. THE COURT IS TO GRANT SUCH ACTION AS IS WARRANTED TO PREVENT A CONTINUING AND SUBSTANTIAL INJURY TO THE CLASS OF PERSONS DESIGNED TO BE PROTECTED BY THE CRIMINAL STATUTE ALLEGEDLY BEING VIOLATED. AS A CIVIL ACTION, THE PROCEEDING IS GOVERNED BY THE FEDERAL RULES OF CIVIL PROCEDURE, EXCEPT THAT IF AN INDICTMENT HAS BEEN RETURNED THE MORE RESTRICTIVE DISCOVERY PROVISIONS OF THE FEDERAL RULES OF CRIMINAL PROCEDURE APPLY.

*403 **3541 PART E-- GOVERNMENT APPEAL OF POST-CONVICTION NEW TRIAL ORDERS

1. IN GENERAL AND PRESENT FEDERAL LAW

THE PURPOSE OF PART E IS TO CREATE STATUTORY AUTHORITY FOR THE GOVERNMENT TO APPEAL A DECISION OF THE DISTRICT COURT TO GRANT A NEW TRIAL TO A DEFENDANT FOLLOWING THE ENTRY OF JUDGMENT OR VERDICT OF GUILTY. THE PROPOSAL IS IDENTICAL TO A PROVISION IN S. 1630, THE CRIMINAL CODE REFORM LEGISLATION APPROVED BY THE COMMITTEE IN THE 97TH CONGRESS, [FN954] AND
WAS THE SUBJECT OF A SEPARATE EXECUTIVE COMMUNICATION TO CONGRESS DURING THE PRESENT SESSION. [FN955] CURRENTLY, NO APPEAL LIES FROM AN ERRONEOUS POST-CONVICTION RULING AWARDING A DEFENDANT A NEW TRIAL, ALTHOUGH SUCH AN APPEAL WOULD NOT VIOLATE CONSTITUTIONAL RIGHTS. PERMITTING AN APPEAL IS CONSISTENT WITH THE PURPOSES OF THE 1970 STATUTE REVISING THE CRIMINAL APPEALS ACT, 18 U.S.C. 3731, AND WOULD PROVIDE A FAR FAIRER AND MORE EFFICIENT MECHANISM TO CORRECT AN ERRONEOUS DECISION THAN A COSTLY, TIME-CONSUMING NEW TRIAL, THE ONLY ALTERNATIVE UNDER PRESENT LAW.

PRIOR TO 1970, THE RIGHT OF THE UNITED STATES TO APPEAL TRIAL COURT ERRORS IN CRIMINAL CASES WAS SEVERELY RESTRICTED. NOT ONLY WERE THE PARAMETERS OF APPELLATE JURISDICTION UNDER THE THEN APPLICABLE CRIMINAL APPEALS ACT UNJUSTIFIABLY NARROW, THE GOVERNMENT'S OPPORTUNITIES TO OBTAIN APPELLATE REVIEW UNDER THE ACT WERE FURTHER CONSTRAINED BY THE ACT'S RELIANCE ON ARCANE COMMON LAW DISTINCTIONS THAT HAD NO ANALOGUE IN MODERN FEDERAL PRACTICE. BY 1970, THE SUPREME COURT HAD COME TO CHARACTERIZE THE ACT AS A 'FAILURE.' [FN956]


WHILE, AS HAS BEEN NOTED BY THE SUPREME COURT, IT WAS THE INTENT OF THE CONGRESS IN ITS 1970 AMENDMENT OF 18 U.S.C. 3731 'TO REMOVE ALL STATUTORY BARRIERS TO GOVERNMENT APPEALS AND TO ALLOW *404 **3542 APPEALS WHENEVER THE CONSTITUTION WOULD PERMIT,' [FN957] THE 1970 AMENDMENT NEGLECTED, IN ONE IMPORTANT AREA, TO CORRECT THE THEN PREVAILING UNWARRANTED RESTRICTIONS ON GOVERNMENT APPEALS. THE AREA LEFT UNREMEDIED, AS REFLECTED IN CONSISTENT DECISIONS DENYING THE GOVERNMENT A RIGHT TO APPEAL, WAS WITH RESPECT TO ERRONEOUS POST-CONVICTION ORDERS FOR A NEW TRIAL. [FN958]

THE PRESENT GAP IN THE APPELLATE JURISDICTION CONFERRED BY 18 U.S.C. 3731 WHICH PROHIBITS REVIEW OF POST-CONVICTION ERRONEOUSLY GRANTED NEW TRIAL ORDERS IS WASTEFUL OF RESOURCES AND HARMFUL TO THE GOVERNMENT. SINCE THE GOVERNMENT HAS NO OPPORTUNITY TO OBTAIN CORRECTION OF A WRONGLY ENTERED POST-CONVICTION NEW TRIAL ORDER, ALL SUCH CASES MUST BE RETRIED AT CONSIDERABLE PUBLIC EXPENSE AND FURTHER BURDENING OUR OVERCROWDED COURTS. MOREOVER, THE LIKELIHOOD OF THE GOVERNMENT'S PREVAILING AGAIN AT A SECOND TRIAL IS NECESSARILY DIMINISHED FOR REASONS UNRELATED TO THE GUILT OR INNOCENCE OF THE DEFENDANT, FOR THE STRATEGY OF THE PROSECUTION WILL HAVE ALREADY BEEN REVEALED AND WITH THE PASSAGE OF TIME GOVERNMENT WITNESSES MAY HAVE BECOME UNAVAILABLE OR THEIR MEMORIES DIMMED. IN RECENT YEARS, THE GOVERNMENT'S INABILITY TO SEEK REVIEW OF POST-CONVICTION NEW TRIAL ORDERS HAS BEEN RESPONSIBLE FOR THE GOVERNMENT'S ULTIMATELY LOSING AN INCREASING NUMBER OF CASES IN WHICH IT HAD ORIGINALLY OBTAINED A CONVICTION. THUS, IN THE COMMITTEE'S VIEW, THERE IS SUBSTANTIAL REASON TO EXTEND THE BROAD AUTHORITY FOR APPELLATE REDRESS OF TRIAL COURT ERRORS NOW SET OUT IN 18 U.S.C. 3731 TO THE CONTEXT OF POST-CONVICTION NEW TRIAL ORDERS. INDEED, SUCH AN AMENDMENT IS FULLY CONSISTENT WITH THE PRESENT
PURPOSES OF THE STATUTE.
THE COMPELLING NEED FOR APPELLATE REVIEW OF ORDERS GRANTING A CRIMINAL DEFENDANT A NEW TRIAL WAS WELL ILLUSTRATED IN JUDGE MANSFIELD’S CONCURRENCE IN UNITED STATES V. SAM GOODY, INC., 675 F.2D 17(2D CIR. 1982), IN WHICH A NEW TRIAL WAS GRANTED TO THE DEFENDANTS CONVICTED FOLLOWING A ONE-MONTH TRIAL ON CHARGES OF CRIMINAL COPYRIGHT INFRINGEMENT AND INTERSTATE TRANSPORTATION OF STOLEN PROPERTY. ALTHOUGH JUDGE MANSFIELD FOUND THAT THE TRIAL JUDGE HAD 'GROSSLY ABUSED HIS DISCRETION IN GRANTING A NEW TRIAL,' HE WAS CONSTRAINED TO AGREE WITH THE MAJORITY THAT THERE WAS NO AUTHORITY FOR THE COURT TO ENTERTAIN AN APPEAL OF THE NEW TRIAL ORDER. HE EMPHASIZED, HOWEVER, THAT THIS RESULT WORKED A 'GRAVE INJUSTICE': [FN959]
THE EFFECT OF THE DISTRICT COURT’S ORDER IS TO DEPRIVE THE PUBLIC OF A FAIRLY-WON AND FULLY SUPPORTED CONVICTION.

* * * *

SHOULD THE GOVERNMENT BE UNABLE, BECAUSE OF THE PASSAGE OF TIME OR LACK OF PROSECUTORIAL RESOURCES TO REASSEMBLE ALL THE PROOF FOR A LONG AND EXPENSIVE RETRIAL, THE GUILTY APPELLANTS WILL GO SCOT-FREE.
JUDGE MANSFIELD FURTHER NOTED: [FN960]

THE ABSENCE OF EXPRESS AUTHORITY TO APPEAL NEW TRIAL ORDERS UNDER 18 U.S.C. 3731 LEAVES ONLY ONE POSSIBLE AVENUE FOR THE GOVERNMENT TO OBTAIN REVIEW OF ERRONEOUS GRANTS OF NEW TRIALS IN CRIMINAL CASES, AND THAT IS THROUGH A PETITION FOR A WRIT OF MANDAMUS VACATING THE NEW TRIAL ORDER AND REINSTATE THE JUDGMENT OR VERDICT OF CONVICTION. HOWEVER, THE WRIT OF MANDAMUS IS AN EXTRAORDINARY REMEDY AND WILL NOT BE EMBRACED BY THE COURTS AS A SUBSTITUTE FOR APPELLATE REVIEW. AS SUCH, ITS AVAILABILITY AS A MEANS OF ADDRESSING THE CURRENT GAP IN APPELLATE JURISDICTION OVER NEW TRIAL ORDERS IS EXTREMELY LIMITED. [FN961]
PROVIDING FOR A POST-CONVICTION RIGHT OF APPEAL FROM A DISTRICT COURT ORDER AWARDING A NEW TRIAL WOULD VIOLATE NO CONSTITUTIONAL GUARANTEE. IN UNITED STATES V. WILSON, [FN964] THE SUPREME COURT HELD THAT 'WHERE THERE IS NO THREAT OF EITHER MULTIPLE PUNISHMENT OR SUCCESSIVE PROSECUTIONS, THE DOUBLE JEOPARDY CLAUSE IS NOT OFFENDED,' [FN965] AND THEREFORE A JUDGE RULES IN FAVOR OF THE DEFENDANT AFTER A VERDICT OF

2. PROVISIONS OF THE BILL, AS REPORTED

THE BILL ACCOMPLISHES THE GOAL OF CONFEERING AUTHORITY ON THE UNITED STATES TO APPEAL FROM A POST-CONVICTION NEW TRIAL ORDER BY AMENDING PRESENT 18 U.S.C. 3731 TO ADD THE PHRASE 'OR GRANTING A NEW TRIAL AFTER VERDICT OR JUDGMENT ' FOLLOWING THE WORDS 'INDICTMENT OR INFORMATION'. THIS EXTENDS THE AMBIT OF THE STATUTE TO ORDERS GRANTING A NEW TRIAL AFTER CONVICTION.


IN SUM, THERE IS A PRESSING NEED FOR THE AMENDMENT TO 18 U.S.C. 3731 SET FORTH IN PART E OF TITLE XII AUTHORIZING GOVERNMENT APPEALS OF POST-CONVICTION NEW TRIAL ORDERS. THE UNITED STATES’ PRESENT INABILITY TO SEEK CORRECTION OF ERRONEOUS NEW TRIAL ORDERS IS JUSTIFIED BY NEITHER CONSTITUTIONAL PRINCIPLES NOR POLICY CONSIDERATIONS AND IS CLEARLY CONTRARY TO THE INTERESTS OF JUSTICE. AT BEST, THIS SITUATION REQUIRES THE EXPENSE OF UNWARRANTED NEW TRIALS. AT WORST, BECAUSE OF THE INEVITABLE DISADVANTAGE TO THE GOVERNMENT IN HAVING TO PROCEED WITH A SECOND TRIAL, IT AFFORDS PROPERLY CONVICTED DEFENDANTS AN OPPORTUNITY FOR AN UNJUSTIFIED ACQUITTAL.

*407 **3545 PART F-- WITNESS SECURITY PROGRAM IMPROVEMENTS

1. IN GENERAL AND PRESENT FEDERAL LAW


*408 **3546* THE FEDERAL GOVERNMENT SHOULD ESTABLISH RESIDENTIAL FACILITIES FOR THE PROTECTION OF WITNESSES DESIRING SUCH ASSISTANCE DURING THE PENDENCY OF ORGANIZED CRIME LITIGATION. AFTER TRIAL, THE WITNESS SHOULD BE PERMITTED TO REMAIN AT THE FACILITY SO LONG AS HE NEEDS TO BE PROTECTED.

THE COMMITTEE HAS CONCLUDED THAT TWELVE YEARS OF EXPERIENCE WITH WITNESS PROTECTION UNDER THE 1970 ACT HAS AMPLY PROVEN BOTH THE NECESSITY AND UTILITY OF SUCH PROVISIONS. IT IS A RECOGNIZED FACT THAT TESTIFYING IN ORGANIZED CRIME OR NARCOTICS BASES INVOLVES A REAL DANGER OF VIOLENT RETALIATION. PROTECTION BY MEANS OF RELOCATION TO A SAFE ENVIRONMENT IS OFTEN NECESSARY IN SUCH CASES. INDEED, THE ABILITY TO OFFER PROTECTION TO WITNESSES IS VIRTUALLY A REQUIREMENT OF AN EFFECTIVE CAMPAIGN AGAINST ORGANIZED CRIME. IN ADDITION, THE COMMITTEE HAS CONCLUDED THAT IN APPROPRIATE SITUATIONS PROTECTION SHOULD BE PROVIDED IN CASES THAT DO NOT INVOLVE ORGANIZED CRIME ACTIVITY BUT DO INVOLVE SERIOUS CRIMINAL VIOLATIONS AND A VERY REAL PRESENCE OF DANGER TO WITNESSES AND INFORMANTS.

THE COMMITTEE HAS FURTHER CONCLUDED THAT THE LANGUAGE USED IN TITLE V OF THE 1970 ACT MAY BE INADEQUATE TO DESCRIBE WHAT IS NECESSARY TO EFFECTIVELY RELocate ENDANGERED WITNESSES AND TO ENSURE THEIR SECURITY. UNDER THE CURRENT LANGUAGE OF TITLE V TO PROVIDE 'PROTECTED HOUSING FACILITIES AND TO OTHERWISE OFFER TO PROVIDE FOR THE HEALTH, SAFETY, AND WELFARE OF WITNESSES,' FOR EXAMPLE, THE ATTORNEY GENERAL HAS BEEN CALLED UPON TO DEVELOP SPECIAL PROCEDURES AND TECHNIQUES OF PROTECTION AND RELOCATION. THESE TECHNIQUES AND PROCEDURES ARE GIVEN GREATER STATUTORY RECOGNITION IN THIS BILL. THE COMMITTEE, HOWEVER, BELIEVES THAT SETTING OUT THESE TECHNIQUES AND PROCEDURES IN THE CODE IS NOT A NEW GRANT OF AUTHORITY, BUT IS RATHER A RECOGNITION OF THE CURRENT PROGRAM AND A REAFFIRMATION THAT THESE TECHNIQUES AND PROCEDURES ARE FULLY JUSTIFIED AND WELL WITHIN THE CONTEMPLATION OF TITLE V OF THE 1970 ACT.
PART F PROPOSES TO CREATE A NEW CHAPTER, 224, OF TITLE 18, U.S.C. CONSISTING OF THREE SECTIONS, 3521, 3522, AND 3524. [FN971] THESE SECTIONS WILL BE DISCUSSED IN SEQUENCE.

SECTION 3521. WITNESS RELOCATION AND PROTECTION

SECTION 3521 CONTINUES THE CURRENT LAW AUTHORITY OF THE ATTORNEY GENERAL TO PROVIDE PROTECTION AND SECURITY BY MEANS OF RELOCATION FOR WITNESSES AND THEIR IMMEDIATE FAMILIES IN PROCEEDINGS BROUGHT AGAINST PERSONS INVOLVED IN CRIMINAL ACTIVITY. SEVERAL CHANGES HAVE BEEN MADE. FIRST, UNDER CURRENT LAW THE PROTECTION MAY BE OFFERED WHERE THE PROCEEDINGS HAVE BEEN INSTITUTED AGAINST A PERSON ALLEGED TO HAVE PARTICIPATED IN AN 'ORGANIZED CRIME ACTIVITY'. THE COMMITTEE FEELS THAT THE TERM 'ORGANIZED CRIME ACTIVITY' IS, ON THE ONE HAND, TOO VAGUE IN THAT IT FAILS TO GIVE SUFFICIENT GUIDANCE TO THE ATTORNEY GENERAL IN THE IMPLEMENTATION OF THIS STATUTE, AND IS, ON THE OTHER HAND, TOO RESTRICTIVE OF THE ATTORNEY GENERAL'S AUTHORITY TO AFFORD PROTECTION WHERE IT IS OTHERWISE WARRANTED. ACCORDINGLY, THE COMMITTEE HAS SUBSTITUTED A MORE PRECISE TERM. UNDER SECTION 3521, WITNESS PROTECTION MAY BE PROVIDED IN AN OFFICIAL PROCEEDING IF THE ATTORNEY GENERAL DETERMINES THAT AN OFFENSE DESCRIBED IN SECTION 1512 (TAMPERING WITH A WITNESS, VICTIM, OR AN INFORMANT) OR 1513 (RETAILIATING AGAINST A WITNESS OR AN INFORMANT) OR A SIMILAR STATE OR LOCAL OFFENSE INVOLVING A CRIME OF VIOLENCE DIRECTED AT A WITNESS, IS LIKELY TO BE COMMITTED. THE REFERENCE TO SECTIONS 1512 AND 1513 [FN972] INSURES COMPLETENESS OF COVERAGE. CLEARLY, THE OFFENSES SET FORTH IN THOSE SECTIONS ARE PRECISELY THE TYPE OF CONDUCT AGAINST WHICH THIS SUBCHAPTER SEEKS TO AFFORD PROTECTION FOR WITNESSES, POTENTIAL WITNESSES, VICTIMS, AND THEIR IMMEDIATE FAMILIES. THE COMMITTEE INTENDS BY REFERENCE TO THESE TWO SECTIONS TO DESCRIBE THE KIND OF CONDUCT WHICH MUST BE PROTECTED AGAINST. IN ADDITION, THE SECTION MAKES CLEAR THAT THERE IS NO INTENT TO LIMIT PROTECTION TO FEDERAL OFFENSES. THE ATTORNEY GENERAL CAN ORDER PROTECTION OF STATE OR LOCAL WITNESSES ON A REIMBURSABLE BASIS. SIMILARLY THERE IS NO INTENT TO RESTRICT PROTECTION TO ORGANIZED CRIME ACTIVITIES. THERE IS NO REASON TO DENY PROTECTION TO ORGANIZED CRIME ACTIVITIES. THERE IS NO REASON TO DENY PROTECTION TO A WITNESS WHO IS IN DANGER OF RETALIATION, SIMPLY BECAUSE THE NEXUS BETWEEN THE OFFENSE AND ORGANIZED CRIMINAL ACTIVITY IS LACKING. FOR INSTANCE, A RAPE VICTIM FEARING RETALIATION FROM HER ASSAILANT MAY NOT BE WILLING TO TESTIFY UNLESS RELOCATION OR PROTECTION IS MADE AVAILABLE. THAT A FURTHER ASSAULT WILL SUBJECT THE ATTACKER TO FURTHER PROSECUTION IS COLD COMFORT IN SUCH A SITUATION. PROTECTION OR RELOCATION SHOULD BE AVAILABLE IN SUCH A CIRCUMSTANCE. EXTENDING WITNESS PROTECTION IN THIS MANNER SHOULD NOT CREATE A BURDEN ON THE DEPARTMENT OR THE WITNESS RELOCATION PROGRAM, FIRST BECAUSE ANY STATE VICTIMS ARE TO BE PROTECTED SUBJECT TO REIMBURSEMENT OF THE FEDERAL GOVERNMENT BY THE STATE, AND SECOND BECAUSE THE ATTORNEY GENERAL RETAINS DISCRETION AS TO ANY INDIVIDUAL VICTIM BEING AFFORDED PROTECTION. THE COMMITTEE ALSO HAS SUBSTITUTED THE TERM 'OFFICIAL PROCEEDING' FOR THE CURRENT LAW TERM 'LEGAL PROCEEDINGS.' THIS CHANGE IS NOT INTENDED TO LIMIT THE REACH OF THE CURRENT LANGUAGE. IN PARTICULAR, THE COMMITTEE INTENDS THAT THE STATUTE REMAIN APPLICABLE IN CIVIL AND ADMINISTRATIVE PROCEEDINGS, WHERE WARRANTED, AS WELL AS IN CRIMINAL PROCEEDINGS. THE TERM 'OFFICIAL PROCEEDING ' IS INTENDED TO ACHIEVE THIS RESULT. IN ADDITION, THE WORD 'INVOLVING IS USED INSTEAD OF THE MORE LIMITED WORD 'INSTITUTED' TO MAKE IT
CLEAR THAT RELOCATION IS POSSIBLE PRIOR TO FORMAL CHARGES BEING BROUGHT AGAINST A SPECIFIC DEFENDANT.

IN ADDITION, RELOCATION AND PROTECTION MAY BE OFFERED NOT ONLY TO THE WITNESS OR A POTENTIAL WITNESS AND TO THE IMMEDIATE FAMILY OF SUCH WITNESS BUT 'TO A PERSON OTHERWISE CLOSELY ASSOCIATED' WITH THE WITNESS. EXPERIENCE HAS SHOWN THAT THE DANGER OF RETALIATION IS NOW ALWAYS CONFINED SOLELY TO THE WITNESS AND HIS IMMEDIATE FAMILY. PROTECTION HAS TO BE AFFORDED OCCASIONALLY TO THE FIANCÉE OF A WITNESS, TO CHILDREN OF THE FIANCÉ, AND TO OTHERS CLOSELY ASSOCIATED WITH THE WITNESS. THE PHRASE 'A PERSON OTHERWISE CLOSELY ASSOCIATED' IS *410 **3548 INTENDED TO RECOGNIZE THIS NEED. THE STANDARD THAT MUST BE APPLIED BEFORE PROTECTION AND RELOCATION WILL BE AFFORDED TO A FAMILY MEMBER OR A PERSON CLOSELY ASSOCIATED WITH THE WITNESS IS THAT SUCH PERSON MAY ALSO BE ENDANGERED.

SECTION 3521(B) SPELLS OUT IN MORE DETAIL THE PROTECTIVE MEASURES THAT THE ATTORNEY GENERAL MAY TAKE TO ENSURE WITNESS PROTECTION OR RELOCATION. THE GENERAL CONCEPT IS THAT PROTECTION OF THE WITNESS WILL BE ACHIEVED EITHER THROUGH RELOCATION AND THE ESTABLISHMENT OF A NEW IDENTITY OR THROUGH WHATEVER MEANS THE ATTORNEY GENERAL DEEMS NECESSARY AND ADEQUATE SHORT OF RELOCATION. THIS CAN MEAN AS LITTLE AS PUTTING SOMEONE IN A MOTEL OUTSIDE OF TOWN UNTIL THE TRIAL IS OVER, OR IT COULD INCLUDE THE FULL PANOPLY OF PROCEDURES LISTED IN SECTION 3521(B).

THE PROCEDURES DEVELOPED BY THE ATTORNEY GENERAL TO IMPLEMENT SECTION 3521(B) MUST BE DESIGNED TO PROTECT THE HEALTH, SAFETY, AND WELFARE OF THE PERSON TO BE PROTECTED FROM BODILY DANGER. THE ATTORNEY GENERAL IS AFFORDED WIDE LATITUDE IN TAKING ANY ACTION HE DEEMS NECESSARY TO ACHIEVE THIS RESULT, AND HE CAN CONTINUE SUCH ACTION FOR SO LONG AS, IN HIS JUDGMENT, THE DANGER CONTINUES. TO GUIDE THE EXERCISE OF HIS DISCRETION, THE COMMITTEE HAS OUTLINED SIX MEASURES THAT MAY BE INVOLVED IN ANY RELOCATION. THE LIST IN SECTION 3521(B), HOWEVER, IS NOT INTENDED TO BE ALL-INCLUSIVE AND FOR THE MOST PART REFLECTS PROCEDURES ALREADY DEVELOPED TO IMPLEMENT THE CURRENT STATUTE.

FIRST, THE ATTORNEY GENERAL IS AUTHORIZED TO PROVIDE SUITABLE OFFICIAL DOCUMENTS TO ENABLE THE PERSON RELOCATED OR PROTECTED TO ESTABLISH A NEW IDENTITY WITHOUT HAVING TO REVEAL HIS PRIOR IDENTITY. [FN973] SUCH DOCUMENTATION MAY INCLUDE SUCH ITEMS AS BIRTH CERTIFICATES, DRIVERS LICENSES, SOCIAL SECURITY CARDS, MILITARY RECORDS, SCHOOL RECORDS, MEDICAL RECORDS, AND THE LIKE. IT IS EXPECTED THAT NEW NAMES WILL, IN MOST INSTANCES, BE LEGITIMIZED ULTIMATELY BY COURT APPROVED NAME CHANGES. THE COMMITTEE IS AWARE OF THE COOPERATION AFFORDED TO THE EXISTING PROGRAM BY MANY FEDERAL, STATE, AND LOCAL GOVERNMENTAL AGENCIES IN THIS REGARD AND URGES THAT SUCH COOPERATION AND ASSISTANCE BE MAINTAINED IN THE FUTURE.

SECOND, THE ATTORNEY GENERAL IS AUTHORIZED, TO PROVIDE HOUSING FOR THE PROTECTED OR RELOCATED PERSONS AND, THIRD, FOR TRANSPORTATION OF PERSONS AND PROPERTY TO THE NEW RESIDENCE. IN THIS REGARD THE ATTORNEY GENERAL MAY ASSIST IN THE SELECTION AND LOCATION OF A NEW RESIDENCE AND THE PAYMENT OF MOVING EXPENSES, AND MAY RENDER SUCH OTHER ASSISTANCE AS MAY BE NECESSARY TO EFFECT THE RELOCATION.

FOURTH, THE ATTORNEY GENERAL IS GRANTED AUTHORITY TO PROVIDE A TAX FREE SUBSISTENCE PAYMENT IN A SUM TO BE ESTABLISHED BY HIM IN REGULATIONS. THIS PROVISION IS IN RECOGNITION OF THE NEED TO PROVIDE FUNDS FOR LIVING EXPENSES TO A WITNESS AND HIS FAMILY WHO ARE SUDDENLY REMOVED FROM THEIR EXISTING LIFE AND EMPLOYMENT. THE SUBSISTENCE AMOUNT AND LENGTH OF PAYMENT WILL VARY FROM WITNESS TO WITNESS, BUT IT IS NOT INTENDED THAT IT BE PAID FOR A GREAT LENGTH OF TIME. IT IS A STOP-GAP MEASURE UNTIL THE RELOCATED FAMILY CAN BECOME ESTABLISHED AND SELF-SUFFICIENT. THERE IS NO
REQUIREMENT *411 **3549 THAT THE ATTORNEY GENERAL CONTINUE SUCH PAYMENTS BEYOND THE LENGTH OF TIME HE DEEMS SUFFICIENT IN THE INDIVIDUAL CASE FOR THE RELOCATED WITNESS TO BE ABLE TO FULLY SUPPORT HIMSELF. THIS PAYMENT IS IN NO WAY TO BE A SUBSTITUTE WELFARE SYSTEM. IN THIS REGARD, THE COMMITTEE NOTES WITH APPROVAL THE EXISTING DEPARTMENT OF JUSTICE EFFORTS TO LIMIT THE DURATION OF SUCH PAYMENTS. THIS PAYMENT IS ALSO NOT INTENDED TO RELIEVE THE INVESTIGATIVE AGENCIES OF ANY AUTHORITY OR RESPONSIBILITY THAT THEY MAY HAVE TO PAY INFORMANTS FROM TIME TO TIME.

FIFTH, THE ATTORNEY GENERAL IS AUTHORIZED TO ASSIST THE PERSON RELOCATED IN PROCURING EMPLOYMENT. HERE THE OBLIGATION IS TO ASSIST IN FINDING JOB OPPORTUNITIES; HOWEVER, THE PRIMARY OBLIGATION IN FINDING NEW EMPLOYMENT RESTS WITH THE RELOCATED WITNESS. ACCORDINGLY, THERE IS NO GUARANTEE OF A JOB CONTEMPLATED AND THE RESPONSIBILITY DOES NOT HOLD FOR FINDING FUTURE EMPLOYMENT IN LATER YEARS.

SIXTH, THE ATTORNEY GENERAL IS AUTHORIZED, IN HIS DISCRETION, TO REFUSE TO DISCLOSE TO ANYONE THE IDENTITY, LOCATION, OR ANY OTHER MATTER CONCERNING THE PERSON RELOCATED OR PROTECTED OR THE PROGRAM. OBVIOUSLY, THE SUCCESS OF A WITNESS PROTECTION AND RELOCATION PROGRAM DEPENDS ON ASSURED SECURITY AS TO ITS DETAILS. THERE IS NO POINT IN RELOCATING A WITNESS WITH A NEW IDENTITY IF THAT IDENTITY WILL BE MADE PUBLIC. IN EXERCISING HIS DISCRETION TO MAINTAIN THE SECRECY OF THE PROGRAM, THE ATTORNEY GENERAL IS TO BE GUIDED BY CERTAIN FACTORS. THESE ARE THE DANGER TO THE LIFE AND SAFETY OF THE PERSON RELOCATED OR PROTECTED, THE SECURITY OF THE PROGRAM ITSELF, AND THE BENEFIT THAT WOULD ACCRUE FROM SUCH DISCLOSURE TO THE PUBLIC OR TO THE PERSON SEEKING THE DISCLOSURE. [FN974]

SUBSECTION (C) DEALS WITH THE OCCASIONAL BUT VEXING PROBLEM OF A CITIZEN WHO HAS A CIVIL CAUSE OF ACTION AGAINST A PROTECTED PERSON WHO IS STYMIED IN HIS EFFORTS TO LITIGATE BECAUSE HE CANNOT LEARN THE NEW IDENTITY OR WHEREABOUTS OF THE POTENTIAL DEFENDANT. UNDER SUBSECTION (B)(6) DISCLOSURE OF SUCH INFORMATION FOR THE PURPOSE OF SERVING PROCESS WOULD GENERALLY BE FORBIDDEN. IT IS NOT THE INTENT OF THE WITNESS RELOCATION AND PROTECTION PROGRAM TO DEPRIVE OTHERWISE INNOCENT PERSONS OF THEIR RIGHT TO LITIGATE CIVIL CLAIMS FOR DAMAGES; HOWEVER, A BALANCE MUST BE STRUCK TO ENSURE PROTECTION OF THE WITNESS. SUBSECTION (C) SEeks TO STRIKE SUCH A BALANCE. IT AUTHORIZES THE ATTORNEY GENERAL TO ACCEPT THE SERVICE OF PROCESS ON A PROTECTED PERSON NAMED AS A DEFENDANT IN A CIVIL CAUSE OF ACTION ENSUING PRIOR TO THE PERSON'S RELOCATION. THE ATTORNEY GENERAL IS REQUIRED TO MAKE REASONABLE EFFORTS TO SERVE A COPY OF THE PROCESS ON THE RELOCATED PERSON AT HIS LAST KNOWN ADDRESS. IF A JUDGMENT IS ENTERED AGAINST THE RELOCATED PERSON THE ATTORNEY GENERAL MUST DETERMINE IF THE PERSON HAS MADE REASONABLE EFFORTS TO COMPLY WITH THE PROVISIONS OF THE JUDGMENT, AND, IF THE PERSON CAN STILL BE LOCATED, THE ATTORNEY GENERAL IS REQUIRED TO TAKE AFFIRMATIVE STEPS TO URGE COMPLIANCE BY THE PROTECTED PERSON WITH THE JUDGMENT. IF THE ATTORNEY GENERAL DETERMINES THAT THE PERSON HAS FAILED TO MAKE REASONABLE EFFORTS TO COMPLY WITH THE JUDGMENT, HE IS GRANTED DISCRETION TO REVEAL THE IDENTITY AND LOCATIONS OF THE PERSON TO THE PLAINTIFF, AFTER GIVING APPROPRIATE WEIGHT TO THE DANGER TO THE PROTECTED PERSON THAT WILL BE CAUSED. SUCH DISCLOSURE TO THE PLAINTIFF MUST BE MADE UPON THE EXPRESS CONDITION THAT THE PLAINTIFF WILL NOT USE THAT INFORMATION FOR ANY PURPOSE OTHER THAN FOR DISCLOSURES THAT ARE ESSENTIAL FOR RECOVERY UNDER THE JUDGMENT. FINALLY, THE SUBSECTION PROVIDES THAT ANY DISCLOSURE OR NONDISCLOSURE OF THE IDENTITY OR LOCATION OF THE PROTECTED PERSON BY THE ATTORNEY GENERAL IS NOT TO SUBJECT THE GOVERNMENT TO LIABILITY IN ANY ACTION BASED ON THE CONSEQUENCES OF SUCH DISCLOSURE.
SECTION 3522. REIMBURSEMENT OF EXPENSES

This section continues the existing authority of the Attorney General to provide transportation, housing, subsistence, or other assistance for a witness or other person pursuant to Section 3521 to State or local governments conditioned, in his discretion, upon reimbursement of all or part of the costs involved.

SECTION 3524. DEFINITION FOR SUBCHAPTER D

This section contains a definition of 'government' for Subchapter D. It is defined to make it clear that the term includes both a State and local government as well as the Federal Government. This definition conforms to that contained in current law.

*413 PART G-- CLARIFICATION OF CHANGE OF VENUE FOR CERTAIN TAX OFFENSES

1. IN GENERAL

PART G WOULD AMEND SECTION 3237(B) OF 18 U.S.C. TO CLARIFY THE CONDITIONS UNDER WHICH A TRANSFER OF VENUE MAY BE GRANTED IN CONNECTION WITH CERTAIN TAX PROSECUTIONS.

2. PRESENT FEDERAL LAW

The general venue provision for the prosecution of federal offenses committed in more than one district is 18 U.S.C. 3237(A). Except as otherwise provided by law, a federal offense may be prosecuted in any judicial district where the offense was begun, continued or completed. An offense involving use of the mails, or transportation in interstate or foreign commerce, is a continuing offense which may be prosecuted in any judicial district from, through, or into which the mail or commerce moves. SECTION 3237(B) MODIFIES THE GENERAL VENUE PROVISIONS OF SECTION 3237(A) IN CASES WHERE A PROSECUTION IS INSTITUTED FOR VIOLATION OF CERTAIN SPECIFIC TAX STATUTES (26 U.S.C. 7201 AND 7206(1), (2) OR (5)), THE OFFENSE INVOLVES USE OF THE MAILS, AND THE PROSECUTION IS COMMENCED IN A DISTRICT OTHER THAN THE DISTRICT IN WHICH DEFENDANT RESIDES. IN SUCH CASES, THE DEFENDANT MAY FILE A MOTION WITHIN 20 DAYS AFTER ARRAIGNMENT ELECTING TO BE TRIED IN THE DISTRICT IN WHICH HE WAS RESIDING AT THE TIME THE ALLEGED OFFENSE WAS COMMITTED. THE **3551 COURTS OF APPEAL FOR THE SECOND CIRCUIT [FN975] AND THE FOURTH CIRCUIT [FN976] HAVE HELD THAT THE TRANSFER OF VENUE ELECTION IS AVAILABLE ONLY WHEN VENUE IN THE DISTRICT OF PROSECUTION IS DEPENDENT ON THE USE OF THE MAILS. THE COURT OF APPEALS FOR THE NINTH CIRCUIT [FN977] AND SEVERAL DISTRICT COURTS HAVE HELD, ON THE OTHER HAND, THAT WHEN THE MAILS ARE USED AS PART OF THE OFFENSE, THE ELECTION TO TRANSFER THE PROSECUTION IS AVAILABLE EVEN THOUGH VENUE IS NOT BASED ON THE MAILING.

3. PROVISIONS OF THE BILL, AS REPORTED

THE BILL WOULD CLARIFY LANGUAGE CONTAINED IN SECTION 3237(B) RELATING TO USE OF THE MAILS, WHICH HAS BEEN THE SUBJECT OF DIFFERING INTERPRETATIONS BY THE COURTS. THE TRANSFER OF VENUE OPTION WAS ENACTED TO PROVIDE A DEFENDANT WITH A SHIELD AGAINST HAVING TO DEFEND A TAX PROSECUTION FAR FROM HIS RESIDENCE WHERE THE PLACE OF PROSECUTION IS BASED SOLELY ON A
MAILING TO A DISTANT OFFICE OF THE INTERNAL REVENUE SERVICE. IT WAS NOT INTENDED TO BE A SWORD PERMITTING \*414\* TRANSFER ON THE ELECTION OF THE DEFENDANT IN CASES WHERE THE PROSECUTOR SEEKS TO ESTABLISH VENUE WHOLLY APART FROM THE RECEIPT BY THE INTERNAL REVENUE SERVICE OF MATERIALS TRANSMITTED BY MAIL.

THE COMMITTEE ENDORSES THE VIEW OF THE SECOND CIRCUIT [FN978] AND THE FOURTH CIRCUIT [FN979] THAT SECTION 3237(B) HAS NO APPLICATION IN SITUATIONS WHERE VENUE IS PREDICATED ON FACTS INDEPENDENT OF ANY MAILING. THE BILL WOULD CLARIFY SECTION 3237(B) BY PROVIDING EXPRESSLY THAT A TRANSFER OF VENUE IS REQUIRED ONLY WHEN THE SOLE BASIS FOR VENUE IN A PARTICULAR DISTRICT IS THE RECEIPT BY THE INTERNAL REVENUE SERVICE OF MAILED MATERIALS.

\*415 **3552\* PART H-- 18 U.S.C. 951 AMENDMENTS

1. PRESENT FEDERAL LAW

UNDER 18 U.S.C. 951, NON-DIPLOMATIC FOREIGN AGENTS ARE REQUIRED TO NOTIFY THE SECRETARY OF STATE OF THEIR INTENTION TO ACT ON BEHALF OF FOREIGN GOVERNMENTS. THOSE WHO FAIL TO DO SO ARE SUBJECT TO A PRISON TERMS OF NOT MORE THAN TEN YEARS OR A FINE OF NOT MORE THAN $75,000 OR BOTH. THOUGH THIS STATUTORY REQUIREMENT DATES BACK TO 1917, THE DEPARTMENT OF STATE HAS NEVER PROMULGATED REGULATIONS NOR FORMALIZED THE PROCEDURES GOVERNING NOTIFICATION. THE PRESENT STATUTE SOMETIMES PLACES THE DEPARTMENT IN AN AWKWARD RELATIONSHIP TO THE REPRESENTATIVES OF FOREIGN GOVERNMENTS WITH WHOM THE DEPARTMENT ROUTINELY DOES BUSINESS. THE PRESENT ACT, THEREFORE, CAN IMPEDE OUR FOREIGN RELATIONS.

2. PROVISIONS OF THE BILL, AS REPORTED


CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
WASHINGTON, D.C., SEPTEMBER 7, 1983.
HON. STROM THURMOND,
CHAIRMAN, COMMITTEE ON THE JUDICIARY, U.S. SENATE,
224 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C.
DEAR MR. CHAIRMAN: PURSUANT TO SECTION 403 OF THE CONGRESSIONAL BUDGET
SINCERELY,
RUDOLPH G. PENNER, DIRECTOR.

CONGRESSIONAL BUDGET OFFICE-- COST ESTIMATE

1. BILL NUMBER: S. 1762.
2. BILL TITLE: COMPREHENSIVE CRIME CONTROL ACT OF 1983.
4. BILL PURPOSE: THE COMPREHENSIVE CRIME CONTROL ACT OF 1983 WOULD AMEND TITLE 18 OF THE UNITED STATES CODE BY REVISING FEDERAL CRIMINAL LAW, REORGANIZING ADMINISTRATIVE PROCEDURES AND CIVIL PROCEEDINGS, AND CHANGING TERMS OF IMPRISONMENT AND FINES. SOME NEW OFFENSE CATEGORIES ARE SPECIFIED AND CERTAIN EXISTING OFFENSES ARE REDEFINED. THE BILL ALSO ALLOWS THE DETENTION OF DEFENDANTS BELIEVED TO PRESENT A DANGER TO THE COMMUNITY AND REQUIRES ADDITIONAL PRISON TIME FOR INDIVIDUALS WHO COMMIT OFFENSES WHILE ON RELEASE. IN ADDITION, A UNITED STATES SENTENCING COMMISSION IS CREATED FOR THE PURPOSE OF ESTABLISHING SENTENCING POLICY GUIDELINES. AUTHORIZATIONS ARE ALSO PROVIDED FOR A NUMBER OF NEW AND EXISTING PROGRAMS WITHIN THE OFFICE OF JUSTICE ASSISTANCE.
5. ESTIMATED COST TO THE FEDERAL GOVERNMENT:
   TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE. THIS ESTIMATE DOES NOT INCLUDE THE COSTS OF THE FORMULA AND DISCRETIONARY GRANTS AUTHORIZED UNDER TITLE VI OF THE BILL, BECAUSE NO SPECIFIC AUTHORIZATIONS ARE PROVIDED, AND BECAUSE CBO HAS NO BASIS FOR PROJECTING THE SCOPE OF THE PROGRAM. ALSO, WHILE THE NET COST OF THE BILL WOULD BE REDUCED BY SUBSTANTIALLY INCREASED FINE AND FORFEITURE RECEIPTS, THESE INCREASED COLLECTIONS CANNOT BE ESTIMATED ON THE BASIS OF AVAILABLE DATA AND ARE THEREFORE NOT INCLUDED IN THE FIGURES ABOVE. THE COSTS OF THIS BILL FALL WITHIN BUDGET FUNCTIONS 750 AND 800.
   BASIS OF ESTIMATES.-- FOR PURPOSES OF THIS ESTIMATE, IT IS ASSUMED THAT THE BILL WILL BE ENACTED BY SEPTEMBER 30, 1983, AND THAT ALL PROVISIONS CONTAINED IN THE BILL, EXCEPT FOR CERTAIN SECTIONS OF TITLE II, WILL BECOME EFFECTIVE OCTOBER 1, 1983. THE ESTABLISHMENT OF A SENTENCING COMMISSION AND THE REPEAL OF THE YOUTH CORRECTIONS ACT ARE ASSUMED TO TAKE EFFECT OCTOBER 1, 1983, WHILE THE REMAINDER OF TITLE II IS ASSUMED TO TAKE EFFECT TWO YEARS LATER, AS SPECIFIED BY THE BILL. IT IS ALSO ASSUMED THAT ANY INCREASE IN DETENTION OR INCARCERATION WILL BE ABSORBED BY EXISTING FEDERAL FACILITIES, OR BY THE USE OF STATE AND LOCAL FACILITIES TO IMPRISON FEDERAL OFFENDERS. WHILE ANY INCREASE IN DETENTION AND INCARCERATION WILL IMPOSE FURTHER BURDENS ON FEDERAL, STATE, AND LOCAL CORRECTIONAL FACILITIES, AND MAY, IN *417 **3554 THE LONG TERM, CONTRIBUTE TO THE NEED FOR NEW FACILITIES, THERE IS NO BASIS FOR RELATING THE EFFECTS OF THIS BILL, BY ITSELF, TO THE NEED FOR FUTURE PRISON CONSTRUCTION.
   TITLE I-- BAIL REFORM-- THIS TITLE AMENDS THE BAIL REFORM ACT OF 1966 TO PERMIT FEDERAL JUDGES TO TAKE INTO CONSIDERATION A DEFENDANT'S DANGER TO THE COMMUNITY IN SETTING PRETRIAL RELEASE CONDITIONS, TO PERMIT PRETRIAL AND PRESENTENCE DETENTION OF CERTAIN INDIVIDUALS, AND TO ALTER THE STRUCTURE OF SANCTIONS FOR VIOLATORS OF RELEASE CONDITIONS. ENACTMENT OF THIS TITLE WOULD RAISE FEDERAL EXPENDITURES BY INCREASING THE NUMBER OF DAYS SPENT BY DEFENDANTS IN PRETRIAL, PRESENTENCE, AND POSTSENTENCE
DETENTION. THE MANDATORY ADDITIONAL SENTENCE FOR THOSE INDIVIDUALS CONVICTED OF AN OFFENSE WHILE ON RELEASE IS ALSO EXPECTED TO RESULT IN INCREASED FEDERAL COSTS. THE ESTIMATED COSTS OF TITLE I ARE SUMMARIZED IN THE FOLLOWING TABLE.

ESTIMATED BUDGET IMPACT-- BAIL REFORM

(BY FISCAL YEARS, IN MILLIONS OF DOLLARS)

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE


TITLE II ALSO AMENDS THOSE SECTIONS OF LAW GOVERNING THE PREPARATION OF PRESENTENCE REPORTS. PRESENTENCE REPORTS ARE CURRENTLY PREPARED IN ABOUT 85 PERCENT OF THE CASES APPEARING BEFORE A JUDGE. THE BILL WOULD HAVE THE EFFECT OF REQUIRING A PRESENTENCE REPORT ON VIRTUALLY EVERY OFFENDER. THE ADDITIONAL COST TO THE GOVERNMENT OF THIS PROVISION IS ESTIMATED TO BE ABOUT $2 MILLION ANNUALLY, BEGINNING IN FISCAL YEAR 1986.

THIS TITLE RAISES THE MAXIMUM LIMITATION ON FINES TO $250,000 FOR AN INDIVIDUAL AND $500,000 FOR AN ORGANIZATION. (THE MAXIMUM FINE FOR A FELONY IS CURRENTLY $10,000.) IT IS NOT POSSIBLE TO ESTIMATE THE ADDITIONAL REVENUES THAT WILL BE GENERATED FROM INCREASED FINES, HOWEVER, SINCE THERE IS NO BASIS FOR PREDICTING HOW THE NEW CEILINGS WILL AFFECT THE AMOUNT OF FINES LEVIED OR COLLECTED. NEVERTHELESS, THE INCREASED REVENUE IS LIKELY TO BE SUBSTANTIAL, BECAUSE THE NEW LIMITS ARE MUCH HIGHER THAN UNDER CURRENT LAW, AND BECAUSE THE BILL STRENGTHENS COLLECTION PROCEDURES.

THE CAP ON PAYMENTS TO PRISONERS UPON RELEASE IS RAISED FROM $100 TO $500 BY THE TITLE. THIS WOULD NOT NECESSARILY INCREASE TOTAL EXPENDITURES FOR RELEASE PAYMENTS, HOWEVER, SINCE THE SIZE OF THE PAYMENTS IS DETERMINED BY THE BUREAU OF PRISONS. IF THE NUMBER OF PRISONERS RECEIVING RELEASE PAYMENTS IN FUTURE YEARS IS THE SAME AS IN 1982 (10,576 PRISONERS), AND IF EACH RECEIVES THE NEW MAXIMUM OF $500, THE TOTAL INCREASE IN FEDERAL EXPENDITURES WOULD BE ABOUT $4 MILLION TO $5 MILLION ANNUALLY. HOWEVER, SINCE MANY PRISONERS DO NOT RECEIVE THE MAXIMUM PAYMENT, EVEN UNDER THE CURRENT LIMIT, ANY INCREASE IN COSTS IS LIKELY TO BE MUCH SMALLER.

THE ESTIMATED COSTS OF TITLE II ARE SUMMARIZED IN THE TABLE BELOW. THE FIGURES IN THE TABLE DO NOT REFLECT INCREASED REVENUES RESULTING FROM THE HIGHER FINE LEVELS OR THE INCREASED OUTLAYS RESULTING FROM THE HIGHER PRISONER ALLOTMENT CAP, SINCE BOTH ARE SUBJECT TO DISCRETIONARY ACTION AND CANNOT BE RELIABLY ESTIMATED AT THE PRESENT TIME.

(ESTIMATED BUDGET IMPACT-- SENTENCING REFORM)
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

TITLE III-- FORFEITURE.-- TITLE III IS IDENTICAL TO S. 948, THE COMPREHENSIVE CRIMINAL FORFEITURE ACT OF 1983, AS REPORTED BY THE SENATE COMMITTEE ON THE JUDICIARY, AUGUST 4, 1983. THIS TITLE IS INTENDED TO MAKE IT EASIER FOR THE FEDERAL GOVERNMENT TO REQUIRE THE FORFEITURE OF PROPERTY UTILIZED IN OR OBTAINED THROUGH RACKETEERING AND MAJOR DRUG-RELATED CRIMES. HOWEVER, CBO HAS NO BASIS FOR ESTIMATING THE INCREASED PROCEEDS THAT MIGHT RESULT FROM THIS TITLE, BECAUSE THE AMOUNT OF MONEY ASSOCIATED WITH CRIMINAL ACTIVITIES FOR WHICH FORFEITURE IS PRESCRIBED IS UNKNOWN, AND BECAUSE IT IS IMPOSSIBLE TO PREDICT THE SUCCESS OF GOVERNMENT PROSECUTIONS AND INVESTIGATIONS. INFORMATION PROVIDED BY THE DEPARTMENT OF JUSTICE INDICATES THAT FORFEITURE PROCEEDS COULD INCREASE BY TENS OF MILLIONS OF DOLLARS AS A RESULT OF THE BILL. SIMILARLY, CBO HAS NO BASIS FOR ESTIMATING THE CHANGE IN THE COST TO THE GOVERNMENT OF PROCESSING FORFEITING PROPERTY, SINCE IT IS IMPOSSIBLE TO PREDICT THE TYPE AND VOLUME OF PROPERTY THAT WILL BE SEIZED UNDER FORFEITURE LAWS. FINALLY, THE TWO SPECIAL FORFEITURE FUNDS ESTABLISHED BY THIS TITLE ARE NOT EXPECTED TO HAVE ANY NET EFFECT ON THE FEDERAL BUDGET.


TITLE V-- DRUG ENFORCEMENT AMENDMENTS.-- THE PURPOSE OF THIS TITLE IS TO PROVIDE A MORE RATIONAL PENALTY STRUCTURE FOR MAJOR DRUG TRAFFICKING OFFENSES. PART A ESTABLISHES MORE SEVERE PENALTIES FOR TRAFFICKING IN A HIGHER QUANTITY OF DRUGS, RAISES FINE LEVELS FOR DRUG OFFENSES, AND ELIMINATES THE DISTINCTION BETWEEN NARCOTICS AND CERTAIN OTHER DRUGS FOR PURPOSES OF SENTENCING. PART B GIVES THE ATTORNEY GENERAL NEW EMERGENCY AUTHORITY TO PLACE AN UNCONTROLLED SUBSTANCE UNDER TEMPORARY CONTROL, ALTERS THE REGISTRATION REQUIREMENTS FOR PHARMACIES AND PHARMACISTS, AND PROVIDES SPECIAL GRANT AUTHORITY FOR EXPANSION OF THE DRUG ENFORCEMENT AGENCY'S (DEA) STATE ASSISTANCE PROGRAM. ALTHOUGH THE GRANT AUTHORITY FOR THE STATE ASSISTANCE PROGRAM COULD HAVE A SIGNIFICANT BUDGETARY EFFECT, CBO HAS NO BASIS FOR ESTIMATING THE ADDITIONAL EXPENDITURES RESULTING FROM THE PROGRAM, BECAUSE THE BILL DOES NOT SPECIFY AN AUTHORIZATION LEVEL, AND BECAUSE THERE ARE NO EXISTING DATA ON SIMILAR PROGRAMS.


ESTIMATED BUDGET IMPACT-- JUSTICE ASSISTANCE
(BY FISCAL YEARS, IN MILLIONS OF DOLLARS)

*420 **3557

TITLE VII-SURPLUS PROPERTY AMENDMENTS.-- TITLE VII PROVIDES FOR THE DONATION OF SURPLUS PROPERTY TO ANY STATE OR LOCALITY FOR USE AS A CORRECTIONAL FACILITY. BASED ON INFORMATION PROVIDED BY THE BUREAU OF PRISONS AND THE GENERAL SERVICES ADMINISTRATION (GSA), IT IS ESTIMATED THAT $30 MILLION TO $50 MILLION IN RECEIPTS WOULD BE FORGONE IN THE FIRST FIVE YEARS AFTER ENACTMENT OF THIS BILL. THIS ESTIMATE ASSUMES THAT IF THE BILL IS ENACTED, PROPERTIES CURRENTLY IDENTIFIED BY THE BUREAU OF PRISONS AS HAVING A POTENTIAL FOR DONATION AS CORRECTIONAL FACILITIES WOULD BE DONATED TO STATE AND LOCAL GOVERNMENTS. IT IS ALSO ASSUMED THAT ALL PROPERTY WITH THE POTENTIAL TO BE DONATED WOULD BE SOLD IF THE BILL IS NOT ENACTED. FOR THE PURPOSE OF THIS ESTIMATE, IT IS PROJECTED THAT ABOUT $8 MILLION PER YEAR IN RECEIPTS WOULD BE LOST AS A RESULT OF THIS TITLE.

TITLE VIII-- LABOR RACKETEERING AMENDMENTS.-- TITLE VIII RAISES FINES AND PRISON SENTENCES FOR PEOPLE ATTEMPTING TO BUY OR SELL LABOR PEACE, AND CLARIFIES THE JURISDICTION OF FEDERAL DISTRICT COURTS IN TAFT-HARTLEY ACT CASES. THE TITLE ALSO STRENGTHENS THE PROVISIONS OF LAW PROHIBITING INDIVIDUALS CONVICTED OF CERTAIN CRIMES FROM SERVING AS LABOR OFFICIALS OR AS DECISION-MAKERS FOR AN EMPLOYEE BENEFIT PLAN. ENACTMENT OF THIS TITLE IS NOT EXPECTED TO HAVE ANY SIGNIFICANT BUDGETARY EFFECT.

TITLE IX-- FOREIGN CURRENCY TRANSACTIONS.-- THIS TITLE STRENGTHENS THE POWER OF LAW ENFORCEMENT AUTHORITIES TO STEM THE ILLICIT FLOW OF CURRENCY INVOLVED IN NARCOTICS TRAFFICKING AND IN THE Laundering SCHEMES OF ORGANIZED CRIME. TITLE IX INCREASES THE PENALTIES FOR FAILING TO REPORT THE IMPORTATION AND EXPORTATION OF CURRENCY, MAKES IT EASIER FOR THE POLICE TO ARREST A SUSPECT BEFORE HE LEAVES THE UNITED STATES, AUTHORIZES THE PAYMENT OF AWARDS TO INFORMANTS, AND ALLOWS CUSTOMS SERVICE OFFICERS TO SEARCH WITHOUT A WARRANT IF THERE IS REASONABLE CAUSE TO BELIEVE MONEY IS BEING ILLEGALLY TRANSPORTED. THIS TITLE IS NOT EXPECTED TO HAVE A SIGNIFICANT BUDGETARY EFFECT.

TITLE X-- MISCELLANEOUS VIOLENT CRIME AMENDMENTS.-- TITLE X STRENGTHENS A NUMBER OF PROVISIONS OF LAW DEALING WITH VIOLENT CRIME AND CREATES SEVERAL NEW OFFENSES. PART D REQUIRES MANDATORY PRISON SENTENCES FOR INDIVIDUALS CONVICTED OF USING OR CARRYING A FIREARM IN A FEDERAL CRIME OF VIOLENCE. A PERSON WOULD RECEIVE A FIVE-YEAR MANDATORY SENTENCE FOR THE FIRST CONVICTION AND A TEN-YEAR MANDATORY SENTENCE FOR THE SECOND CONVICTION. INFORMATION PROVIDED BY THE DEPARTMENT OF JUSTICE SUGGESTS THAT ABOUT 2,000 FEDERAL DEFENDANTS WOULD BE AFFECTED BY THIS PROVISION EACH YEAR. THE AVERAGE TIME SERVED BY AN INDIVIDUAL CONVICTED OF A VIOLENT CRIME IS CURRENTLY FOUR YEARS. BASED ON AN AVERAGE COST PER PRISONER OF $13,000 IN 1983, ADJUSTED FOR INFLATION IN FUTURE YEARS, THE LONGER SENTENCES RESULTING FROM PART D ARE ESTIMATED TO INCREASE FEDERAL EXPENDITURES FOR SUPPORT OF PRISONERS BY $2 MILLION IN 1986, $6 MILLION IN 1987, AND $23 MILLION IN 1988. IF THE AVERAGE SENTENCE FOR THOSE AFFECTED BY
THESE MANDATORY SENTENCES WERE TO RISE FROM FOUR TO SIX YEARS AS A RESULT OF THESE PROVISIONS, THE ANNUAL COST BY 1990 WOULD BE $60 MILLION TO $70 MILLION. THE REMAINING SECTIONS OF TITLE X ARE NOT EXPECTED TO RESULT IN ANY SIGNIFICANT ADDITIONAL COST TO THE GOVERNMENT.

TITLE XI--SERIOUS NONVIOLENT OFFENSES.--TITLE XI DEALS WITH SERIOUS NONVIOLENT CRIMES, INCLUDING CHILD PORNOGRAPHY, PROGRAM FRAUD **3558 AND BRIBERY, BANK FRAUD, BANK BRIBERY, AND POSSESSION OF CONTRABAND IN PRISON. NONE OF THE AMENDMENTS CONTAINED IN THIS TITLE ARE EXPECTED TO HAVE A SIGNIFICANT EFFECT ON THE FEDERAL BUDGET.

TITLE XII--MISCELLANEOUS PROCEDURAL AMENDMENTS.--PART A OF THIS TITLE PROVIDES FOR JUVENILES CHARGED WITH FEDERAL CRIMES TO BE PROSECUTED IN FEDERAL COURTS AND PERMITS ADULT PROSECUTION OF JUVENILES CHARGED WITH CERTAIN VIOLENT CRIMES. THE DEPARTMENT OF JUSTICE EXPECTS THIS PROVISION TO INCREASE THE NUMBER OF FEDERAL DEFENDANTS BY 200 PER YEAR, NECESSITATING THE HIRING OF FIVE ADDITIONAL ATTORNEYS AND TWO ADDITIONAL SUPPORT STAFF. THE U.S. MARSHALS SERVICE WOULD ALSO FACE INCREASED COSTS AS A RESULT OF HANDLING A LARGER NUMBER OF DEFENDANTS. THE TOTAL COST OF PART A IS ESTIMATED TO BE ABOUT $1 MILLION ANNUALLY. THE REMAINING PARTS OF TITLE XII ARE NOT EXPECTED TO HAVE ANY SIGNIFICANT BUDGETARY EFFECT.

6. ESTIMATED COST TO STATE AND LOCAL GOVERNMENTS: STATE AND LOCAL GOVERNMENTS WILL INCUR VARIOUS COSTS IF THEY CHOOSE TO PARTICIPATE IN OFFICE OF JUSTICE ASSISTANCE LAW ENFORCEMENT GRANT PROGRAMS AUTHORIZED BY TITLE VI. THE LEVEL OF EFFORT REQUIRED OF THESE GOVERNMENTS IS DEPENDENT ON THE TYPE OF GRANT. STATE AND LOCAL GOVERNMENTS' ADMINISTRATIVE COSTS ARE NOT EXPECTED TO RISE SIGNIFICANTLY AS A RESULT OF THE GRANTS, SINCE THESE GOVERNMENTS ALREADY HAVE PERSONNEL ADMINISTERING SIMILAR GRANT PROGRAMS.

FORMULA GRANTS.--STATE AND LOCAL GOVERNMENTS ARE REQUIRED TO CONTRIBUTE IN CASH 50 PERCENT OF THE COSTS OF PROJECTS ELIGIBLE FOR FORMULA GRANTS. FORMULA GRANTS TO INDIAN TRIBES, HOWEVER, MAY FINANCE UP TO 100 PERCENT OF PROJECT COSTS. FEDERAL AID IS LIMITED TO NO MORE THAN THREE YEARS.

DISCRETIONARY GRANTS.--DISCRETIONARY GRANTS MAY FUND UP TO 100 PERCENT OF A PROJECT'S COSTS FOR THREE YEARS, BUT STATE AND LOCAL GOVERNMENTS WILL INCUR 50 PERCENT OF THE COSTS IF FEDERAL FUNDING FOR PROJECTS IS EXTENDED FOR AN ADDITIONAL TWO YEARS. STATES AND LOCALITIES MAY USE FUNDS FROM FORMULA GRANTS OR OTHER FEDERAL OR NONFEDERAL SOURCES TO COVER THEIR SHARE OF THE EXTENDED PROJECT COSTS. TOTAL COSTS TO STATES AND LOCALITIES WILL DEPEND ON THE AMOUNT APPROPRIATED FOR DISCRETIONARY GRANTS.

NATIONAL INSTITUTE OF JUSTICE AND BUREAU OF JUSTICE STATISTICS.--THE NATIONAL INSTITUTE OF JUSTICE AND BUREAU OF JUSTICE STATISTICS ARE AUTHORIZED TO PROVIDE STATE AND LOCAL GOVERNMENTS AND NONPROFIT INSTITUTIONS WITH GRANTS COVERING UP TO 100 PERCENT OF THE COST OF A LAW ENFORCEMENT RESEARCH PROJECT. HOWEVER, THE DIRECTOR OF EACH AGENCY MAY REQUIRE THE PARTICIPATING ORGANIZATION TO CONTRIBUTE FINANCIAL OR NONFINANCIAL RESOURCES TO A PROJECT AS A CONDITION FOR RECEIVING AID. THE COST OF THIS PROVISION TO STATE AND LOCAL GOVERNMENTS IS DEPENDENT ON THE ACTIONS TAKEN BY THE NATIONAL INSTITUTE OF JUSTICE AND THE BUREAU OF JUSTICE STATISTICS REGARDING MATCHING FUND REQUIREMENTS.

PRISON CONSTRUCTION AID.--TITLE VI AUTHORIZES DIRECT GRANTS OR BOND INTEREST SUBSIDIES OF UP TO $25 MILLION ANNUALLY TO STATE AND LOCAL GOVERNMENTS FOR PRISON CONSTRUCTION AND RENOVATION. IF PARTICIPATING GOVERNMENTS CHOOSE TO RECEIVE AID IN THE FORM OF GRANTS, MATCHING EXPENDITURES BY STATES AND LOCALITIES WILL TOTAL $25 MILLION A YEAR BETWEEN
1984 AND 1987, SINCE THE GRANTS HAVE A 50 PERCENT MATCHING REQUIREMENT. SOME OR ALL OF THESE AMOUNTS MIGHT BE SPENT BY STATES AND LOCALITIES IN ANY EVENT.

7. ESTIMATE COMPARISON: NONE.
8. PREVIOUS CBO ESTIMATE: NONE.
9. ESTIMATE PREPARED BY: CHARLES ESSICK.
10. ESTIMATE APPROVED BY: C. G. NUCKOLS (FOR JAMES L. BLUM, ASSISTANT DIRECTOR FOR BUDGET ANALYSIS).

REGULATORY IMPACT STATEMENT

IN COMPLIANCE WITH PARAGRAPH 11(B), RULE XXVI OF THE STANDING RULES OF THE SENATE, IT IS HEREBY STATED THAT THE COMMITTEE ANTICIPATES THAT THE BILL WILL HAVE NO ADDITIONAL DIRECT REGULATORY IMPACT. AFTER DUE CONSIDERATION, THE COMMITTEE CONCLUDED THAT THE CHANGES IN EXISTING LAW CONTAINED IN THE BILL WILL NOT INCREASE OR DIMINISH ANY PRESENT REGULATORY RESPONSIBILITIES OF THE UNITED STATES DEPARTMENT OF JUSTICE OR ANY OTHER DEPARTMENT OR AGENCY AFFECTED BY THE LEGISLATION.

ACTION BY THE COMMITTEE

ON JULY 21, 1983, THE COMMITTEE ON THE JUDICIARY CONSIDERED AN ORIGINAL BILL, ENTITLED THE COMPREHENSIVE CRIME CONTROL ACT OF 1983. SEVERAL AMENDMENTS WERE CONSIDERED, AS DISCUSSED BELOW. ON JULY 21, 1983, BY A VOTE OF 16 TO 1, THE COMMITTEE ORDERED AN ORIGINAL COMMITTEE BILL REPORTED OUT WITH RECOMMENDATION THAT IT BE PASSED BY THE SENATE AS FOLLOWS:

YEAS (16):
LAXALT
HATCH [FN981]
DOLE
SIMPSON
EAST
GRASSLEY
DENTON [FN981]
SPECTER
BIDEN
KENNEDY
METZENBAUM [FN981]
DECONCINI [FN981]
LEAHY
BAUCUS [FN981]
HEFLIN
THURMOND

NAYS (1):
MATHIAS

THE FOLLOWING AMENDMENTS WERE ADOPTED BY VOICE VOTE:
1. LAXALT EN BLOC AMENDMENTS.
2. SPECTER JUVENILE JUSTICE AMENDMENTS.
3. SPECTER INSANITY DEFENSE AMENDMENT TO INSERT THE WORD 'SEVERE' WITH RESPECT TO MENTAL DISEASE OR DEFECT. *423 **3560 THE FOLLOWING AMENDMENTS WERE DEFEATED BY ROLLCALL VOTE, AS INDICATED:

1. MATHIAS AMENDMENT REQUIRING THE COURT TO IMPOSE THE LEAST SEVERE APPROPRIATE SANCTION, AND TO PERMIT DEPARTURE FROM THE SENTENCING GUIDELINE WHEN WARRANTED BY THE FACTS OF THE CASE.
YEAS (2)
MATHIAS
HEFLIN
NAYS (15)
LAXALT
HATCH
DOLE
SIMPSON [FN981]
EAST [FN981]
GRASSLEY
DENTON [FN981]
SPECTER
BIDEN
KENNEDY
METZENBAUM
DECONCINI
LEAHY
BAUCUS [FN981]
THURMOND

2. MATHIAS AMENDMENT TO AUTHORIZE A COMMISSION WITHIN THE JUDICIAL
CONFERENCE TO DRAFT SENTENCING GUIDELINES, AND TO NARROW THE SCOPE OF
THE GUIDELINES TO FOCUS ON THE SENTENCINGDECISION.
YEAS (3)
MATHIAS
SPECTER
HEFLIN
NAYS (13)
LAXALT
HATCH
DOLE [FN981]
SIMPSON [FN981]
EAST [FN981]
GRASSLEY
DENTON [FN981]
BIDEN
KENNEDY
BIDEN
KENNEDY
METZENBAUM [FN981]
DECONCINI
BAUCUS [FN981]
THURMOND

3. MATHIAS AMENDMENT TO AUTHORIZE RELEASE ON PAROLE, ON A DATE SET BY THE
SENTENCING JUDGE PURSUANT TO GUIDELINES, FOR DEFENDANTS WHOSE POST-
CONVICTION BEHAVIOR HAD BEEN ACCEPTABLE AND TO AUTHORIZE THE SENTENCING
COURT TO ORDER EARLIER RELEASE UNDER EXTRAORDINARY CIRCUMSTANCES.
YEAS (3)
MATHIAS
DECONCINI
HEFLIN
NAYS (13)
LAXALT
HATCH
DOLE [FN981]
SIMPSON [FN981]
EAST [FN981]

YEAS (1)
Mathias
NAYS (15)
Laxalt
Hatch
Dole [FN981]
Simpson [FN981]
East [FN981]
Grassley
Denton [FN981]
Specter
Biden
Kennedy
Metzenbaum [FN981]

5. Deconcini Amendment to Create a Select Commission on Drug Interdiction and Enforcement.

YEAS (6)
Hatch [FN981]
Dole
Grassley
Specter
Deconcini
Heflin
NAYS (8)
Laxalt
Simpson
East [FN981]
Denton [FN981]
Biden
Kennedy
Metzenbaum [FN981]


YEAS (2)
Deconcini [FN981]
Heflin
NAYS (12)
Laxalt
Hatch [FN981]
Dole

FN2 SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART XIII.

FN3 BAIL REFORM, HEARINGS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 97TH CONG., 1ST SESS. (1981).

FN4 THE INSANITY DEFENSE, HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 97TH CONG., 2D SESS. (1982); LIMITING THE INSANITY DEFENSE, HEARINGS BEFORE THE SUBCOMMITTEE ON CRIMINAL LAW OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 97TH CONG., 2D SESS. (1982).

FN5 FORFEITURE OF NARCOTICS PROCEEDS, HEARINGS BEFORE THE SUBCOMMITTEE ON CRIMINAL JUSTICE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 96TH CONG., 2D SESS. (1980).


FN7 CHILD PORNOGRAPHY, HEARING BEFORE THE SUBCOMMITTEE ON JUVENILE JUSTICE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 97TH CONG., 2D SESS. (1982).

FN8 PHARMACY ROBBERY LEGISLATION, HEARINGS BEFORE THE SUBCOMMITTEE ON CRIMINAL LAW OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 97TH CONG., 2D SESS. (1982).

FN9 THE COMPREHENSIVE CRIME CONTROL ACT OF 1983, HEARINGS BEFORE THE SUBCOMMITTEE ON CRIMINAL LAW OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 98TH CONG., 1ST SESS. (1983) (HEREINAFTER CITED AS CRIME CONTROL ACT HEARINGS); TITLE XIII OF S. 829-- TO AMEND THE FEDERAL TORT CLAIMS ACT, HEARING BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE
AND PROCEDURE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 98TH CONG., 1ST SESS. (1983).

FN10 TO ENHANCE THE POTENTIAL FOR ULTIMATE ENACTMENT OF A COMPREHENSIVE CRIME BILL, THE COMMITTEE DECIDED TO DEAL WITH A NUMBER OF THE MORE CONTROVERSIAL PENDING ISSUES IN SEPARATE LEGISLATION. ACCORDINGLY, BILLS ON HABEAS CORPUS (S. 1763), EXCLUSIONARY RULE (S. 1764), CAPITAL PUNISHMENT (S. 1765), AND TO ESTABLISH AN OFFICE FOR THE DIRECTOR OF NATIONAL AND INTERNATIONAL DRUG OPERATIONS AND POLICY (S. 1787) WERE INTRODUCED AND REPORTED TO THE SENATE ON AUGUST 4, 1983 (SEE, 129 CONG.REC.PP. S11679-S11713 (DAILY ED.).

FN11 18 U.S.C. 3146 ET SEQ.

FN12 FOR AN OVERVIEW OF STUDIES ON BAIL POLICY AND A DETAILED DISCUSSION OF THE HISTORY AND FEDERAL COURT TREATMENT OF ISSUES RELATED TO PRETRIAL RELEASE, SEE S. REP. NO. 98-147, PP. 2-30.

FN13 THE ADVISORY NOTES TO RULE 9(B) OF THE FEDERAL RULES OF APPELLATE PROCEDURE STATE THAT 'NOTWITHSTANDING THE FACT THAT JURISDICTION HAS PASSED TO THE COURT OF APPEALS, BOTH 18 U.S.C. 3148 AND FRCRP 38(C) CONTEMPLATE THAT THE INITIAL DETERMINATION OF WHETHER A CONVICTED DEFENDANT IS TO BE RELEASED PENDING THE APPEAL IS TO BE MADE BY THE DISTRICT COURT.'


FN15 ADDRESS OF PRESIDENT REAGAN TO THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, SEPTEMBER 28, 1981.

FN16 ADDRESS OF CHIEF JUSTICE BURGER TO THE AMERICAN BAR ASSOCIATION, FEBRUARY 8, 1981.

FN17 WITH SOME MODIFICATION, ALL OF THE RECOMMENDATIONS OF THE ATTORNEY GENERAL'S TASK FORCE WITH RESPECT TO AMENDMENT OF THE BAIL REFORM ACT ARE ADOPTED IN THIS CHAPTER.

FN18 AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: PRETRIAL RELEASE, STANDARDS 10-5.2, 10-5.8, AND 10-5.9 (1978).

FN19 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF CRIMINAL PROCEDURE, RULE 341 (1974).

FN21 NATIONAL ASSOCIATION OF PRETRIAL SERVICE AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE AND DIVERSION, STANDARD VII.

FN22 BAIL REFORM HEARINGS, SUPRA NOTE 4, AT 170-171 (TESTIMONY OF JEFFREY HARRIS, DEPUTY ASSOCIATE ATTORNEY GENERAL).

FN23 D.C. CODE, SEC. 23-1321 ET SEQ.


FN27 SEE UNITED STATES V. WIND, 527 F.2D 672(6TH CIR. 1975); UNITED STATES V. GILBERT, 425 F.2D 3 (D.C. CIR. 1969).

FN28 UNITED STATES V. ABRAHAMS, 575 F.2D 3(1ST CIR.), CERT. DENIED, 439 U.S. 821(1978).


FN30 S. REPT. 89-750, 89TH CONG.,1ST SESS. 5(1965).

FN31 SEE MATERIALS IN BAIL REFORM HEARINGS, SUPRA NOTE 4.

FN32 D.C. CODE, SEC. 23-1322.


FN34 ID. AT 1325-1331.

FN35 ID. AT 1331-1333. IN BELL V. WOLFISH, 441 U.S. 520(1979), THE COURT REJECTED THE CONTENTION OF PERSONS DETAINED PRIOR TO TRIAL THAT CERTAIN CONDITIONS OF THEIR CONFINEMENT CONSTITUTED PUNISHMENT THAT WAS IMPERMISSIBLE UNDER THE FOURTH AMENDMENT AND VIOLATIVE OF THE PRESCRIPTION OF INNOCENCE, TWO ARGUMENTS PARALLEL TO THOSE FREQUENTLY RAISED IN OPPOSITION TO PRETRIAL DETENTION GENERALLY. THE PETITIONERS DID

FN36 S. REPT. NO. 96-553, 96TH CONG., 2D SESS. 1073(1980).


FN38 USE OF HIGH MONEY BOND TO DETAIN DEFENDANTS HAS BEEN CITED AS THE REASON FOR THE INFREQUENT USE OF THE D.C. CODE PRETRIAL DETENTION STATUTE OVER MUCH OF ITS HISTORY. INSLAW STUDY, SUPRA NOTE 15 AT 45.

FN39 INSLAW STUDY, SUPRA NOTE 15.

FN40 ID. AT 63-64.

FN41 BAIL REFORM HEARINGS, SUPRA NOTE 4, AT 169, 174-175 (TESTIMONY OF JEFFREY HARRIS, DEPUTY ASSOCIATE ATTORNEY GENERAL).


FN44 BAIL REFORM HEARINGS, SUPRA NOTE 4, AT 154 (STATEMENT OF SENATOR ORRIN G. HATCH).

FN45 ID. AT 177 (TESTIMONY OF JEFFREY HARRIS, DEPUTY ASSOCIATE ATTORNEY GENERAL).

FN46 ID. AT 215-221 (TESTIMONY OF BRUCE D. BEAUDIN, DIRECTOR, D.C. PRETRIAL SERVICES AGENCY).

FN47 SECTION 3142(C).

FN48 BAIL REFORM HEARINGS, SUPRA NOTE 4, AT 194-195 (TESTIMONY OF JEFFREY HARRIS, DEPUTY ASSOCIATE ATTORNEY GENERAL).


FN50 D.C. CODE, SEC. 23-1322.

FN51 605 F.2D 85(3D CIR. 1979).

FN52 RISK OF CONTINUED DRUG ACTIVITY IS CURRENTLY CONSIDERED A DANGER TO THE COMMUNITY OR OTHER PERSONS UNDER CURRENT 18 U.S.C. 3148. SEE, E.G., UNITED STATES V. HAWKINS, 617 F.2D 59(5TH CIR.), CERT. DENIED, 449 U.S. 952(1980).
FN53 This concept was endorsed in the commentary to the Uniform Rules of Criminal Procedure, supra note 9 at 64, citing an Arizona case to the effect that it is permissible to condition the pretrial release, by a requirement that the defendant conduct himself as a law-abiding citizen, State of California v. Cassius, 110 Ariz. 485 (1974).


FN55 The InsLaw Study, supra note 15 at 54, 58, found that defendants released to third-party custodians seemed more likely to be rearrested than were defendants on other forms of pretrial release.

FN56 In general see Reducing Victim/Witness Intimidation: A Package, American Bar Association, Section of Criminal Justice Committee on Victims (1979).


FN58 Section 3502(F).

FN59 ABA Standards on Pretrial Release, supra note 8, Standard 10-1.3(C).

FN60 In any event, a defendant who is a danger to the community remains dangerous even if he has posted a substantial money bond.

FN61 Prior to establishing such new conditions, and prior to a hearing thereon, the court may revoke the defendant's release and order him arrested. United States v. Gamble, 205 F.Supp. 1192 (S.D. Tex. 1969).


FN63 United States v. Abrahams, supra note 18.

FN64 D.C. Code, Sec. 23-1322(B)(2)(C).

FN65 United States v. Edwards, supra note 23 at 1339.

FN66 Bail Reform Hearings, supra note 4 at 189-191 (Testimony of Jeffrey Harris, Deputy Associate Attorney General).

FN67 Because of the requirements of Rules 4(A) and 5(A) of the Federal Rules of Criminal Procedures, probable cause that the defendant committed the offense with which he is charged must be established either prior to, or at the time of, the initial appearance. Furthermore, the issue of probable cause will subsequently be reexamined in the course of a preliminary hearing or in proceedings leading to the filing of an indictment.

FN68 Bail Reform Hearings, supra note 4 at 56-60. (Testimony of Senator Lawton Chiles).

FN69 The concept of danger to the safety of the community includes drug trafficking. See United States v. Hawkins, supra note 42.

FN71 UNITED STATES V. GILBERT AND UNITED STATES V. WIND, SUPRA NOTE 17: UNITED STATES V. ABRAHAMS, SUPRA NOTE 18.

FN72 D.C. CODE, SEC. 23-1322(C)(3).

FN73 D.C. CODE, SECS. 23-1322(C)(4) AND 23-1322(C)(5). ONE ELEMENT OF THE DISTRICT OF COLUMBIA CODE PROVISION NOT CARRIED FORWARD IN SECTION 3142(F) IS ITS 60-DAY LIMITATION ON THE DETENTION PERIOD WHICH IS SET OUT IN SECTION 23-1322(D)(2)(A) OF THE DISTRICT OF COLUMBIA CODE, 18 U.S.C. 3161, SPECIFICALLY REQUIRES THAT PRIORITY BE GIVEN TO A CASE IN WHICH A DEFENDANT IS DETAINED, AND ALSO REQUIRES THAT HIS TRIAL MUST, IN ANY EVENT, OCCUR WITHIN 90 DAYS, SUBJECT TO CERTAIN PERIODS OF EXCLUDABLE DELAY, SUCH AS FOR MENTAL COMPETENCY TESTS. THESE CURRENT LIMITATIONS ARE SUFFICIENT TO ASSURE THAT A PERSON IS NOT DETAINED PENDING TRIAL FOR AN EXTENDED PERIOD OF TIME.

FN74 SUPRA NOTE 23 AT 1333-1341.

FN75 18 U.S.C. 3146(F). IT IS THE INTENT OF THE COMMITTEE TO RETAIN CURRENT LAW SO THAT ANY INFORMATION PRESENTED OR CONSIDERED IN ANY OF THE RELEASE OR DETENTION PROCEEDINGS UNDER THIS CHAPTER NEED NOT CONFORM TO THE RULES OF EVIDENCE APPLICABLE IN CRIMINAL TRIALS.

FN76 UNDER CURRENT LAW, CONSIDERATION OF A DEFENDANT'S CRIMINAL HISTORY IS CONFINED TO HIS RECORD OF CONVICTIONS. SEE 18 U.S.C. 3146(B). WHILE A PRIOR ARREST SHOULD NOT BE ACCORDED THE WEIGHT OF A PRIOR CONVICTION, THE COMMITTEE BELIEVES THAT IT WOULD BE INAPPROPRIATE TO REQUIRE THE JUDGE IN THE CONTEXT OF THIS KIND OF HEARING TO IGNORE A LENGTHY RECORD OF PRIOR ARRESTS, PARTICULARLY IF THERE WERE CONVICTIONS FOR SIMILAR CRIMES. SIMILARLY, IT WOULD BE IMPROPER TO PROHIBIT CONSIDERATION OF PRIOR ARRESTS IF THERE WERE ALSO EVIDENCE THAT THE FAILURE TO CONVICT WAS DUE TO THE DEFENDANT'S INTIMIDATION OF WITNESSES. IN ANY EVENT, INDEPENDENT INFORMATION CONCERNING PAST CRIMINAL ACTIVITIES OF A DEFENDANT CERTAINLY CAN, AND SHOULD, BE CONSIDERED BY A COURT.


FN78 THE EMPHASIS ON DRUG-RELATED FACTORS AND ON PRIOR CRIMINAL HISTORY IS IN ACCORD WITH EMPIRICAL RESEARCH CONDUCTED IN THE DISTRICT OF COLUMBIA WHICH INDICATES A SIGNIFICANT CORRELATION BETWEEN DRUG USE AND BOTH FAILURE TO APPEAR AND PRETRIAL REARREST, AND BETWEEN CRIMINAL HISTORY AND PRETRIAL REARREST. INSLAW STUDY, SUPRA NOTE 15, AT 57-59 AND 61-65.

FN79 BAIL REFORM HEARINGS, SUPRA NOTE 4 AT 181-182, 186-187 (TESTIMONY OF JEFFREY HARRIS, DEPUTY ASSOCIATE ATTORNEY GENERAL).

FN80 THE COMMITTEE NOTES THAT THE AUTHORITY TO CONSIDER DANGER TO THE COMMUNITY, AND THE PRESUMPTION THAT DRUG TRAFFICKERS SHOULD BE DETAINED, ALLEVIATES THE PROBLEM ADDRESSED HERE TO SOME EXTENT, SINCE MANY MAJOR DRUG TRAFFICKERS WOULD SIMPLY BE HELD WITHOUT BOND UNDER
THE BILL.

FN81 THE JUDICIAL OFFICERS MAY ALSO DECLINE ACCEPTING THE PROPERTY IF THE DEFENDANT REFUSES TO EXPLAIN ITS SOURCE. SEE UNITED STATES V. DEMORCHENA, 330 F.SUPP. 1223 (S.D. CAL. 1970), IN WHICH THE COURT REFUSED TO ACCEPT A $50,000 SURETY BOND SECURED BY $55,000 DELIVERED IN CASH TO THE BONDSMAN UNTIL THE DEFENDANT PRESENTED EVIDENCE AS TO THE SOURCE OF THE MONEY.

FN82 UNITED STATES V. NEBBIA, 357 F.2D 303(2D CIR. 1966).

FN83 RULE 46(D) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE PROVIDES THAT EVERY SURETY, EXCEPT AN APPROVED CORPORATE SURETY, MAY BE REQUIRED TO FILE AN AFFIDAVIT LISTING THE PROPERTY USED TO SECURE THE BOND. THIS PROVISION MAY IMPLICITLY AUTHORIZE A HEARING TO INQUIRE INTO THE SOURCE OF THE PROPERTY. THE RULE'S EXEMPTION OF APPROVED CORPORATE SURETIES FROM THIS REQUIREMENT RAISES A QUESTION WHETHER SIMILAR INQUIRIES CAN BE MADE IN THE CASE OF CORPORATE SURETIES. AT LEAST TWO (S.D., N.Y. 1970); UNITED STATES V. DEMORCHENA, SUPRA NOTE 71.

FN84 INSLAW STUDY, SUPRA NOTE 15, AT 54, 58.

FN85 18 U.S.C. 3146(C).

FN86 SEE UNITED STATES V. CARDILLO, 473 F.2D 325(4TH CIR. 1973); UNITED STATES V. DEPUGH, 434 F.2D 548(18TH CIR. 1970), CERT. DENIED, 401 U.S. 978(1971); UNITED STATES V. ESKEW, 469 F.2D 278(9TH CIR. 1972).

FN87 WHETHER A SEPARATION OF THE DETAINED PERSON FROM PERSONS ALREADY CONVICTED WILL BE PRACTICABLE IS TO BE GAUGED IN LIGHT OF EXISTING FACILITIES. THE COMMITTEE EMPHASIZES THAT THIS PROVISION IS NOT INTENDED TO BE USED TO REQUIRE THE CONSTRUCTION OF NEW DETENTION FACILITIES OR RENOVATION OF EXISTING FACILITIES.

FN88 THE COUNTERPART OF SUBSECTION (I) APPEARS AT D.C. CODE SECS. 23-1321(H) AND 23-1322(C).

FN89 BELL V. WOLFISH, SUPRA, NOTE 5, 441 U.S.AT 533; SEE DISCUSSION OF THE PRESUMPTION OF INNOCENCE IN S. REPT. NO. 98-147, SUPRA NOTE 2 AT 13-18.

FN90 UNITED STATES V. BACA, 444 F.2D 1292, 1296(10TH CIR.), CERT. DENIED, 404 U.S. 979(1971).


FN92 D.C. CODE SEC. 23-1325.

FN93 18 U.S.C. 3146, AS AMENDED BY THE BILL.

FN94 SEE ALSO RULE 46(C) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.


FN96 THE ADVISORY NOTES TO RULE 9(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE STATE THAT THE BURDEN OF SHOWING THAT THE APPEAL APPEARS TO
BE FRIVOLOUS OR TAKEN FOR DELAY RESTS WITH THE GOVERNMENT. THE COMMITTEE INTENDS THAT UNDER SECTION 3143 THE BURDEN OF SHOWING THE MERIT OF THE APPEAL SHOULD NOW REST WITH THE DEFENDANT. RULE 9(C) IS CHANGED BY SECTION 109 OF THIS TITLE TO CONFORM TO THIS SECTION.


FN98 A GRAND JURY INVESTIGATION IS A ‘CRIMINAL PROCEEDING’ WITHIN THE MEANING OF THIS SECTION. BACON V. UNITED STATES, 449 F.2D 933(9TH CIR. 1971).

FN99 Ibid.

FN100 OF COURSE A MATERIAL WITNESS IS NOT TO BE DETAINED ON THE BASIS OF DANGEROUSNESS.

FN101 BACON V. UNITED STATES, SUPRA NOTE 88; SEE ALSO, UNITED STATES V. ANFIELD, 539 F.2D 674, 677(9TH CIR. 1976).

FN102 THE PROCEDURES FOR SUCH APPEALS, WHICH ARE SET FORTH IN RULE 9 OF THE FEDERAL RULES OF APPELLATE PROCEDURE, ARE DESIGNED, AS STRESSED IN THE ADVISORY NOTES, TO FACILITATE SPEEDY REVIEW IF RELIEF IS TO BE EFFECTIVE.

FN103 SEE UNITED STATES V. ZUCCARO, SUPRA, NOTE 52, WHICH HELD THAT THE RIGHT OF THE GOVERNMENT TO SEEK RECONSIDERATION OF A BAIL DETERMINATION BY THE TRIAL COURT IS IMPLICIT IN THE BAIL REFORM ACT. SINCE 18 U.S.C. 3147(B) PERMITS APPEAL OF RELEASE DECISIONS ONLY WHEN THE DEFENDANT HAS BEEN DETAINED, IT IS DOUBTFUL THAT THE GOVERNMENT HAS ANY RIGHT TO APPEAL, AS OPPOSED TO A RIGHT TO SEEK RECONSIDERATION OF, A RELEASE DECISION UNDER THE ACT.

FN104 18 U.S.C. 3146 ET SEQ.


FN106 UNITED STATES V. BOURASSA, 411 F.2D 69, 74(10TH CIR.), CERT. DENIED, 396 U.S. 915(1969).

FN107 UNITED STATES V. DEPUUGH, 434 F.2D 548(8TH CIR. 1970), CERT. DENIED, 401 U.S. 978(1971); UNITED STATES V. BOURASSA, SUPRA NOTE 96.

FN108 UNITED STATES V. WRAY, 369 F.SUPP. 118 (W.D. MO. 1970); BUT SEE UNITED STATES V. BRIGHT, 541 F.2D 471(5TH CIR. 1976), AND UNITED STATES V. WEST, 477 F.2D 1056(4TH CIR. 1973), REACHING THE OPPOSITE CONCLUSION ON THE GROUND THAT THE MARSHAL IS AN AGENT OF THE COURT FOR THESE PURPOSES.

FN109 UNITED STATES V. DEPUUGH, SUPRA NOTE 97; UNITED STATES V. BOURASSA, SUPRA NOTE 97.

FN110 SUPRA NOTE 97.
FN111 346 F.2d 875(2D CIR.), CERT. DENIED, 382 U.S. 919(1965).

FN112 SEE UNITED STATES V. BRIGHT, SUPRA NOTE 98. COMPARE GANT V. UNITED STATES, 506 F.2d 518(8TH CIR. 1974), CERT. DENIED, 420 U.S. 1005(1975).


FN114 412 F.2d 885(5TH CIR. 1969).

FN115 SEE UNITED STATES V. DEPUGH, SUPRA NOTE 97.

FN116 IBID.; UNITED STATES V. BOURASSA, SUPRA NOTE 97.

FN117 BAIL REFORM HEARINGS, SUPRA NOTE 4 AT 185 (TESTIMONY OF JEFFREY HARRIS, DEPUTY ASSOCIATE ATTORNEY GENERAL).

FN118 ALL RELEASES UNDER THE PROVISIONS OF THIS BILL, WHETHER PRETRIAL OR PENDING SENTENCE OR APPEAL, ARE TECHNICALLY PURSUANT TO SECTION 3142. THUS THE SANCTIONS ARE APPLICABLE TO ALL RELEASES PURSUANT TO THIS SUBSECTION.

FN119 D.C. CODE, SEC. 23-1329.

FN120 CRIMINAL CODE HEARINGS, PART XIV, P. 10323 (TESTIMONY BY PROFESSOR ALAN DERSHOWITZ).

FN121 SPECIFIC PROVISION FOR REVOCATION IS ALSO RECOMMENDED BY THE ABA 1978 STANDARDS, SUPRA NOTE 8, STANDARD 10-5.7 AND BY THE UNIFORM RULES OF CRIMINAL PROCEDURE, SUPRA NOTE 9, RULE 341(E).

FN122 BAIL REFORM HEARING, SUPRA NOTE 4 AT 179 (TESTIMONY OF JEFFREY HARRIS, DEPUTY ASSOCIATE ATTORNEY GENERAL).


FN125 SENATOR KENNEDY WAS JOINED AS ORIGINAL COSPONSORS ON S. 668 BY SENATORS THURMOND, BIDEN, LAXALT, BAUCUS, DECONCINI, HATCH, LEAHY, METZENBAUM, SIMPSON, SPECTER, ABDNOR, HAWKINS, COHEN, D'AMATO, CHILES, GLENN, HUDDLESTON, LUGAR, STEVENS, ZORINSKY, MOYNIHAN, AND SASSER.

FN126 CRIME CONTROL ACT HEARINGS.

FN127 CRIMINAL CODE HEARINGS, PART XVI, AT 11765.

FN128 SUCH DISPARATE RELEASE DATES ARE THE RESULT OF THE WIDE DISCRETION GRANTED TO SENTENCING JUDGES AND THE UNITED STATES PAROLE COMMISSION UNDER CURRENT FEDERAL LAW. SEE 18 U.S.C. 4203 (POWERS AND DUTIES OF THE COMMISSION); 18 U.S.C. 4206 (PAROLE DETERMINATION CRITERIA: PRISONER MAY BE RELEASED BY THE COMMISSION 'UPON CONSIDERATION OF THE OFFENSE AND THE HISTORY AND CHARACTERISTICS OF THE PRISONER * * * AND PURSUANT TO GUIDELINES PROMULGATED BY THE COMMISSION * * *. (THE)
COMMISSION MAY (ALSO) GRANT OR DENY RELEASE ON PAROLE NOTWITHSTANDING. (THESE) GUIDELINES IF IT DETERMINES THERE IS GOOD CAUSE FOR SO DOING 18 U.S.C. 4207 (ALLOWING THE PAROLE COMMISSION TO CONSIDER REPORTS FROM ANY AND ALL SOURCES).

FN129 REVIEW OF SENTENCES IMPOSED BY THE COURTS IS CONFINED TO TWO SPECIAL SENTENCING STATUTES (18 U.S.C. 3576, RELATING TO DANGEROUS SPECIAL OFFENDERS, AND 21 U.S.C. 849, RELATING TO DANGEROUS SPECIAL DRUG OFFENDERS) UNLESS THE SENTENCE IS ILLEGAL. REVIEW OF DECISIONS OF THE PAROLE COMMISSION IS GENERALLY CONFINED TO THE QUESTION OF WHETHER IT HAS ABUSED ITS DISCRETION.

FN130 FOR MOST OFFENSES, THE JUDGE MAY SUSPEND EXECUTION OR IMPOSITION OF THE SENTENCE AND PLACE THE CONVICTED OFFENDER ON PROBATION, OR IMPOSE A SPLIT SENTENCE OF UP TO SIX MONTHS IN PRISON FOLLOWED BY PROBATION. SEE 18 U.S.C. 3651.


FN132 18 U.S.C. 5005 ET SEQ.
FN134 18 U.S.C. 4251 ET SEQ.
FN135 18 U.S.C. 3575 ET SEQ.
FN137 SEE 45 CONG.REC. 6374(1910) (REMARKS OF REP. CLAYTON).


FN139 THE PAROLE COMMISSION DOES PROVIDE A SMALL AMOUNT OF ADVANCEMENT IN THE PRESUMPIVE RELEASE DATE FOR 'DOCUMENTED SUSTAINED SUPERIOR PROGRAM ACHIEVEMENT OVER A PERIOD OF 9 MONTHS OR MORE IN CUSTODY,' AND PERMITS PARTIAL ADVANCEMENT EVEN IF THERE HAVE BEEN MINOR DISCIPLINARY INFRACTIONS (28 C.F.R. 2.60(1982).

FN140 A RECENT STUDY INDICATES THAT FEDERAL JUDGES DISAGREE CONSIDERABLY ABOUT THE PURPOSES OF SENTENCING. WHILE ONE-FOURTH OF THE JUDGES THOUGHT REHABILITATION WAS AN EXTREMELY IMPORTANT GOAL OF SENTENCING, 19 PERCENT THOUGHT IT WAS NO MORE THAN 'SLIGHTLY' IMPORTANT; CONVERSELY, ABOUT 25 PERCENT THOUGHT 'JUST DESERTS' WAS A VERY IMPORTANT OR EXTREMELY IMPORTANT PURPOSE OF SENTENCING, WHILE 45 PERCENT THOUGHT IT WAS ONLY SLIGHTLY IMPORTANT OR NOT IMPORTANT AT ALL. INSLAW, INC., AND YANKELOVICH, SKELLY, AND WHITE, FEDERAL SENTENCING: TOWARD A MORE EXPLICIT POLICY OF CRIMINAL SANCTIONS, III-4 (1981) (HEREINAFTER CITED AS FEDERAL SENTENCING STUDY).

FN141 SEE ID. AT III-19 TO III-21.

FN142 ID. AT III-9 TO III-14.


FN146 FEDERAL SENTENCING STUDY, SUPRA NOTE 18 AT III-16.

FN147 ID., EXHIBIT III-8.

FN148 ID. AT III-17.


FN150 SEE SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART XIII, AT 8870, 8881, 8897, 8903, 8916, 8960; CRIMINAL CODE HEARINGS, PART XVI, AT 11752, 11786-87, 11911.

FN151 SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART XIII, AT 9095.


FN155 THE PRESENTENCE REPORT INFORMS THE SENTENCING JUDGE AS TO THE PROBABLE APPLICATION OF THE PAROLE GUIDELINES IN EACH CASE. SEE DIVISION OF PROBATION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE PRESENTENCE INVESTIGATION REPORT, PP. 6 AND 16 (1978). IT IS PROBABLE THAT SOME JUDGES, BELIEVING THAT THE PAROLE RELEASE DATE SPECIFIED IN THE GUIDELINES IS REASONABLE, IMPOSE SENTENCES TO IMPRISONMENT THAT ASSURE PAROLE ELIGIBILITY DURING THE GUIDELINES RANGE APPLICABLE IN A PARTICULAR CASE, WHILE OTHER JUDGES MAY DELIBERATELY IMPOSE SENTENCE BELOW THE PAROLE GUIDELINE BELIEVING THAT IT IS TOO HARSH OR SET A HIGH SENTENCE WITH PAROLE ELIGIBILITY ABOVE THE GUIDELINE IF IT IS BELIEVED TO BE TOO LOW.

FN156 IT IS IRONIC THAT THOSE WHO WOULD RETAIN PAROLE ON THE GROUND THAT IT IS A VALUABLE 'SAFETY VALVE' DESIGNED TO SHORTEN LENGTHY SENTENCES IMPOSED BY JUDGES WHO WOULD IGNORE THE GUIDELINES ESTABLISHED UNDER THIS TITLE COULD VERY WELL BE ASSURING THAT LONGER SENTENCES WOULD BE IMPOSED BY JUDGES TRYING TO STRUCTURE SENTENCES TO OVERCOME PROSPECTIVELY THE ANTICIPATED REDUCTION BY THE PAROLE COMMISSION. IN ADDITION, IF PAROLE ELIGIBILITY IS RETAINED FOR A SUBSTANTIAL PERCENTAGE OF A PRISON TERM, THE SENTENCING GUIDELINES WOULD NECESSARILY RECOMMEND FAR LONGER PRISON TERMS THAT IF THERE
WERE NO PAROLE RELEASE SYSTEM. THIS WOULD VIRTUALLY ASSURE THAT PRISON TERMS IMPOSED BY JUDGES WOULD BEAR NO MORE RESEMBLANCE TO TERMS ACTUALLY SERVED THAN THEY DO TODAY. ABOUT HALF THE PRISONERS WITHIN THE JURISDICTION OF THE PAROLE COMMISSION ARE RELEASED AT THE EXPIRATION OF SENTENCE, LESS GOOD TIME, RATHER THAN ON PAROLE. OF THE 7,077 PERSONS WHO WERE SENTENCED TO TERMS OF IMPRISONMENT OF OVER ONE YEAR AND WHO WERE RELEASED FROM PRISON IN THE FISCAL YEAR ENDED SEPTEMBER 30, 1977, 3,492 WERE RELEASED ON PAROLE. FEDERAL PRISON SYSTEM, STATISTICAL REPORT FISCAL YEAR 1977, TABLE C-1, P. 175. COMPARABLE BUREAU OF PRISONS STATISTICS FOR FISCAL YEAR 1982 INDICATE THAT OF 6,968 PRISONERS SENTENCED TO TERMS OF IMPRISONMENT IN EXCESS OF ONE YEAR WHO WERE RELEASED THAT YEAR, 3,956 WERE RELEASED ON PAROLE. FEDERAL PRISON SYSTEM, STATISTICAL REPORT FISCAL YEAR 1982, TABLE C-1.


FN160 CRIMINAL CODE HEARINGS, PART XIV, AT 10648-10651, 10665 NOTE 29.

FN161 18 U.S.C. 4205(B).

FN162 RECENT AMENDMENTS TO THE OFFENSE SEVERITY INDEX FOR THE PAROLE GUIDELINES PROVIDE MORE DETAILED DISTINCTIONS IN OFFENSE DESCRIPTIONS THAN PREVIOUS FORMULATIONS. SEE 47 FED.REG. 56336-41 (DEC. 16, 1982).


FN165 ID. AT 12-23.

FN166 SEE 18 U.S.C. 4161 ET SEQ.

ACCORDANCE WITH JUDICIAL EXPECTATIONS, AND TO USE COLLATERAL ATTACK AS
A MECHANISM FOR ENSURING THAT THESE EXPECTATIONS ARE CARRIED OUT
WOULD SUBSTANTIALLY UNDERMINE THE CONGRESSIONAL DECISION TO ENTRUST
RELEASE DECISIONS TO THE COMMISSION AND NOT THE COURTS. NOTHING IN SEC.
2255 SUPPORTS-- LET ALONE MANDATES-- SUCH FRUSTRATION OF CONGRESSIONAL
INTENT.' ID. AT 190. THUS, '(W)HEN PAROLE BOARDS EXERCISED AUTHORITY OVER
RELEASE, JUDGES' SENTENCES WERE OF SECONDARY IMPORTANCE * * * '.
NATIONAL ACADEMY OF SCIENCES, PANEL ON SENTENCING RESEARCH, RESEARCH
ON SENTENCING: THE SEARCH FOR REFORM 57 (A. BLUMSTEIN, J. COHEN, S.
MARTIN & M. TONRY, EDS., 1983) (HEREINAFTER CITED AS NATIONAL ACADEMY OF
SCIENCES REPORT).


FN171 THERE ARE A FEW EXCEPTIONS IN RECENTLY ENACTED PROVISIONS. SEE,


FN173 PROPOSED 18 U.S.C. 3551(B).


FN175 PROPOSED 18 U.S.C. 3554.


3663 AND 3644. SECTIONS 3663 AND 3664 WERE ENACTED AS 18 U.S.C. 3579 AND
3580 BY SECTION 5 OF THE VICTIM AND WITNESS PROTECTION ACT OF 1982, AND
WOULD BE RENUMBERED AS SECTIONS 3663 AND 3664 BY SECTION 202(A) OF THIS
BILL.


FN179 PROPOSED 18 U.S.C. 3581(B).

FN180 PROPOSED 18 U.S.C. 3571(B).


FN184 PROPOSED 18 U.S.C. 3559(B)(1). AN EXCEPTION IS MADE WHEN THE
MAXIMUM FINE IN CURRENT LAW IS HIGHER THAN THAT SPECIFIED IN TITLE II OF
THIS BILL; IN THAT CASE, THE CURRENT MAXIMUM WOULD APPLY.

FN185 SEE PROPOSED 28 U.S.C. 991(B) AND 994(A); PROPOSED 18 U.S.C. 3553(B).

FN186 PROPOSED 18 U.S.C. 3553(B).

FN188 PROPOSED 18 U.S.C. 3742(B).


FN191 PROPOSED 18 U.S.C. 3553(B).


FN193 THE UNITED STATES PAROLE COMMISSION CURRENTLY SETS PRISON RELEASE DATES OUTSIDE ITS GUIDELINES IN ABOUT 20 PERCENT OF THE CASES IN ITS JURISDICTION. UNITED STATES PAROLE COMMISSION, REPORT FOR OCTOBER 1, 1978 TO SEPTEMBER 30, 1980, TABLE III AT 22(1981). IT IS ANTICIPATED THAT JUDGES WILL IMPOSE SENTENCES OUTSIDE THE SENTENCING GUIDELINES AT ABOUT THE SAME RATE OR POSSIBLY AT A SOMEWHAT LOWER RATE SINCE THE SENTENCING GUIDELINES SHOULD CONTAIN RECOMMENDATIONS OF APPROPRIATE SENTENCES FOR MORE DETAILED COMBINATIONS OF OFFENSE AND OFFENDER CHARACTERISTICS THAN DO THE PAROLE GUIDELINES. SEE ALSO NATIONAL ACADEMY OF SCIENCES REPORT, SUPRA NOTE 45 AT 29, WHICH CONCLUDES THAT, ‘WITH VOLUNTARY GUIDELINES, STUDIES HAVE FOUND NO EVIDENCE OF SYSTEMATIC JUDICIAL COMPLIANCE; WITH CHANGES DIRECTLY MANDATED BY STATUTE, AS IN THE CASES OF MANDATORY AND DETERMINATE SENTENCING LAWS (SUCH AS THE CALIFORNIA SYSTEM OF LEGISLATED SENTENCES), STUDIES HAVE FOUND FORMAL (BUT NOT NECESSARILY SUBSTANTIVE) JUDICIAL COMPLIANCE. HOWEVER, UNDER MINNESOTA’S PRESUMPTIVE SENTENCING GUIDELINES (WHICH WERE PROMULGATED UNDER LEGISLATION SUBSTANTIALLY SIMILAR TO THIS BILL), THE PRESENCE OF EFFECTIVE EXTERNAL ENFORCEMENT MECHANISMS, IN THE FORM OF APPELLATE REVIEW OF SENTENCES AND CLOSE MONITORING BY THE GUIDELINES COMMISSION, HAS RESULTED IN GENERALLY HIGH RATES OF SUBSTANTIVE COMPLIANCE WITH GUIDELINES BY JUDGES IN THAT STATE.’


FN195 SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART XIII, AT 9020-28.

FN196 THE COMMITTEE’S VIEW THAT PAROLE SHOULD BE ABOLISHED IN THE CONTEXT OF A COMPLETELY RESTRUCTURED GUIDELINES SENTENCING SYSTEM IS CONSISTENT WITH THE GENERAL SENTENCING PHILOSOPHY EXPRESSED BY NUMEROUS COMMENTATORS ON THE CURRENT SENTENCING PROCESS. SEE, E.G., P. O’DONNELL, J. CHURGIN, AND D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 13, 14, 28, 56 (NEW YORK 1977) (THE STUDY ON WHICH THE SENTENCING PROVISIONS IN S. 668 ARE LARGELY
BASED) ('* * * (O)UR DECISION TO RECOMMEND A GUIDELINE APPROACH FOR SENTENCING REQUIRES ABOLITION OF PAROLE, AT LEAST AS THAT PROCESS HAS BEEN ADMINISTERED IN THE PAST'); KENNEDY, TOWARD A NEW SYSTEM OF CRIMINAL SENTENCING: LAW WITH ORDER, 16 AM.CR.L.REV. 353 (SPRING 1979); FRANKEL, PANEL ON SENTENCING PROVISIONS IN THE PROPOSED FEDERAL CODE, 80 F.R.D. 151, 153(1979) ('LET THE JUDGES JUDGE AND BE ACCOUNTABLE. THE IDEA OF A PAROLE BOARD OR COMMISSION SERVING IN EFFECT TO REVIEW THE JUDGES WAS NOT SOUND WHEN IT WAS MORE OR LESS COVERT; IT DOES NOT IMPROVE AS AN EXPRESS PROPOSITION '.); NEWMAN, A BETTER WAY TO SENTENCE CRIMINALS, 63 A.B.A.J. 1563, 1566 (NOVEMBER 1977) ('BY RATING CASES ACCORDING TO OFFENSE SEVERITY AND OFFENDER BACKGROUNDS ONLY AND ABANDONING ANY PRETENSE OF BEING ABLE TO PERFORM THE IMPOSSIBLE TASK OF DETERMINING WHEN A PRISONER HAS BEEN 'REHABILITATED,' THE PAROLE COMMISSION HAS DEMONSTRATED ABUNDANTLY THAT IT CAN NOW GO OUT OF BUSINESS'); MORRIS, TOWARD PRINCIPLED SENTENCING, 37 MD.L.REV. 276(1977); SRIVSETH, ABOLISHING PAROLE: ASSURING FAIRNESS AND CERTAINTY IN SENTENCING, 7 HOFSTRA L.REV. 281, 313(1979), VAN DEN HAAG, PUNITIVE SENTENCES, 7 HOFSTRA L.REV. 123, 135(1978); GENEGO, GOLDBERGER, AND JACKSON, PAROLE RELEASE DECISION-MAKING AND THE SENTENCING PROCESS, 84 YALE L.J. 897 (MARCH 1975) ('(T)HE PAROLE BOARD CAN MAKE NO GREATER CONTRIBUTION THAN CAN THE JUDICIARY IN FAIRLY EFFECTUATING THE GOALS OF PUNISHMENT OR REDUCING THE MOST SERIOUS SENTENCING DISPARITY.'); PIERCE, REHABILITATION IN CORRECTIONS: A REASSESSMENT, 38 FED PROBATION 14-19(1974); FAIRBANKS, PAROLE-- A FUNCTION OF THE JUDICIARY? 27 OKLA.L.REV. 657(1974) ('* * * (P)AROLE BOARDS DO NOT HAVE INFORMATION REASONABLY RELATED TO PREDICTION, THEY HAVE NO APPARENT PREDICTIVE SKILLS, THEY ARE NOT EVEN THE PUTATIVE EXPERTS, THE ENTIRE BUSINESS OF PREDICTING RECIDIVISM EVEN BY SO-CALLED EXPERTS IS SO DUBIOUS THAT IT CAN HARDLY STAND AS A RATIONALE FOR THE DISCRETIONARY RELEASE ASPECT OF PAROLE. * * * THE CASE FOR THE ABOLISHMENT OF PAROLE IS NOT AS RADICAL OR AS DIFFICULT AS MIGHT FIRST APPEAR. HAVING SHOWN PAROLE TO BE INEFFECTIVE, AND NOT LIKELY TO IMPROVE; AND HAVING ALSO SHOWN THAT IN TERMS OF WHAT PAROLE ACTUALLY DOES IT IS DUPLICATIVE. * * * '); MCANANY, MERRITT AND TROMANHAUSER, ILLINOIS RECONSIDERS FLAT TIME: AN ANALYSIS OF THE IMPACT OF THE JUSTICE MODEL, 52 CHICAGO-KENT L.REV. 640(1976); STANLEY, PRISONERS AMONG US: THE PROBLEM OF PAROLE 77-79 (WASHINGTON, D.C. 1976); N. MORRIS, THE FUTURE OF IMPRISONMENT (CHICAGO, 1974). A NUMBER OF WITNESSES AT THE COMMITTEE HEARINGS ON THE PROPOSED REVISION OF THE FEDERAL CODE ALSO EXPRESSED A SENTENCING PHILOSOPHY CONSISTENT WITH THE ABOLITION OF PAROLE IN THE CONTEXT OF COMPREHENSIVE SENTENCING REFORM. SEE, E.G., CRIMINAL CODE HEARINGS, PART XVI, AT 11765-66 (STATEMENT OF ATTORNEY GENERAL WILLIAM FRENCH SMITH); PP. 11787-88 (STATEMENT OF FORMER ATTORNEY GENERAL GRiffin B. BELL, CHAIRMAN OF THE ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME); SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART XIII, AT PP. 8595-96 (TESTIMONY OF ATTORNEY GENERAL GRiffin B. BELL); PP. 9008-09 (STATEMENT OF RONALD L. GAINER); P. 8961 (TESTIMONY OF FORMER JUDGE HAROLD TYLER: '(I)F THE (SENTENCING) COMMISSION WORKS WELL THERE WOULD THEN BE NO NEED OF PAROLE COMMISSIONS AS WE NOW KNOW THEM ** * '); P. 8973 (TESTIMONY OF JUDGE MORRIS LASKER: 'I DO BELIEVE THAT HISTORY IS SHOWING THAT PAROLE AS AN INSTITUTION IS AN IDEA WHOSE TIME MAY BE PAST,'); P. 9127 (STATEMENT OF KAY HARRIS: 'NMPC (THE NATIONAL MORATORIUM ON PRISON CONSTRUCTION) FAVORS IN PRINCIPLE THE ABOLITION OF PAROLE, BUT BELIEVES THAT PAROLE ABOLITION SHOULD NOT BE ATTEMPTED IN ISOLATION FROM OTHER MAJOR CRIMINAL JUSTICE SYSTEM CHANGES ** * (W)E BELIEVE THAT THE PAROLE SYSTEM IS FATALI FLAWED CONCEPTUALLY, BASED AS IT IS ON PREDICTION OF FUTURE INDIVIDUAL CONDUCT. PAROLE HAS OFTEN SERVED TO INCREASE, RATHER THAN
DECREASE, ARBITRARY AND INEQUITABLE TREATMENT OF PRISONERS.

THE HOUSE JUDICIARY SUBCOMMITTEE ON CRIMINAL JUSTICE, IN THE COURSE OF ITS CONSIDERATION OF A REVISED FEDERAL CRIMINAL CODE IN THE 96TH CONGRESS, ALSO RECEIVED TESTIMONY AND LETTERS IN SUPPORT OF PAROLE ABOLITION. FORMER JUDGE HAROLD TYLER IN HIS PREPARED STATEMENT PRESENTED TO THE COMMITTEE ON OCTOBER 11, 1979, STATED THAT THE PROPOSAL TO RETAIN THE PAROLE COMMISSION FOR FIVE YEARS UNDER CONSIDERATION BY THE SUBCOMMITTEE, WAS 'EXTREMELY UNWISE' FOR SEVERAL REASONS: FIRST, 'IT WILL BE IMPOSSIBLE TO UNDERSTAND OR KNOW WHETHER JUDGES IN FACT WERE SENTENCING AN OFFENDER TO THE AMOUNT OF TIME THEY ACTUALLY INTENDED OR TO TWICE THE TIME THEY INTENDED IN ANTICIPATION THAT THE PAROLE COMMISSION WOULD GRANT ONE-HALF PAROLE '; SECOND, THERE 'IS THE LIKELIHOOD THAT THERE WOULD BE CONFUSION AND UNFAIRNESS TO SENTENCED OFFENDERS AND TO THE PUBLIC AT LARGE'; THIRD, 'IT SEEMS TO ME THAT CONTINUING THE PAROLE COMMISSION IS REALLY UNNECESSARY IN ORDER * * * TO DEAL WITH THAT OCCASIONAL CASE WHERE, IN A DETERMINE SENTENCING SCHEME, AN OFFENDER RECEIVES A SENTENCE WHICH TURNS OUT TO BE MANIFESTLY UNFAIR OR 'WRONG', PARTICULARLY IN LIGHT OF POST-SENTENCE DEVELOPMENTS' AND THAT THERE ARE ALTERNATIVE METHODS FOR SOLVING THIS PROBLEM. REVISION OF THE FEDERAL CRIMINAL CODE, HEARINGS BEFORE THE SUBCOMM. ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 96TH CONG., 1ST SESS. 1911 (HEREINAFTER CITED AS HOUSE HEARINGS). SEE ALSO HOUSE HEARINGS, ID. AT 1832 (TESTIMONY OF NORMAN CARLSON); LETTER OF HARVEY A. SILVERGLATE, A MEMBER OF THE EXECUTIVE BOARD OF THE MASSACHUSETTS CHAPTER OF THE AMERICAN CIVIL LIBERTIES UNION, TO CONGRESSMAN ROBERT F. DRINAN, CHAIRMAN, SUBCOMMITTEE ON CRIMINAL JUSTICE, HOUSE COMMITTEE ON THE JUDICIARY, DATED OCTOBER 4, 1979, SUGGESTING ABOLITION OF PAROLE; AND LETTER FROM CIRCUIT JUDGE JON O. NEWMAN, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, TO CONGRESSMAN DRINAN, DATED SEPTEMBER 14, 1979, OPPOSING EVEN THE TEMPORARY RETENTION OF THE PAROLE COMMISSION IN A SENTENCING GUIDELINES SYSTEM AND SUGGESTING POSSIBLE 'SAFETY VALVES' IN THE UNUSUAL CASE IN WHICH ONE IS NEEDED. HOUSE HEARINGS, ID. AT 4539-43.

FN197 SEE SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART XIII, AT 9028-29 (LETTER OF DOROTHY PARKER, COMMISSIONER OF UNITED STATES PAROLE COMMISSION).

FN198 Ibid. THE COMMITTEE DOES NOT, HOWEVER, AGREE WITH THE SUGGESTION BY MRS. PARKER THAT THE SOLUTION TO THIS PROBLEM IS TO TRANSFER THE PAROLE COMMISSION TO THE JUDICIAL BRANCH; WHILE IMPLEMENTATION OF THAT SUGGESTION MIGHT RESOLVE THE THEORETICAL PROBLEM CAUSED BY THE PAROLE COMMISSION'S CURRENT POSITION IN THE EXECUTIVE BRANCH, IT WOULD NOT SOLVE ANY OF THE OTHER PROBLEMS DISCUSSED HERE.


FN201 Id. at 39, 75-76. THE GENERAL COUNSEL OF THE PAROLE COMMISSION HAS QUESTIONED THE LEGALITY OF A PAROLE RELEASE DECISION BASED ON AN
INCORRECT INTERPRETATION OF THE GUIDELINES. ID. AT 75-76.

FN202 THE ANNUAL BUDGET OF THE PAROLE COMMISSION IS ABOUT $7.8 MILLION.

FN203 PROPOSED 18 U.S.C. 3624(B).

FN204 UNDER SECTION 225(B) OF THE REPORTED BILL, THE PAROLE COMMISSION WILL REMAIN IN EXISTENCE FOR 5 YEARS AFTER THE SENTENCING GUIDELINES GO INTO EFFECT TO SET RELEASE DATES FOR PRISONERS SENTENCED BEFORE THAT DATE. AT THE END OF THAT PERIOD, THE PAROLE COMMISSION WILL SET FINAL RELEASE DATES FOR ALL PRISONERS STILL IN ITS JURISDICTION. IN ADDITION, SECTION 226 OF THE BILL REQUIRES THE GENERAL ACCOUNTING OFFICE, FOUR YEARS AFTER THE SENTENCING GUIDELINES GO INTO EFFECT, TO CONDUCT A STUDY, BASED IN PART ON A REPORT BY THE SENTENCING COMMISSION ON THE OPERATION OF THE SENTENCING GUIDELINES SYSTEM. CONGRESS WOULD THEN EVALUATE THE EFFECTIVENESS OF THE GUIDELINES SYSTEM INCLUDING A DETERMINATION WHETHER THE PAROLE SYSTEM SHOULD BE REINSTATED IN SOME FORM.


FN209 DESPITE THESE CONCLUSIONS OF MANY IN THE CORRECTIONS COMMUNITY, THE PAROLE COMMISSION, IN DETERMINING A PRISONER'S RELEASE DATE, HAS RECENTLY PLACED INCREASED EMPHASIS ON 'SUPERIOR PROGRAM ACHIEVEMENT.' SEE 28 C.F.R. 2.60.

FN210 PROPOSED 18 U.S.C. 3624(B).

FN211 SEE SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART XIII, AT 9212-13.


FN213 UNDER THE JUDICIAL CONFERENCE PROPOSAL, THE SENTENCING GUIDELINES (AND A SENTENCE IMPOSED PURSUANT TO THEM) COULD THEORETICALLY PROVIDE THE SAME PERIOD FOR PAROLE ELIGIBILITY AND FOR THE MAXIMUM TERM OF IMPRISONMENT, THUS AVOIDING THIS PROBLEM IN CASES IN WHICH POST-RELEASE SUPERVISION IS UNNECESSARY. HOWEVER, IT IS UNLIKELY THAT THIS WAS INTENDED SINCE IT LEAVES NO POSSIBILITY OF CREDIT FOR GOOD BEHAVIOR FOR THE CATEGORY OF PRISONERS MOST LIKELY TO EARN IT.

FN214 PROPOSED 18 U.S.C. 3583(E)(2) OR (3).


FN216 PROPOSED 18 U.S.C. 3571(B).
FN217 SEE PROPOSED 18 U.S.C. 3551(B), 3551(C), 3561.
FN223 PROPOSED 28 U.S.C. 991(B) AND 994(A) AND (F).
FN225 PROPOSED RULE 32(A)(1), F.R. CRIM. P.
FN227 IBID.
FN228 SEE GENERALLY, NATIONAL ACADEMY OF SCIENCES REPORT, SUPRA NOTE 45, WHICH DESCRIBES STATE AND LOCAL SENTENCING REFORM EFFORTS AND DISCUSSES AVAILABLE RESEARCH ON THE IMPLEMENTATION OF THOSE REFORM EFFORTS.
FN229 PROPOSED 28 U.S.C. 994(G) AND (L).
FN233 MINNESOTA STAT. ANN. SECS. 244.04, 244.05, 244.08, 244.09, 244.10 (WEST SUPP. 1983).
BOARD OF PROBATION AND PAROLE AND THE COMMISSION ON SENTENCING ARE SCHEDULED TO BE ABOLISHED DECEMBER 31, 1985, PA. CONS. STAT. ANN. SEC. 1795.6(B) (PURDON SUPP. 1982-1983).


FN239 ME. REV. STAT. ANN. TIT. 17-A, SEC. 1252 (WEST SUPP. 1982).


FN241 ADMINISTRATIVE OFFICE OF THE COURTS, MARYLAND SENTENCING GUIDELINES MANUAL (REV. ED. OCTOBER 1982); STATE OF NEW JERSEY, ADMINISTRATIVE OFFICE OF THE COURTS, SENTENCING GUIDELINES PROJECT, REPORT OF THE SENTENCING GUIDELINES PROJECT TO THE ADMINISTRATIVE DIRECTOR OF THE COURTS.

FN242 SEE NATIONAL ACADEMY OF SCIENCES REPORT, SUPRA NOTE 45 AT 2, 61.

FN243 NATIONAL ACADEMY OF SCIENCES REPORT, SUPRA NOTE 45.


FN245 SEE, E.G., SCHULHO弗ER, PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM 53-72 (1979); CRIMINAL CODE HEARINGS, PART XIV, AT 10101 (TESTIMONY OF JOHN CLEARY).

FN246 HOUSE HEARINGS, SUPRA NOTE 74 AT 4621-24 (1979) (LETTER OF PROFESSOR STEPHEN J. SCHULHO弗ER).


FN251 MOST STATUTES THAT SPECIFY MINIMUM SENTENCES DO NOT CREATE MANDATORY MINIMUM SENTENCES OF CONFINEMENT, SINCE THEY DO NOT PRECLUDE THE SUSPENSION OF SENTENCE, OR THE PLACEMENT OF THE DEFENDANT ON PROBATION OR PAROLE. COMPARE THE APPARENT MANDATORY MINIMUM SENTENCE APPLICABLE TO A FIRST OFFENSE UNDER 18 U.S.C. 924(C) WITH THE MANDATORY MINIMUM SENTENCE APPLICABLE TO A SECOND OFFENSE UNDER THE SAME PROVISION.

FN253 FEDERAL YOUTH CORRECTIONS ACT, CHAPTER 402 OF TITLE 18, UNITED STATES CODE.


FN255 18 U.S.C. 4251 ET SEQ.

FN256 18 U.S.C. 3575 ET SEQ.


FN259 18 U.S.C. 5010(B) AND (C).


FN261 THE SUBJECT OF GENERAL DETERRENCE AS A BASIS FOR IMPRISONMENT WAS DISCUSSED IN UNITED STATES V. FOSS, 501 F.2D 522(1ST CIR. 1974).

FN262 SECTION 3582(A) PROVIDES, HOWEVER, IN LIGHT OF CURRENT KNOWLEDGE THAT IN DETERMINING WHETHER TO IMPOSE A SENTENCE OF IMPRISONMENT AND IN DETERMINING THE LENGTH OF A TERM OF IMPRISONMENT, THE SENTENCING JUDGE SHOULD RECOGNIZE THAT 'IMPRISONMENT IS NOT AN APPROPRIATE MEANS OF PROMOTING CORRECTION AND REHABILITATION.' PROPOSED SECTION 994(K) OF TITLE 28, AS ENACTED BY SECTION 207(A) OF THE BILL, PROVIDES THAT THE SENTENCING GUIDELINES SHOULD REFLECT THE 'INAPPROPRIATENESS' OF USING REHABILITATION OR AVAILABILITY OF CORRECTIONS PROGRAMS AS THE BASIS FOR IMPOSING A TERM OF IMPRISONMENT.

FN263 SEE, E.G., CRIME CONTROL ACT HEARINGS (TESTIMONY ON MAY 23, 1983); SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART XIII, AT 8582, 8590, 8874, 8883; CRIMINAL CODE HEARINGS, PART XVI, AT 11957 AND 11962.

FN264 THE NATIONAL COMMISSION'S RECOMMENDATION THAT THERE BE AN ALTERNATIVE SENTENCE OF 'UNCONDITIONAL DISCHARGE' (FINAL REPORT SECS. 3301, 3105) HAS NOT BEEN ADOPTED BY THE COMMITTEE. IT SEEMS TO THE COMMITTEE THAT IT IS BOTH ILLOGICAL AND UNWISE TO CONVICT A DEFENDANT OF A CRIMINAL OFFENSE WITHOUT IMPOSING ANY SANCTION FOR THAT MISCONDUCT. IN A COMPELLING CASE, A SIMILAR RESULT CAN BE ACHIEVED BY IMPOSING A SENTENCE TO A TERM OF PROBATION WITHOUT SUPERVISION. SEE SECTIONS 2101(B) AND 2103.

FN265 18 U.S.C. 3651. SEE DISCUSSION OF SUBCHAPTER B OF THIS CHAPTER.


FN267 A CORPORATION MAY BE PLACED ON PROBATION UNDER CURRENT LAW. SEE, E.G., UNITED STATES V. ATLANTIC RICHFIELD CO., 465 F.2D 58(7TH CIR. 1972); UNITED STATES V. J. C. EHRlich CO., INC. 372 F.SUPP. 768 (D. MD. 1974).

FN268 SECTION 1-4A1(C)(1).

FN270 SEE S. 1437, 95TH CONG., 1ST SESS., PROPOSED 18 U.S.C. 2103(B)(6).

FN271 SEE SECTION 207 OF THE REPORTED BILL.

FN272 UNITED STATES V. TUCKER, 404 U.S. 443(1972).


FN275 THE DETERMINATION OF THE APPLICABLE GUIDELINE MADE BY THE PROBATION OFFICER IS, OF COURSE, NOT BINDING ON THE PAROLE COMMISSION, WHICH CAN, AND FREQUENTLY DOES, DETERMINE THAT A DIFFERENT GUIDELINE APPLIES.

FN276 SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART XIII, AT 8940.

FN277 CRIMINAL CODE HEARINGS, PART XVI, AT 11021.

FN278 18 U.S.C. 4205(C).

FN279 SEE PROPOSED 18 U.S.C. 3562(B), 3573(C), AND 3582(B) CONCERNING DEGREE OF FINALITY.

FN280 SEE S. 1722, 96TH CONG., 1ST SESS. 101, PROPOSED 18 U.S.C. 2002(D), AS REPORTED.

FN281 AS DISCUSSED IN CONNECTION WITH SECTION 3551, A NUMBER OF SENTENCING STATUTES APPLICABLE TO SPECIALIZED CATEGORIES OF OFFENDERS OFFER LIMITED LEGISLATIVE GUIDANCE AS TO THE PURPOSES OF A SENTENCE UNDER THE SPECIALIZED STATUTE.


FN284 IT HAS BEEN SUGGESTED THAT ONE ASPECT OF THIS PURPOSE OF SENTENCING, 'JUST DESERTS,' SHOULD BE THE SOLE PURPOSE OF SENTENCING. SEE TESTIMONY OF ANDREW VON HIRSCH, SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART XIII, AT 8977-78 AND 8982-83; VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976). WHILE THE COMMITTEE OBVIOUSLY BELIEVES THAT A SENTENCE SHOULD BE 'JUST'; AND THAT THE PUNITIVE PURPOSE IS IMPORTANT, IT ALSO BELIEVES THAT IT IS CONSISTENT WITH THAT PURPOSE TO EXAMINE THE OTHER PURPOSES OF SENTENCING SET FORTH IN SECTION 3553(A)(2) IN DETERMINING THE TYPE AND LENGTH OF SENTENCE TO BE IMPOSED IN A PARTICULAR CASE. REHABILITATIVE CONSIDERATIONS MAY CALL FOR A SENTENCE TO PROBATION WITH APPROPRIATE CONDITIONS WHERE A SENTENCE TO A TERM OF IMPRISONMENT IN OTHER CIRCUMSTANCES MIGHT BE 'JUST'; INCAPACITATION FOR AN EXTENDED PERIOD OF AN OFFENDER WITH A SERIOUS CRIMINAL HISTORY MIGHT BE APPROPRIATE WHERE SUCH
A long term would not be 'just' if the offender's criminal record were not considered.

Fn285 See proposed section 994(b)(1)(b) of title 28, U.S.C. as added by section 207(a) of the bill, as reported.


Fn288 Proposed 28 U.S.C. 994(k), as added by section 207(a) of the reported bill. It is understood, of course, that if the commission finds that the primary purpose of sentencing in a particular kind of case should be deterrence or incapacitation, and that a secondary purpose should be rehabilitation, the recommended guideline sentence should be imprisonment if that is determined to be the best means of assuring such deterrence or incapacitation, notwithstanding the fact that such a sentence would not be the best means of providing rehabilitation. A balancing of competing interests is necessary.


Fn290 See discussion of proposed 18 U.S.C. 3551(a).

Fn291 See W. Smith, Remarks at the Vanderbilt Univ. school of law 10-11 (Mar. 3, 1983); N. Carlson, supra note 167 at 8.

Fn292 See the discussion of 28 U.S.C. 991(b)(1)(B).


Fn295 The government has the right under current law to seek correction of an illegal sentence by a writ of mandamus. See United States v. Denson, 588 F.2d 1112, 1127(5th Cir. 1979). Such sentences will be appealable under proposed 18 U.S.C. 3742.

Fn296 The Palmyra, 25 U.S. (12 Wheat.) 1, 14(1827) (opinion of Mr. Justice Story).

Fn297 Attaindre was a legal declaration of a man's death which occurred as an inevitable consequence of the declaration of final sentencing for high treason or outlawry; once attainted a person could not act as a
WITNESS IN COURT, MAKE A WILL, CONVEY PROPERTY, OR BRING AN ACTION. 4 BLACKSTONE, COMMENTARIES 347 (NEW ED. 1813).

FN298 HIGH TREASON GENERALLY INCLUDED KILLING THE KING, PROMOTING REVOLT AGAINST THE KING, OR COUNTERFEITING THE GREAT SEAL. ID. AT 66-75.

FN299 OUTLAWRY CONSISTED OF FLIGHT WHILE ACCUSED OF AN OFFENSE. IT WAS DECLARED IN ABSENTIA BUT WAS ATTAINABLE ONLY IN CASES WHERE TREASON HAD ORIGINALLY BEEN CHARGED. ID. AT 353.

FN300 ID. AT 349.

FN301 1 STAT. 117.


FN303 SEE S. REPT. NO. 91-617, 81ST CONG.,1ST SESS. 79 (1970).

FN304 THUS, 28 U.S.C. 2461(B), WHICH PROVIDES THAT 'UNLESS OTHERWISE PROVIDED BY ACT OF CONGRESS, WHENEVER A FORFEITURE OF PROPERTY IS PRESCRIBED AS A PENALTY FOR VIOLATION OF AN ACT OF CONGRESS AND THE SEIZURE TAKES PLACE ON THE HIGH SEAS OR ON NAVIGABLE WATERS WITHIN THE ADMIRALTY AND MARITIME JURISDICTION OF THE UNITED STATES, SUCH FORFEITURE MAY BE ENFORCED BY A PROCEEDING BY LIBEL WHICH SHALL CONFORM AS NEAR AS MAY BE TO PROCEEDINGS IN ADMIRALTY,' IS NOT APPLICABLE TO CASES COMING UNDER THIS SECTION.


FN306 BLACKSTONE, COMMENTARIES 305 (NEW ED. 1813); 3 COKE, INSTITUTE, 57-58(1813 ED.)


FN309 NATIONAL COMMISSION FINAL REPORT, SUPRA NOTE 1, SEC. 3007.

FN310 SEE GENERALLY 16 CR.L.RPTR. 2178-2183 (NOV. 1974) (TRANSCRIPT OF INTERVIEW WITH JUDGE CHARLES R. RENFREW OF THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF CALIFORNIA.)

FN312 See Proposed 18 U.S.C. 3583(D).


FN314 In certain cases where the execution of the order has not been stayed, any costs in excess of that amount might be assumed (or costs pending payment of the ordered amount might temporarily be assumed) by the government, if otherwise appropriate and authorized, especially in cases in which timely notice is important because of the fraud’s risk to the health of the victims or because of the incipient running of the civil statute of limitations.


FN316 The Committee generally looks with disfavor on statutory minimum sentences to imprisonment, since their inflexibility occasionally results in too harsh an application of the law and often results in detrimental circumvention of the laws. The Committee believes that for most offenses the sentencing guidelines will be better able to specify the circumstances under which an offender should be sentenced to a term of imprisonment and those under which he should be sentenced to a term of probation.

FN317 18 U.S.C. 4205(F) provides a procedure, which achieves the same result, by which the court may specify that a person sentenced to a term of imprisonment of more than six months and less than one year shall be released as if on parole at a date prior to the expiration of his sentence.

FN318 The National Commission had proposed inflexible terms of probation of five years for a felony, 2 years for a misdemeanor, and 1 year for an infraction. The Committee believes that such fixed periods might unduly restrict the Court’s options. See the recommendation of the National Legal Aid and Defender Association, Subcommittee Criminal Code Hearings, Part III, at 1420.

FN319 It has been held that probation is authorized, under reasonable conditions, pursuant to this statute for organizations as well as individuals. United States v. Atlantic Richfield Co., 465 F.2d 58 (7th Cir. 1972), United States v. J. C. Ehrlich Co. Inc., 372 F.Supp. 768 (D. Md. 1974).


FN323 United States v. Ellenboigen, 390 F.2d 537 (2d Cir.), cert. denied, 393 U.S. 918 (1968).

FN324 See Subcommittee Criminal Code Hearings, Part XI, at 7796-7862 (Statement on behalf of the National Legal Aid and Defender Association).

FN325 See, e.g., 16 Cr.L.Reptr. 2178, 2183 (Nov. 1974) (transcript of interview
WITH JUDGE CHARLES B. RENFREW OF THE NORTHERN DISTRICT OF COLUMBIA).

FN326 NIX V. UNITED STATES, 131 F.2D 857(5TH CIR.), CERT. DENIED, 318 U.S. 771(1943); BUHLER V. PESCOR, 63 F.SUPP. 632 (W.D. MO. 1945).

FN327 SEE, E.G., UNITED STATES V. ALBERS, 115 F.2D 833(2D CIR. 1940).

FN328 SEE PROPOSED 18 U.S.C. 3742.

FN329 SEE, E.G., TRUEBLOOD LONGKNIFE V. UNITED STATES, 381 F.2D 17, 19(9TH CIR. 1967); U.S. V. ALARIK, 439 F.2D 1349, 1351(8TH CIR. 1971).

FN330 THIS PROVISION RECOGNIZES STATUTORILY A CURRENT PRACTICE OF THE FEDERAL COURTS.

FN331 THIS DIFFERS SOMEWHAT FROM CURRENT PRACTICE. THE FORM USED BY FEDERAL JUDGES TO LIST CONDITIONS OF PROBATION LISTS A NUMBER OF CONDITIONS ROUTINELY IMPOSED, SUCH AS MAINTAINING REASONABLE HOURS, NOTIFYING PROBATION OFFICER OF JOB CHANGES, NOT LEAVING THE DISTRICT WITHOUT NOTIFYING THE PROBATION OFFICER, AND REPORTING TO THE PROBATION OFFICER AS REQUIRED. WHILE THE COMMITTEE AGREES THAT THESE CONDITIONS SHOULD BE IMPOSED WHEN THE CASE WARRANTS, IT DOES NOT THINK THE CONDITIONS SHOULD APPLY IN ALL CASES.

FN332 A CONDITION OF RESTITUTION IS A MANDATORY CONDITION OF PROBATION IN ANOTHER SENSE AS WELL. UNDER 18 U.S.C. 3579(G) (WHICH IS REDESIGNATED 18 U.S.C. 3663(G) BY SECTION 202(A)(1) OF THIS BILL), IF A DEFENDANT IS PLACED ON PROBATION AND ORDERED TO PAY RESTITUTION, THE RESTITUTION ORDER IS A CONDITION OF PROBATION BY OPERATION OF LAW.

FN333 SEE, E.G., BERNAL-ZAZUETA V. UNITED STATES, 225 F.2D 64(9TH CIR. 1955) (NO COMMISSION OF CRIME DURING TERM OF PROBATION); UNITED STATES V. WILSON, 469 F.2D 368(2D CIR. 1972) (SUPPORT DEPENDENTS AND MEET FAMILY OBLIGATIONS); STONE V. UNITED STATES, 153 F.2D 331(9TH CIR. 1946) (PAYMENT OF FINE, REFRAIN FROM SPECIFIED EMPLOYMENT); UNITED STATES V. VELAZCO-HERNANDEZ, 565 F.2D 583(9TH CIR. 1977) UNITED STATES V. MILLER, 549 F.2D 105(9TH CIR. 1976) (REFRAIN FROM USE OF ALCOHOL); WHALEY V. UNITED STATES, 376 U.S. 911(9TH CIR. 1963), CERT. DENIED, 376 U.S. 911 (REFRAIN FROM EMPLOYMENT IN BUSINESS RELATED TO OFFENSE).

FN334 NATIONAL COMMISSION FINAL REPORT, SUPRA NOTE 1, SEC. 3103.

FN335 WHILE MOST OF THE CONDITIONS HAVE AS THEIR PRIMARY PURPOSE THE REHABILITATION OF THE OFFENDER, SOME OF THE LISTED ALTERNATIVES, OF COURSE, WOULD ALSO TEND TO AFFECT THE PUNITIVE AND DETERRENT PURPOSES OF SENTENCING-- AND EVEN, TO A CERTAIN DEGREE, THE INCAPACITATIVE PURPOSE IN LIMITED KINDS OF CASES.

FN336 SEE 18 U.S.C. 3663(G) (FORMER 18 U.S.C. 3579(G)).


FN338 THIS KIND OF PROVISION HAS ALSO BEEN RECOGNIZED AS PERMISSIBLE. SEE BIRZON V. KING, 469 F.2D 1241(2D CIR. 1972). THE PHRASE 'UNNECESSARILY
ASSOCIATING’ IS MEANT TO BE CONSTRUED AS NOT PRECLUDING ‘INCIDENTAL CONTACTS BETWEEN EX-CONVICTS IN THE COURSE OF WORK ON A LEGITIMATE JOB FOR A COMMON EMPLOYER.’ ARCINIEGA V. FREEMAN, 404 U.S. 4(1971).


FN340 SEE SKIPWORTH V. UNITED STATES, 508 F.2D 598(3D CIR. 1975).

FN341 SEE ZAROOGIAN V. UNITED STATES, 367 F.2D 959(1ST CIR. 1966); MCHUGH V. UNITED STATES, 230 F.2D 262(1ST CIR.), CERT. DENIED, 351 U.S. 955(1956).

FN342 AN ERROR IN THE RECITATION OF CONDITIONS IN THE STATEMENT, OR EVEN AN ACCIDENTAL FAILURE TO SUPPLY SUCH A STATEMENT, SHOULD NOT NECESSARILY BE CONSTRUED AS A REASON TO IMPUGN THE PROPRIETY OR VALIDITY OF A DECISION TO REVOKE OR MODIFY THE PROBATION BECAUSE OF A BREACH OF A CONDITION ACTUALLY IMPOSED, SINCE THE COURT WILL HAVE STATED THOSE CONDITIONS DURING THE SENTENCING PROCEEDING IN ANY EVENT.

FN343 GADDIS V. UNITED STATES, 280 F.2D 334(6TH CIR. 1960); DAVIS V. PARKER, 293 F.SUPP. 1388 (D.C. DEL. 1968).

FN344 UNITED STATES V. PISANO, 266 F.SUPP. 913 (E.D. PA. 1967). BUT SEE UNITED STATES V. LANCER, 361 F.SUPP. 129 (E.D. PA. 1973), VACATED AND REMANDED ON OTHER GROUNDS, 508 F.2D 719(3D CIR. 1975), CERT. DENIED, 421 U.S. 989, IN WHICH THE COURT HELD THAT, WHERE TWO INDICTMENTS WERE CONSOLIDATED AT THE DEFENDANT'S REQUEST, THE COURT COULD IMPOSE TWO CONSECUTIVE TERMS OF PROBATION THAT TOTALLED IN EXCESS OF FIVE YEARS.

FN345 ENGLE V. UNITED STATES, 332 F.2D 88(6TH CIR. 1964), CERT. DENIED, 379 U.S. 903.

FN346 U.S. EX REL DEMAROIS V. FARRELL, 87 F.2D 957(10TH CIR.), CERT. DENIED, 302 U.S. 683, REHEARING DENIED, 302 U.S. 775(1937); ASHWORTH V. UNITED STATES, 392 F.2D 245(6TH CIR. 1968).

FN347 UNITED STATES V. PISANO, SUPRA NOTE 222.

FN348 UNITED STATES V. EDMINISTON, 69 F.SUPP. 382 (W.D. LA. 1947); UNITED STATES V. BUCHANAN, 340 F.SUPP. 1285 (E.D. N.C. 1972).


FN351 FOX V. UNITED STATES, 354 F.2D 752(10TH CIR. 1965).


FN354 UNDER MOST CURRENT LAW PROVISIONS, OF COURSE, SUCH A STATEMENT OF A PENALTY IS USUALLY NOT A RECITATION OF TWO MUTUALLY EXCLUSIVE ALTERNATIVES: BOTH THE FIVE-YEAR MAXIMUM TERM OF IMPRISONMENT AND THE $5,000 MAXIMUM FINE MAY BE IMPOSED.

FN355 SEE THE STATEMENT OF JUDGE RENFREW OF THE NORTHERN DISTRICT OF CALIFORNIA IN WHICH HE COMPLAINS THAT THE $50,000 MAXIMUM THAT HE IMPOSED IN A PRICE-FIXING CASE WAS NOT SUFFICIENT UNDER THE CIRCUMSTANCES AND THAT 'HAD THE MAXIMUM BEEN MORE THAN $50,000, THE AMOUNT OF THE FINES WOULD HAVE BEEN SUBSTANTIALLY MORE AS TO ALL OF THE DEFENDANTS. * * * (H)ERE, IT SEEMS TO ME, IS A SITUATION WHERE CLEARLY THERE'S A NEED FOR INCREASING THE AMOUNT OF THE FINE.' 16 CR.L.RPTR. 2178, 2182 (NOV. 1974). SEE ALSO THE STATEMENT OF JUDGE MACMAHON OF THE SOUTHERN DISTRICT OF NEW YORK IN WHICH, UPON IMPOSING THE MAXIMUM AVAILABLE FINES OF $75,000 ON EACH OF TWO MILLIONAIRE DEFENDANTS FOUND GUILTY OF EVADING $761,000 IN TAXES, HE SAID THAT HE REGRETTED THAT THE TAX LAWS DID NOT PERMIT HIM TO IMPOSE A HIGHER FINE ON EACH DEFENDANT. NEW YORK TIMES, MARCH 20, 1973, P. 26, COL. 1. (NOTE TOO, THAT IN EACH OF THESE CASES THE FINES AVAILABLE WERE SUBSTANTIALLY HIGHER THAN THOSE GENERALLY AVAILABLE IN FEDERAL CRIMINAL CASES. NOTE ALSO THAT THE MAXIMUM FINE LEVELS FOR MANY ANTITRUST OFFENSES WERE SUBSTANTIALLY INCREASED IN THE 94TH CONGRESS (15 U.S.C. 1, 2, AND 3).)


FN367 SEE DISCUSSION OF PROPOSED 18 U.S.C. 3559(B).

FN368 SUCH SUBSTANTIALLY HIGHER FINE LEVELS WERE RECOMMENDED BY, INTER ALIA, THE COMMITTEE ON REFORM OF FEDERAL CRIMINAL LAWS OF THE AMERICAN BAR ASSOCIATION, SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART VII, 5817.

FN369 MCKINNEY'S N.Y. CRIM. LAW SEC. 400.30 (1969).


FN373 THIS IS IN OPPOSITION TO THE EXISTING STATUTE, 18 U.S.C. 3565, BUT IN LINE WITH CONSTITUTIONAL REQUIREMENTS. SEE WILLIAMS V. ILLINOIS, SUPRA NOTE 248. THERE IS NO CONSTITUTIONAL PROHIBITION AGAINST IMPOSING A NEW SENTENCE, INCLUDING A SENTENCE TO IMPRISONMENT IN SOME CIRCUMSTANCES, IN THE EVENT A FINE IS NOT PAID, EVEN IF THE NON-PAYMENT IS WITHOUT FAULT ON THE DEFENDANT'S PART, SEE BEARDEN V. GEORGIA, -- U.S.-- (DECIDED MAY 24, 1983), BUT THE COMMITTEE HAS NOT INCORPORATED SUCH PROCEDURE INTO THE PROVISIONS OF THIS BILL. THE COMMITTEE HAD CONSIDERED INCLUDING SPECIFICALLY IN THIS SUBSECTION A REFERENCE BOTH TO THE DISBURSING OFFICERS OF THE ORGANIZATION AND 'THEIR SUPERIORS.' IT WAS DECIDED, HOWEVER, THAT SUCH A REFERENCE TO 'SUPERIORS' WOULD BE REDUNDANT SINCE WHATEVER AUTHORITY A DISBURSING OFFICER OR CASHIER WOULD HAVE, WOULD ALSO BE WITHIN THE AUTHORITY OF EVERY INDIVIDUAL FROM HIS IMMEDIATE SUPERIOR THROUGH THE CHIEF EXECUTIVE OFFICER.

FN374 THE COMMITTEE HAD CONSIDERED INCLUDING SPECIFICALLY IN THIS SUBSECTION A REFERENCE BOTH TO THE DISBURSING OFFICERS OF THE ORGANIZATION AND 'THEIR SUPERIORS.' IT WAS DECIDED, HOWEVER, THAT SUCH A REFERENCE TO 'SUPERIORS' WOULD BE REDUNDANT SINCE WHATEVER AUTHORITY A DISBURSING OFFICER OR CASHIER WOULD HAVE, WOULD ALSO BE WITHIN THE AUTHORITY OF EVERY INDIVIDUAL FROM HIS IMMEDIATE SUPERIOR THROUGH THE CHIEF EXECUTIVE OFFICER.


FN379 MODEL PENAL CODE SEC. 302.3 (P.O.D. 1962).


FN381 SEE UNITED STATES V. DIFRANCESCO, 449 U.S. 117(1980); UNITED STATES V. NEARY, 552 F.2D 1184(7TH CIR. 1977); UNITED STATES V. STEWART, 531 F.2D 326(6TH CIR. 1976); UNITED STATES V. ILACQUA, 562 F.2D 399(6TH CIR. 1977), CERT. DENIED, 435 U.S. 906(1978).

FN382 IN ADDITION TO THE PAROLE ELIGIBILITY PROVISIONS FOR REGULAR ADULT OFFENDERS, CURRENT LAW CONTAINS A NUMBER OF SPECIALIZED PAROLE ELIGIBILITY REQUIREMENTS. THOSE FOR YOUTH OFFENDERS AND YOUNG ADULT OFFENDERS INCLUDED IN 18 U.S.C. 5017 SPECIFY THAT A DEFENDANT SENTENCED TO IMPRISONMENT UNDER ONE OF THOSE PROVISIONS IS ELIGIBLE FOR PAROLE IMMEDIATELY AND MUST BE RELEASED ON PAROLE AT LEAST TWO YEARS BEFORE EXPIRATION OF SENTENCE, AND THOSE RELATING TO PERSONS SENTENCED UNDER TITLE II OF THE NARCOTIC ADDICT REHABILITATION ACT IN 18 U.S.C. 4254 SPECIFY PAROLE ELIGIBILITY AFTER SIX MONTHS.


FN385 It should be noted that even if the defendant who was sentenced to 60 months in prison had been made eligible for parole either at a designated time less than one-third the sentence or immediately upon commencement of sentence pursuant to 18 U.S.C. 4205(b), the application of the parole guidelines to the defendant usually would not be altered regardless of the judge's (usually unstated) purpose in specifying early parole eligibility.

FN386 While the parole guidelines do provide that the worst two groups of offenders who commit robbery should spend from 48 to 72 months in prison, the parole commission's conclusions as to which prisoners would fall within those groups might differ from those of the sentencing judge.

FN387 That rule is subject to limited exceptions. If an offense is not punishable under current law by a term of imprisonment, it will not be punishable by imprisonment under proposed 18 U.S.C. 3559.

FN388 National Commission Final Report, supra note 1, sec. 3201.

FN389 Proposed 18 U.S.C. 3559 specifies how these grades apply to offenses that specify a maximum term of imprisonment rather than a grade.

FN390 The National Commission in its final report proposed generally higher terms of imprisonment for felonies since it retained parole; it proposed a supergrade category of felony permitting life imprisonment (sec. 3601); three other classes of felonies, entailing imprisonment for thirty, fifteen and seven years (secs. 3002(1); 3201(1)); two categories of misdemeanors, carrying one year of imprisonment and thirty days' imprisonment (secs. 3002(2); 3201(2)); and one infraction category (sec. 3002(3)). Under the commission's proposed formulation, with the lowest felony carrying a maximum of seven years, many offenses presently carrying two to five years maximum prison terms would either have to be upgraded to six-year felonies or reduced to one-year misdemeanors. To avoid a six-fold jump in potential penalty between one offense category and the next higher category, the committee felt it appropriate to include a three-year felony, in accord with the recommendation of the cognizant committee of the American Bar Association that there not be a gap in possible maximum sentences from a one-year maximum to a maximum several times as high. Subcommittee Criminal Code Hearings, part vii, at 5816. Similar considerations dictated the inclusion of a six-month misdemeanor.

FN391 Proposed 28 U.S.C. 994(h) requires that the guidelines specify a sentence at or near the maximum provided in proposed 18 U.S.C. 3581(b) for a third conviction of a crime of violence or drug trafficking offense. Proposed 28 U.S.C. 994(i) requires that the guidelines specify a substantial term of imprisonment for other specific categories of very serious offenses. See Subcommittee Criminal Code Hearings, at part xi, at 7814 (statement on behalf of the National League Aid and Defenders' Association); ABA Standards relating to Sentencing Alternatives and Proceedings, sec. 18-2.1(e) (second edition tentative draft 1979).
FN392 SEE PROPOSED 18 U.S.C. 3742. THERE ARE TWO SPECIALIZED PROVISIONS FOR
APPELLATE REVIEW OF A SENTENCE IN CURRENT LAW: 18 U.S.C. 3576, RELATING TO
REVIEW OF A SENTENCE AS A DANGEROUS SPECIAL OFFENDER, AND 21 U.S.C. 849(H),
RELATING TO REVIEW OF A SENTENCE AS A DANGEROUS SPECIAL DRUG OFFENDER.

FN393 SEE PROPOSED 18 U.S.C. 3624(B).

FN394 THE 'SALIENT FACTOR SCORE' SET FORTH IN 28 C.F.R. 2.20, PROVIDES FOR
CONSIDERATION BY THE PAROLE COMMISSION, IN DETERMINING WHETHER AND WHEN
TO RELEASE A PRISONER ON PAROLE, OF THE NUMBER OF PRIOR ADULT OR JUVENILE
CONVICTIONS AND INCARCERATIONS OF MORE THAN 30 DAYS, THE AGE AT TIME OF
COMMITTING THE CURRENT OFFENSE, RECENT PERIOD FREE OF INCARCERATION,
WHETHER THE DEFENDANT WAS ON PAROLE OR PROBATION, OR IN CONFINEMENT OR
ESCAPED, AT THE TIME THE OFFENSE WAS COMMITTED, AND ANY HISTORY OF HEROIN
OR OPIATE DEPENDENCE.

FN395 ONLY IN SOME OF THOSE CASES IN WHICH A HEARING EXAMINER SETS A
PAROLE RELEASE DATE OUTSIDE THE PAROLE COMMISSION GUIDELINES, OR IN WHICH
A PRISONER HAS A RECORD OF SERIOUS INSTITUTIONAL RULES VIOLATIONS, OR IN
WHICH THERE HAS BEEN SUPERIOR PROGRAM ACHIEVEMENT, MAY FACTORS NOT
KNOWN AT THE TIME OF SENTENCING AFFECT THE RELEASE DATE. HOFFMAN AND
DEGOSTIN, PAROLE DECISION MAKING: STRUCTURING DISCRETION, UNITED STATES
BOARD OF PAROLE RESEARCH UNIT, REPORT 5, TABLE II, AT 11 (JUNE 1974), SET OUT
IN THE SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART XIII, AT 9217. IN ADDITION,
28 C.F.R. 2.6 PROVIDES THAT, '(W)HILE NEITHER A FORFEITURE OF GOOD TIME NOR A
WITHHOLDING OF GOOD TIME SHALL BAR A PRISONER FROM RECEIVING A PAROLE
HEARING, SEC. 4206 OF TITLE 18 OF THE U.S.C. PERMITS THE COMMISSION TO PAROLE
ONLY THOSE PRISONERS WHO HAVE SUBSTANTIALLY OBSERVED THE RULES OF THE
INSTITUTION.'


FN397 THE SENTENCING COMMISSION IS REQUIRED TO TAKE INTO ACCOUNT, INTER
ALIA, THE NATURE AND CAPACITY OF THE EXISTING PENAL AND CORRECTIONAL
FACILITIES AND SERVICES, AS WELL AS THE PURPOSES OF SENTENCING, WHEN IT
PROMULGATES THE SENTENCING GUIDELINES. PROPOSED 28 U.S.C. 994(G). THIS
REQUIREMENT ITSELF WILL HELP TO AVOID ANY UNINTENDED CHANGE IN THE ACTUAL
MEDIAN TIME SPENT IN PRISON BY FEDERAL PRISONERS.

FN400 18 U.S.C. 4205(B)(2).
FN400A 18 U.S.C. 3575(F); 21 U.S.C. 849(F).
FN401 18 U.S.C. 5001 ET SEQ.
FN403 18 U.S.C. 5010(B).
FN404 18 U.S.C. 5010(C).

FN409 SEE UNITED STATES V. DORSZYNSKI, SUPRA NOTE 281, WHICH REQUIRES THE JUDGE TO FIND THAT AN OFFENDER UNDER THE AGE OF 22 WILL RECEIVE NO BENEFIT FROM SENTENCING UNDER THE YOUTH CORRECTIONS ACT, BUT DOES NOT REQUIRE THAT THE JUDGE STATE REASONS FOR HIS CONCLUSION.

FN410 18 U.S.C. 4251 ET SEQ.

FN411 'ELIGIBLE OFFENDER' IS DEFINED IN 18 U.S.C. 4251(F) TO INCLUDE ANY INDIVIDUAL CONVICTED OF AN OFFENSE AGAINST THE UNITED STATES EXCEPT AN INDIVIDUAL WHOSE CONVICTION IS FOR A CRIME OF VIOLENCE, OR WHOSE CONVICTION IS FOR TRAFFICKING IN NARCOTIC DRUGS (UNLESS THE OFFENSE WAS COMMITTED PRIMARILY TO SUPPORT THE DEFENDANT'S ADDICTION), OR AGAINST WHOM A FELONY CHARGE IS PENDING, OR WHO IS ON PROBATION OR PAROLE, OR WHO HAS BEEN CONVICTED OF A FELONY ON TWO OR MORE PRIOR OCCASIONS, OR WHO HAS PREVIOUSLY BEEN COMMITTED FOR NARCOTIC ADDICTION ON THREE OR MORE OCCASIONS.


FN414 THE FACTORS ARE REQUIRED TO BE CONSIDERED IN DETERMINING WHETHER A TERM OF IMPRISONMENT SHOULD BE IMPOSED, IN DETERMINING THE APPROPRIATE LENGTH OF ANY SUCH TERM, AND IN DETERMINING WHETHER IT SHOULD BE FOLLOWED BY A PERIOD OF SUPERVISED RELEASE. THE COURT IS ALSO REQUIRED TO CONSIDER POLICY STATEMENTS ISSUED BY THE SENTENCING COMMISSION IN DECIDING WHETHER TO MAKE A RECOMMENDATION AS TO THE APPROPRIATE TYPE OF PRISON FACILITY FOR THE DEFENDANT. SEE PROPOSED 18 U.S.C. 3621(B).

FN415 THE PHRASE 'TO THE EXTENT THAT THEY ARE APPLICABLE' ACKNOWLEDGES THE FACT THAT DIFFERENT PURPOSES OF SENTENCING ARE SOMETIMES SERVED BEST BY DIFFERENT SENTENCING ALTERNATIVES.


FN417 WATTS V. HADDEN, 651 F.2D 1354(10TH CIR. 1981); DANCY V. ARNOLD, 572 F.2D 107(3D CIR. 1978); BROWN V. CARLSON, 431 F.SUPP. 775 (W. D. WISC. 1977). BUT SEE, OUTING V. BELL, F.2D 1144(4TH CIR. 1980).


FN419 THIS IS SIMILAR TO THE AUTHORITY OF THE BUREAU OF PRISONS IN 18 U.S.C. 4205(G) TO FILE A MOTION WITH THE COURT AT ANY TIME TO REDUCE THE MINIMUM TERM OF A PRISONER SO THAT HE CAN BE PAROLED.


FN422 18 U.S.C. 4211(B).


FN426 THE FUNCTIONS OF PROBATION OFFICERS WITH RESPECT TO SUPERVISED RELEASE ARE DESCRIBED MORE FULLY IN THE DISCUSSION OF PROPOSED 18 U.S.C. 3603.


FN428 SEE, E.G., PEREIRA V. UNITED STATES, 347 U.S. 1(1954), SUSTAINING THE IMPOSITION OF CONSECUTIVE SENTENCES FOR CONSPIRACY TO COMMIT MAIL FRAUD AND THAT SUBSTANTIVE OFFENSE.


FN430 SEE SUBAS V. HUDSPETH, 122 F.2D 85(10TH CIR. 1941). 'ABSENT CLEAR LANGUAGE TO THE CONTRARY, IT IS PRESUMED THAT SENTENCES IMPOSED ON MORE THAN ONE OFFENSE AT THE SAME TIME, OR AT DIFFERENT TIMES, WILL RUN CONCURRENTLY.' ID. AT 87, CITING UNITED STATES V. DUGHERTY, 269 U.S. 360 AND OTHER CASES.

FN431 SEE LARIOS V. MADIGAN, 299 F.2D 98, 100(9TH CIR. 1962); UNITED STATES V. HARRISON, 156 F.SUPP. 756 (D.N.J. 1957), WHICH STATES THE OPINION THAT THE RULE SET FORTH IN NOTE 309 DOES NOT APPLY WHERE ONE SENTENCE IS IMPOSED BY A STATE COURT AND ONE BY A FEDERAL ONE. ID. AT 760. SOME COURTS HAVE HELD THAT THE FEDERAL COURTS DO NOT HAVE THE AUTHORITY TO MAKE A FEDERAL SENTENCE CONCURRENT WITH A STATE SENTENCE ALREADY BEING SERVED SINCE 18 U.S.C. 3568 SPECIFIES THAT THE FEDERAL TERM COMMENCES WHEN THE DEFENDANT IS RECEIVED BY FEDERAL AUTHORITIES. SEE, E.G., UNITED STATES V. SEGAL, 549 F.2D 1293, 1031(9TH CIR. 1977).


FN433 SEE NATIONAL COMMISSION FINAL REPORT, SUPRA NOTE 1, SEC. 3204(2)(A) AND (C).

FN434 SEE, E.G., 18 U.S.C. 924(C).
THUS, IT IS INTENDED THAT THIS PROVISION BE CONSTRUED CONTRARY TO THE HOLDING IN UNITED STATES V. SEGAL, SUPRA NOTE 310.


THE PROBLEM OF DETERMINING WHETHER TO IMPOSE CONCURRENT OR CONSEQUENTIAL TERMS OF IMPRISONMENT IS MADE EVEN MORE ACUTE BY THE FACT THAT CRIMINAL CONDUCT ON THE PART OF AN INDIVIDUAL OFTEN MAY BE DISSECTED INTO A NUMBER OF FEDERAL OFFENSES AS DIFFERENT JURISDICTIONAL BASES PROVIDE AUTHORITY FOR FILING SEVERAL CHARGES FOR ESSENTIALLY THE SAME COURSE OF CONDUCT. FOR EXAMPLE, THE MAILING OF FIFTY LETTERS TO EFFECT A SCHEME TO DEFRAUD TECHNICALLY CONSTITUTES THE COMMISSION OF FIFTY OFFENSES FOR WHICH SEPARATE CHARGES COULD BE BROUGHT AND SEPARATE CONSEQUENTIAL SENTENCES IMPOSED. THIS IS AN EXAMPLE OF A PROBLEM IN SENTENCING UNDER FEDERAL LAW THAT SHOULD BE ADDRESSED BY THE SENTENCING COMMISSION'S GUIDELINES AND POLICY STATEMENTS.

THIS PROVISION IS BASED UPON A RECOMMENDATION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES. SEE CRIMINAL CODE HEARINGS, PART XVI, AT 11929.

SEE NOTES 310 AND 314, SUPRA.


IN ADDITION, THE FORM USED BY SENTENCING JUDGES TO LIST CONDITIONS OF PROBATION ASSUMES SUPERVISION.

18 U.S.C. 5037(B).

SEE H. REPT. NO. 1377, 68TH CONG., 2ND SESS. 1(1925).

SEE PROPOSED 18 U.S.C. 3563(B)(14) AND 3583(D).

PROPOSED 18 U.S.C. 3563(B)(5) AND 3583(D).

FOR A COMPREHENSIVE DISCUSSION ON COLLECTING AND PAYING FINES AND PENALTIES, SEE TESTIMONY OF WILLIAM T. PLUMB, JR., SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART III, AT 1709-1732.


SMITH V. UNITED STATES, 143 F.2D 228(9TH CIR.), CERT. DENIED, 323 U.S. 729(1944).


IBID.
FN452 18 U.S.C. 4082(B).


FN454 PROPOSED 18 U.S.C. 3553(B) REQUIRES A STATEMENT OF REASONS FOR IMPOSING A SENTENCE.

FN455 SEE DARCEY V. UNITED STATES, 318 F.SUPP. 1340 (W.D. MO. 1970).

FN456 SEE GREEN V. UNITED STATES, 481 F.2D 1140 (D.C. CIR. 1973).

FN457 18 U.S.C. 4082(D).


FN460 SEE POTTER V. CICCONE, 316 F.SUPP. 703 (W.D. MO. 1970).


FN462 IN OTHER WORDS, THE PRISONER WILL BE SUBJECT TO PAROLE SUPERVISION UPON RELEASE BUT HIS RELEASE DATE WILL NOT BE DETERMINED BY THE PAROLE COMMISSION.

FN463 18 U.S.C. 4205(F).

FN464 18 U.S.C. 4205(A) AND (B).


FN466 18 U.S.C. 4162.


FN468 HOWEVER, THE GOOD TIME STATUTES MAY STILL PLAY A ROLE IN THE DETERMINATION OF WHEN TO RELEASE THESE PRISONERS ON PAROLE SINCE THE PAROLE COMMISSION CONSIDERS FORFEITURE OF GOOD TIME IN DETERMINING WHETHER A PRISONER HAS SUBSTANTIALLY COMPLIED WITH THE RULES OF THE INSTITUTION. HOWEVER, THE SPECIALIZED SENTENCING STATUTES DO NOT PERMIT A DEFENDANT SENTENCED UNDER THEM TO BE RELEASED EXCEPT ON PAROLE. IF THE PRISONER IS INELIGIBLE FOR PAROLE ON THE DATE ON WHICH HE WOULD ORDINARILY BE RELEASED ON PAROLE BECAUSE OF FORFEITED GOOD TIME THAT HAS NOT BEEN RESTORED, HIS PAROLE RELEASE DATE IS MERELY EXTENDED TO ANY PERIOD UP TO THE TIME THAT THE LAW REQUIRES RELEASE ON PAROLE.
FN469 18 U.S.C. 5006(D) defines a 'youth offender' as a person who is under 22 years of age at the time of conviction.

FN470 18 U.S.C. 5010(B).


FN472 18 U.S.C. 5017(C).


FN475 18 U.S.C. 5017(D).


FN479 The parole commission considers whether to release on parole any prisoner whose sentence exceeds one year in length. 18 U.S.C. 4205(A).

FN480 Under 18 U.S.C. 4161, good time allowances are credited at rates of from five to ten days a month, with three rates in between, depending upon the length of the term of imprisonment.


FN482 Of course, if a violation of rules is a criminal offense, the offense can be prosecuted in appropriate cases.


FN485 See Clardy v. Levi, 545 F.2d 1241 (9th Cir. 1976) (APA not applicable to prison discipline proceedings); Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978) (Determinations of Bureau of Prisons are discretionary agency action so no need to reach question whether APA applies to them), reversed on other grounds sub nom. Bell v. Wolfish, 441 U.S. 520 (1979).


STATEMENT OF THE HON. MARVIN E. FRANKEL. ILLEGAL SENTENCES ARE SUBJECT TO CORRECTION TODAY PURSUANT TO RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.


FN491 THIS WOULD BE THE CASE EVEN IF THE APPELLATE COURT WERE AUTHORIZED TO AUGMENT (AS WELL AS DIMINISH) THE SENTENCE, SINCE IT IS UNLIKELY THAT A DEFENDANT WOULD CHOOSE TO APPEAL, ON THE BASIS OF ALLEGED EXCESSIVENESS, A SENTENCE DEEMED BY THE REVIEWING COURT AS SO INADEQUATE AS TO WARRANT ENHANCEMENT. SUCH A SYSTEM, MOREOVER, PLACES AN UNDESIRABLE STRAIN ON THE DEFENDANT'S RIGHT TO SEEK SENTENCE REVIEW. FOR THESE REASONS, INTER ALIA, SUCH A SCHEME WAS REJECTED BY THE COMMITTEE.

FN492 21 U.S.C. 849 CONTAINS A SIMILAR PROVISION AS TO DANGEROUS SPECIAL DRUG OFFENDERS.


FN494 UNITED STATES V. DIFRANCESCO, SUPRA NOTE 372 AT 136-137.

FN495 ID. AT 138-39, DISTINGUISHING EX PARTE LANGE, 18 WALL. 163(1874).


FN497 PROPOSED 18 U.S.C. 3563(B)(6) PERMITS AS A CONDITION OF PROBATION OR SUPERVISED RELEASE THE BARRING OF AN INDIVIDUAL FROM ENGAGING IN A BUSINESS OR PROFESSION RELATED TO HIS OFFENSE AND RESTRICTIONS RELEVANT TO THE OFFENSE ON THE MANNER IN WHICH AN INDIVIDUAL OR ORGANIZATION CONDUCTS A BUSINESS OR PROFESSION. SEE PROPOSED 18 U.S.C. 3583.

FN498 PROPOSED 3563(B)(11) PERMITS AS A CONDITION OF PROBATION THE INCARCERATION OF A DEFENDANT FOR EVENINGS OR WEEKENDS OR OTHER INTERVALS OF TIME IN THE FIRST YEAR OF A SENTENCE.
FN499 CRIME CONTROL ACT HEARINGS (STATEMENT OF JUDGE GERALD B. TJOFLAT, PP. 7-8).

FN500 SEE UNITED STATES V. DIFRANCESCO, SUPRA NOTE 372 AT 136-137.

FN501 SEE SUBCOMMITTEE CRIMINAL CODE HEARINGS, PART XIII, AT 8608, 8873, 8887, AND 8953.

FN502 SEE S. REPT. NO. 97-307, AT 1184-89.


FN504 CRIMINAL CODE HEARINGS, PART XVI, AT 11921-22.

FN505 IF THE PRESIDENT WISHED TO NAME ANOTHER PERSON AS CHAIRMAN AT THE EXPIRATION OF THE CHAIRMAN'S FIRST TERM, BUT WISHED TO RETAIN THE CHAIRMAN AS A MEMBER OF THE COMMISSION, HE COULD APPOINT A NEW CHAIRMAN AND REAPPOINT THE FORMER CHAIRMAN AS A MEMBER OF THE COMMISSION.

FN506 THE JUDICIAL AND OTHER MEMBERS MAY COMPLETE WORK ON CASES IN PROGRESS IF THEY ARE SO FAR INVOLVED THAT IT IS IMPRACTICAL FOR THE WORK TO BE TURNED OVER TO ANOTHER PERSON. OF COURSE, IF THE WORK WAS SUCH THAT THERE WAS A POTENTIAL CONFLICT OF INTEREST OR APPEARANCE OF SUCH A CONFLICT, THE WORK WOULD HAVE TO BE TURNED OVER TO SOMEONE ELSE.

FN507 PURSUANT TO SECTION 992(C), A FEDERAL JUDGE NEED NOT RESIGN HIS APPOINTMENT AS A FEDERAL JUDGE WHILE SERVING AS A MEMBER OF THE SENTENCING COMMISSION.


FN510 P. O'DONNELL, M. CHURGIN, AND D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM 5-6, TABLE 2 (1977).


FN516 PROPOSED 18 U.S.C. 3583(D) AND 3563.
FN519 PROPOSED 18 U.S.C. 3582(C).

FN520 SEE, FOR EXAMPLE, AMERICAN BAR ASSOCIATION RECOMMENDATIONS, CRIMINAL CODE HEARINGS, PART XVI, AT 11855-58, 11877-78, 12354-56.

FN521 SEE S. SCHULHOFER, PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM, REPORT FOR FEDERAL JUDICIAL CENTER (AUGUST 1979).


FN524 SUBSECTIONS (C) AND (D) SUGGEST FACTORS THAT THE COMMISSION MIGHT CONCLUDE ARE PERTINENT TO THE SENTENCING DECISION.

FN525 FOR EXAMPLE, IT IS POSSIBLE IN SOME CASES THAT THE SENTENCING RECOMMENDATION FOR A PARTICULAR TYPE OF CASE WILL VARY AS TO LENGTH OR TYPE OF SENTENCE BECAUSE DIFFERENT PURPOSES OF SENTENCING APPLY TO DIFFERENT CATEGORIES OF OFFENDERS CONVICTED OF BASICALLY SIMILAR OFFENSES.

FN526 IN DEVELOPING THE FORM IN WHICH THE GUIDELINES ARE TO BE USED, THE COMMITTEE EXPECTS THAT THE COMMISSION WILL UNDERTAKE AN EVALUATION TO ASSURE THAT THE GUIDELINES ARE NOT SO COMPLEX AS TO DETRACT FROM THEIR EFFECTIVE USE.

FN527 THIS IS ESPECIALLY TRUE SINCE THE BILL DOES NOT ATTEMPT TO REGRADE CURRENT LAW OFFENSES ACCORDING TO THEIR RELATIVE SERIOUSNESS, BUT LEAVES CONSIDERATION OF THESE ISSUES TO A LATER DAY.

FN528 THE COMMITTEE HOPES THAT THE PROCESS OF DEVELOPING THE GUIDELINES WILL LEAD TO RECOMMENDATIONS BY THE SENTENCING COMMISSION AS TO APPROPRIATE GRADES FOR THE OFFENSES CONTAINED IN FEDERAL LAW.

FN529 THE COMMUNITY MIGHT BE NATIONAL OR IT MIGHT BE REGIONAL. IT IS EXPECTED THAT, WHILE NATIONWIDE CONSISTENCY IN SENTENCES IN FEDERAL CASES IS GENERALLY DESIRABLE, IN CERTAIN SITUATIONS THE COMMISSION MAY FIND IT APPROPRIATE TO DRAFT THE GUIDELINES TO TAKE ACCOUNT OF CONSIDERATIONS BASED ON PERTINENT REGIONAL DIFFERENCES.

FN530 THE REQUIREMENT OF NEUTRALITY WITH REGARD TO SUCH FACTORS IS NOT A REQUIREMENT OF BLINDNESS. IN SENTENCING A PERSON TO IMPRISONMENT IT WOULD BE APPROPRIATE TO HAVE A JUDGE CONSIDER, FOR EXAMPLE, RECOMMENDING PLACEMENT IN AN INSTITUTION EQUIPPED TO ACCOMMODATE THE RELIGIOUS DIETARY LAWS FOLLOWED BY THE DEFENDANT, OR AN INSTITUTION HOUSING PRISONERS OF THE DEFENDANT'S SEX.

FN531 INDEED, IN THE LATTER SITUATION, IF AN OFFENSE DOES NOT WARRANT IMPRISONMENT FOR SOME OTHER PURPOSE OF SENTENCING, THE COMMITTEE WOULD EXPECT THAT SUCH A DEFENDANT WOULD BE PLACED ON PROBATION WITH APPROPRIATE CONDITIONS TO PROVIDE NEEDED EDUCATION OR VOCATIONAL
TRAINING. THIS QUALIFYING LANGUAGE IN SUBSECTION (D), WHEN READ WITH THE
PROVISIONS IN PROPOSED SECTION 3582(A) OF TITLE 18 AND 28 U.S.C. 994(K),
WHICH PRECLUDES THE IMPOSITION OF A TERM OF IMPRISONMENT FOR THE SOLE
PURPOSE OF REHABILITATION, MAKES CLEAR THAT A DEFENDANT SHOULD NOT BE
SENT TO PRISON ONLY BECAUSE THE PRISON HAS A PROGRAM THAT 'MIGHT BE GOOD
FOR HIM.'

FN532 A DEFENDANT'S EDUCATION OR VOCATION WOULD, OF COURSE, BE HIGHLY
PERTINENT IN DETERMINING THE NATURE OF COMMUNITY SERVICE HE MIGHT BE
ORDERED TO PERFORM AS A CONDITION OF PROBATION OR SUPERVISED RELEASE.

FN533 THE PAROLE GUIDELINES WERE A PIONEERING EFFORT TO BRING UNIFORMITY
TO PAROLE DECISIONS, WHICH THEY HAVE BEEN FAIRLY SUCCESSFUL IN DOING. THEY
WERE DEVELOPED, HOWEVER, FROM PAST DECISIONS. THE SENTENCING GUIDELINES
WILL DIFFER SIGNIFICANTLY IN THEIR SUBSTANCE AND IN THEIR THEORETICAL BASE.
THEY WILL REQUIRE REEVALUATION OF ALL UNDERLYING POLICIES.

FN534 THE SIMILAR PROVISIONS OF S. 1437, AS INTRODUCED IN THE 95TH
CONGRESS, APPLIED ONLY TO DEFENDANTS UNDER THE AGE OF TWENTY-SIX AT THE
TIME OF SENTENCING.

FN535 SEE THE DISCUSSION OF PROPOSED 18 U.S.C. 3584, SUPRA.

FN536 WITH THE ELIMINATION OF EARLY PAROLE RELEASE IT IS ABSOLUTELY
ESSENTIAL THAT THE COMMISSION NOT BE UNDULY INFLUENCED BY THE LENGTHS OF
SENTENCES OF IMPRISONMENT IMPOSED TODAY. A FEDERAL JUDGE WHO TODAY
BELIEVES THAT AN OFFENDER SHOULD SERVE FOUR YEARS IN PRISON MAY IMPOSE A
SENTENCE IN THE VICINITY OF TEN YEARS, KNOWING THAT THE OFFENDER IS ELIGIBLE
FOR PAROLE RELEASE AFTER ONE-THIRD OF THE SENTENCE. THE COMMISSION SHOULD
CONCERN ITSELF, INSTEAD, WITH THE LENGTH OF TIME CONVICTED DEFENDANTS
ACTUALLY SPEND IN PRISON TODAY-- THIS LENGTH OF TIME PROVIDES A
CONSIDERABLY MORE ACCURATE PICTURE OF ACTUAL SENTENCING PRACTICES THAN
DOES THE SENTENCE IMPOSED.

FN537 SEE B. FORST, W. RHODES, AND C. WELLFORD, SENTENCING AND SOCIAL
SCIENCE: RESEARCH FOR THE FORMULATION OF FEDERAL SENTENCING GUIDELINES, 7

FN538 IBID.

FN539 E.G., MAGISTRATE, PROBATION OFFICER, OR PRISON OFFICIALS.


FN542 IT IS INTENDED THAT THE MEMBERS OF THE COMMISSION APPROVE THE BROAD
OUTLINES OF VARIOUS RESEARCH-RELATED PROJECTS AND PROVIDE POLICY
GUIDANCE TO THEIR CONDUCT. THE FUNCTIONS OF THE COMMISSION SET FORTH
HERE COULD, OF COURSE, BE DELEGATED TO A COMMITTEE OR STAFF PERSONNEL BY
VOTE OF THE COMMISSION IN THOSE INSTANCES WHERE THE DAY-TO-DAY DETAILS
WOULD BE TOO CUMBERSOME TO MANAGE BY FULL COMMISSION ACTION. SEE
SUBSECTION (B). THIS IS IN CONTRAST TO THE PROMULGATION OF GUIDELINES AND
POLICY STATEMENTS PURSUANT TO SECTION 994 MATTERS WHICH CANNOT BE
DELEGATED. SEE PROPOSED 28 U.S.C. 995(B).


FN547 THE SENTENCING COMMISSION MAY WISH TO INCLUDE IN THESE PROGRAMS SUCH PERSONS AS PROSECUTORS AND DEFENSE COUNSEL, SENTENCING AND APPELLATE JUDGES, AND PROBATION OFFICERS WHO NEED TO UNDERSTAND THE COMMISSION'S GUIDELINES AND POLICY STATEMENTS IN ORDER TO ASSURE THEIR UNDERSTANDING OF THE NEW SENTENCING POLICIES AND PROCEDURES. IN ADDITION, PRISON OFFICIALS WOULD BENEFIT FROM SUCH INSTRUCTION IF THEY ARE INVOLVED IN MAKING SENTENCING RECOMMENDATIONS AND CARRYING OUT SENTENCES PURSUANT TO THE GUIDELINES AND POLICY STATEMENTS.

FN548 SEE SUBSECTIONS (A)(11) AND (B).

FN549 SEE PROPOSED 28 U.S.C. 995(B).

FN550 CRIMINAL CODE HEARINGS, PART XVI, AT 11918 (TESTIMONY OF JUDGE GERALD TJOFLAT).

FN551 THE COMMITTEE INTENDS THAT, IN THE FINAL SETTING OF RELEASE DATES UNDER THIS PROVISION, THE PAROLE COMMISSION GIVE THE PRISONER THE BENEFIT OF THE APPLICABLE NEW SENTENCING GUIDELINE IF IT IS LOWER THAN THE MINIMUM PAROLE GUIDELINE.


FN553 FORFEITURE OF NARCOTICS PROCEEDS, HEARINGS BEFORE THE SUBCOMMITTEE ON CRIMINAL JUSTICE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 96TH CONG.,2D (1980).


FN555 DEA OVERSIGHT AND BUDGET AUTHORIZATION, HEARINGS BEFORE THE SUBCOMMITTEE ON SECURITY AND TERRORISM OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 97TH CONG.,2D SESS. (1982).

FN556 S. REPT. NO. 97-520, 97TH CONG.,2D SESS. (1982).

FN557 128 CONG.REC.S 12793-S 12794, S 12839-S 12840,S 12859 (DAILY ED.).


FN559 ID. AT H 10509, S 15853.

FN560 SEE, E.G., CRIME CONTROL ACT HEARINGS (STATEMENT OF THE DEPARTMENT

FN561 19 U.S.C. 1595A.


FN566 RULES 31(E) AND 32(B)(2) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.


FN568 SEE, E.G., FORFEITURE OF NARCOTICS PROCEEDS HEARING, SUPRA NOTE 2.

FN569 SEE E.G., UNITED STATES V. MCMANIGAL, 708 F.2D 276(7TH CIR. 1983) AND UNITED STATES V. MARUBENI AMERICA CORP., 611 F.2D 763(9TH CIR. 1980).

FN570 REAL PROPERTY IS SUBJECT TO CRIMINAL FORFEITURE UNDER THE RICO AND CCE STATUTES. ALSO, REAL PROPERTY WHICH CONSTITUTES OR IS TRACEABLE TO THE PROCEEDS OF AN ILLEGAL DRUG TRANSACTION IS CIVILLY FORFEITABLE UNDER 21 U.S.C. 881(A)(6).

FN571 SEE, E.G., UNITED STATES V. CROZIER, 674 F.2D 1293(9TH CIR. 1982), PETITION FOR CERT. FILED NO. 82-819 (NOV. 15, 1982).

FN572 UNITED STATES V. MARTINO, 681 F.2D 952(5TH CIR. 1982) (EN BANC) (HOLDING PROCEEDS OF ARSON-FOR-PROFIT SCHEME SUBJECT TO RICO CRIMINAL FORFEITURE), CERT. GRANTED SUB NOM. RUSSELLO V. UNITED STATES, 103 S.CT. 721(1982) (NO. 82-472).


FN575 IN UNITED STATES V. JEFFERS, 532 F.2D 1101, 1117(7TH CIR. 1976), AFF'D IN PART, VACATED IN PART, 432 U.S. 137(1977), THE COURT TOOK NOTICE OF THE 'EXTREME DIFFICULTY IN THIS CONSPIRATORIAL, CRIMINAL AREA OF FINDING HARD EVIDENCE OF NET PROFITS.'

FN576 UNITED STATES V. GODOY, 678 F.2D 84(9TH CIR. 1982), PETITION FOR CERT. FILED, NO. 82-538 (SEPT. 27, 1982); UNITED STATES V. L'HOSTE, 609 F.2D 796(5TH CIR.) ,CERT. DENIED, 449 U.S. 833(1980).
FN577 See United States v. Rubin, 559 F.2d 975 (5th Cir.), vacated and remanded on other grounds, 439 U.S. 810 (1977), where the defendant was convicted on RICO and other charges arising out of embezzlement of union and employee welfare benefit plans and was ordered to forfeit his various union and benefit plan offices.


FN579 This result was not permitted in United States v. Long, 654 F.2d 911 (3rd Cir. 1981), in which it was held that property derived from a violation of 21 U.S.C. 848 remained subject to criminal forfeiture although transferred to the defendant's attorneys more than six months prior to conviction, and that an order restraining the attorneys from transferring or selling the property was properly entered.

FN580 Where it is clear that a forfeitable asset has been sold for value to an innocent purchaser, the committee expects that the government would seek forfeiture of substitute assets of the defendant, as provided in Section 1963(d), at the conclusion of trial and avoid the necessity of the purchaser petitioning for a post-trial hearing.

FN581 The authority to order the forfeiture of substitute assets must be understood in conjunction with Section 1963(c), as amended, which allows, in certain circumstances, the voiding of transfers to third parties. The bill does not permit the government to obtain forfeiture both of the transferred property and of substitute assets. Instead, it permits the government to reach substitute assets where the property cannot be reached once transferred or where such action is a preferable alternative to seizure of property sold to an innocent purchaser.

FN582 This provision should be particularly helpful in combating the problem of use of offshore banks as safe havens for crime-related assets.

FN583 This provision will be of utility where a defendant substantially depletes a forfeitable asset in anticipation of its being ordered forfeited. It is phrased, however, so that it will not apply where the value of the property has been subject to minimal or ordinary depreciation.

FN584 The same restraining order authority is set out in the other criminal forfeiture provision of current law, the CCE statute, 21 U.S.C. 848.

FN585 The United States has, however, filed a petition for certiorari to obtain review of this issue in United States v. Crozier, supra note 20.


FN588 See United States v. Scalzitti, 408 F.Supp. 1014, 1015 (W.D. Pa. 1975) and United States v. Bello, 470 F.Supp. 723, 724-725 (S.D. Cal. 1979) (defendant was no more stripped of the presumption of innocence by a restraining order than would be the case were he required to post bond); but see United States v. Mandel, 408 F.Supp. 679, 682-684 (D. Md. 1976). The presumption of innocence is an evidentiary standard applied in criminal
TRIALS. IT DOES NOT SERVE AS A SUBSTANTIVE BAR TO ANY INTERFERENCE WITH A
DEFENDANT'S INTERESTS PRIOR TO AN ADJUDICATION OF GUILT. BELL V. WOLFISH,

FN589 UNITED STATES V. CROZIER, SUPRA NOTE 20; UNITED STATES V. SPILOTRO,
680 F.2D 612(9TH CIR. 1982).

FN590 RULE 1101(D)(3) OF THE FEDERAL RULES OF EVIDENCE.

FN591 WHEN AN INDICTMENT OR INFORMATION ALLEGES THAT PROPERTY IS SUBJECT
TO CRIMINAL FORFEITURE, A SPECIAL VERDICT MUST BE RETURNED AS TO THE EXTENT
OF THE PROPERTY SUBJECT TO FORFEITURE. RULE 31 OF THE FEDERAL RULES OF
CRIMINAL PROCEDURE.

FN592 THIS IS ALSO THE PROCEDURE MANDATED UNDER RULE 32 OF THE FEDERAL
RULES OF CRIMINAL PROCEDURE.

FN593 THIS PROVISION IS NOT INTENDED TO PRECLUDE A THIRD PARTY WITH AN
INTEREST IN PROPERTY THAT IS OR MAY BE SUBJECT TO A RESTRAINING ORDER FROM
PARTICIPATING IN A HEARING REGARDING THE ORDER, HOWEVER.

FN594 ALTHOUGH THIS PROVISION DOES NOT SPECIFY THE SAME AUTHORITY TO
ORDER DEPOSITIONS FOR THE PURPOSES OF RESOLVING MATTERS RAISED IN A
HEARING OCCURRING UNDER SECTION 1963(M), DISCUSSED BELOW, IN SUCH
JUDICIAL HEARINGS, THIS AUTHORITY WOULD BE PART OF THE INHERENT POWER OF
THE COURT.

FN595 THIS PRACTICE WAS SANCTIONED IN UNITED STATES V. MANDEL, 505

FN596 THE SAME PROVISION HAS BEEN ADDED TO THE CRIMINAL FORFEITURE
STATUTE FOR ALL DRUG FELONIES SET FORTH IN SECTION 303 OF THE BILL.

FN597 THE COURT MAY DECLINE TO GRANT A HEARING, FOR EXAMPLE, IF THE
PETITION FAILS TO STATE ANY BASIS FOR RELIEF DESCRIBED IN THIS PROVISION.

FN598 THE PROVISION SHOULD BE CONSTRUED TO DENY RELIEF TO THIRD PARTIES
ACTING AS NOMINEES OF THE DEFENDANT OR WHO HAVE KNOWINGLY ENGAGED IN
SHAM OR FRAUDULENT TRANSACTIONS. THE STANDARD FOR RELIEF REFLECTS THE
PRINCIPLES CONCERNING VOIDING OF TRANSFERS SET OUT IN 18 U.S.C. 1963(C), AS
AMENDED BY THE BILL.

FN599 21 U.S.C. 801 ET SEQ.


FN602 THE FELONY OFFENSES UNDER TITLES II AND III OF THE COMPREHENSIVE DRUG
ABUSE PREVENTION AND CONTROL ACT ARE VIOLATIONS OF 21 U.S.C. 841 (EXCEPT
FIRST OFFENSES INVOLVING SCHEDULE V SUBSTANCES AND DISTRIBUTION OF SMALL
AMOUNTS OF MARIHUANA FOR NO REMUNERATION); 21 U.S.C. 842 (IN CASES OF
REPEAT VIOLATIONS OF CERTAIN MORE SERIOUS REGULATORY OFFENSES); 21 U.S.C.
843 (WHICH ADDRESSES KNOWING AND INTENTIONAL VIOLATIONS CONCERNING
FRAUD AND OFFENSES INVOLVING COUNTERFIT SUBSTANCES, AND ALSO THE USE OF
COMMUNICATIONS FACILITIES IN COMMITTING FELONIES UNDER THE ACT); 21 U.S.C.

FN603 THE SEPARATE CRIMINAL FORFEITURE PROVISIONS OF 21 U.S.C. 848 ARE REPEALED IN SECTION 305 OF THE BILL.

FN604 AS PREVIOUSLY NOTED, THE PRESIDENT WITHHELD APPROVAL OF THIS MEASURE FOR REASONS UNRELATED TO THE FORFEITURE PROVISIONS.


FN607 DISPOSITION OF FORFEITED PROPERTY IS TO BE GOVERNED BY 21 U.S.C. 881(E).


FN609 THE CURRENT $250 BOND AMOUNT DATES FROM 1844 WHEN THE LIMIT ON THE VALUE OF PROPERTY SUBJECT TO ADMINISTRATIVE FORFEITURE WAS ONLY $100.

FN610 THE DRUG ASSETS FUND MAY BE USED, IN ADDITION TO PAYING EXPENSES AND REWARDS, FOR PAYMENT OF LIENS AND PAYMENTS ASSOCIATED WITH REMISSION AND MITIGATION, WHEN APPROPRIATE. THE CUSTOM FORFEITURE FUND DOES NOT INCLUDE THESE ADDITIONAL PURPOSES, BUT THE CUSTOMS SERVICE RETAINS ITS EXISTING AUTHORITY TO MAKE SUCH PAYMENTS OUT OF SALE PROCEEDS UNDER 19 U.S.C. 1613.


FN612 UNITED STATES V. SWAROVSKI, 557 F.2D 40(2D CIR. 1977); UNITED STATES V. HELICZER, 373 F.2D 241(2D CIR. 1967), CERT. DENIED, 388 U.S. 1917 (1967).

FN613 THIS OCCURRED, FOR EXAMPLE, IN THE CASE OF THE FEDERAL AIR SECURITY
PROGRAM AND THE 'CUBAN FREEDOM FLOTILLA' PROGRAM.

FN614 THIS PROVISION OF THE INTERNAL REVENUE CODE IS REPEALED IN SUBSECTION (B) OF SECTION 320 OF THE BILL.


FN616 THE INSANITY DEFENSE, HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 97TH CONG., 2D SESS. (1982); LIMITING THE INSANITY DEFENSE, HEARINGS BEFORE THE SUBCOMMITTEE ON CRIMINAL LAW OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 97TH CONG., 2D SESS. (1982).


FN618 CLARK & F. 200, 8 ENG.REP. 718 (HOUSE OF LORDS, 1843).

FN619 SEE DAVIS V. UNITED STATES, 165 U.S. 373, 378 (1897).


FN621 ID. AT 874.


FN623 MODEL PENAL CODE, SEC. 4.01 (P.O.D. 1962).

FN624 THE POSITIONS OF THE VARIOUS CIRCUITS ARE SURVEYED IN UNITED STATES V. BRAWNER, SUPRA NOTE 8 AT 979-981. THE MOST NOTABLE DEPARTURE FROM UNIFORMITY IS THE THIRD CIRCUIT, WHERE THE COURT HAS ELIMINATED THE COGNITIVE ASPECT OF THE A.L.I. TEST. SEE UNITED STATES V. CURRENS, 290 F.2D 751 (3D CIR. 1961); CF. GOVERNMENT OF VIRGIN ISLANDS V. BELLOTT, 495 F.2D 1393 (3D CIR. 1974).

FN625 160 U.S. 469 (1895). IN DAVIS THE COURT WAS PRINCIPALLY CONCERNED WITH THE TRIAL JUDGE’S INSTRUCTION THAT SEEMED TO PLACE ON THE DEFENDANT CHARGED WITH MURDER THE BURDEN OF DISPROVING THAT HE ACTED WITH MALICE AFORETHOUGHT.

FN626 343 U.S. 790, 797 (1952).


FN629 RULE 704, FEDERAL RULES OF EVIDENCE.

FN630 SEE HEARING ON THE INSANITY DEFENSE, SUPRA NOTE 2.

FN631 SEE GENERALLY, HEARINGS SUPRA NOTE 2; S. REPT. NO. 97-307, SUPRA NOTE 1 AT 96-108.

FN632 HEARINGS, THE INSANITY DEFENSE, SUPRA NOTE 2 AT 73.
FN633 INTRODUCTORY LECTURES OF PSYCHOANALYSIS, PP. 86-88 (1923).
FN635 HEARINGS, THE INSANITY DEFENSE, SUPRA NOTE 2 AT 276-277.
FN636 ID. AT 72.
FN637 1949-1953 REPORT, P. 80.
FN639 AMERICAN PSYCHIATRIC ASSOCIATION STATEMENT ON THE INSANITY DEFENSE, P. 14 (AS APPROVED BY THE BOARD OF TRUSTEES) (DECEMBER 1982).
FN640 CRIME CONTROL ACT HEARINGS (STATEMENT OF THE AMERICAN BAR ASSOCIATION, PP. 41-43).
FN641 ID. (STATEMENT OF LEROY S. ZIMMERMAN ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, P. 6). THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL ALSO RECOMMENDED THE ESTABLISHMENT OF AN ADDITIONAL VERDICT OF GUILTY BUT MENTALLY ILL. THE COMMITTEE BELIEVES THAT THIS APPROACH, WHILE PROBABLY CONSTITUTIONAL IN THAT IT WOULD NOT RELIEVE THE GOVERNMENT OF THE BURDEN OF PROVING ANY ELEMENT OF THE OFFENSE INCLUDING ANY MENTAL ELEMENT, WOULD DO NOTHING TO ELIMINATE CONFUSING PSYCHIATRIC TESTIMONY ON A WIDE RANGE OF ISSUES NOT DIRECTLY RELATED TO WHETHER THE DEFENDANT UNDERSTOOD THE NATURE OF HIS ACTS.
FN642 ID. (STATEMENT OF PRESIDENT-ELECT EDWIN L. MILLER, JR. ON BEHALF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, PP. 15-16).
FN643 THE THEORY AND PRACTICE OF PSYCHIATRY, SUPRA NOTE 20 AT 1.
FN645 SUPRA NOTE 28 AT 16-17.
FN647 AMERICAN PSYCHIATRIC ASSOCIATION STATEMENT ON THE INSANITY DEFENSE, SUPRA NOTE 25 AT 18-19. SEE ALSO, HEARINGS, LIMITING THE INSANITY DEFENSE, SUPRA NOTE 2 AT 256-258 (STATEMENT OF DR. LOREN ROTH, UNIVERSITY OF PITTSBURGH) AND 272-273 (STATEMENT OF DR. SEYMOUR L. HALLECK, UNIVERSITY OF NORTH CAROLINA.
FN650 ACT OF SEPT. 7, 1949, CH. 535, BB1, 63 STAT. 686.
FN651  **GREENWOOD V. UNITED STATES, 350 U.S. 366, 373(1966).**
FN652  **362 U.S. 402(1960).**
FN653 IBID.
FN654 THE COMMITTEE INTENDS TO PERPETUATE CURRENT LAW TO THE EFFECT THAT NEITHER AMNESIA NOR THE USE OF NARCOTICS PER SE RENDERS AN ACCUSED INCOMPETENT TO STAND TRIAL. SEE E.G.,  **UNITED STATES V. BORUM, 464 F.2D 896(10TH CIR. 1972); UNITED STATES V. WILLIAMS, 468 F.2D 819(5TH CIR. 1972).**
FN655 SEE  **UNITED STATES V. BECERA SOTO, 387 F.2D 792(7TH CIR. 1967), CERT. DENIED, 391 U.S. 928(1968); KRUPNICK V. UNITED STATES, 264 F.2D 213(8TH CIR. 1959).**
FN656 SEE  **UNITED STATES V. IRVIN, 450 F.2D 968(9TH CIR. 1971); UNITED STATES V. BURGIN, 440 F.2D 1092(4TH CIR. 1971).**
FN657 THIS PERIOD HAS BEEN JUDICIALLY CONSTRUED TO INCLUDE THE TIME AFTER ARREST AND BEFORE THE DEFENDANT IS INDICTED.  **UNITED STATES V. ADAMS, 296 F.SUPP. 1150 (S.D. N.Y.1969); OR ARRAIGNED, ARCO V. CICCONE, 359 F.2D 796(8TH CIR. 1966); ON THE DAY OF TRIAL, MITCHELL V. UNITED STATES, 316 F.2D 354 (D.C. CIR. 1963); AND AFTER TRIAL. UNITED STATES V. LAWRENSON, 210 F.SUPP. 422 (D. MD. 1962), AFFD. 315 F.2D 612(4TH CIR.), CERT. DENIED, 373 U.S. 938(1963).**
FN658 SEE  **HANSON V. UNITED STATES, 406 F.2D 199(9TH CIR. 1969).** MOREOVER, THE **SECTION 2255** MOTION OBVIATES THE NECESSITY TO INCLUDE A SECTION SIMILAR TO **18 U.S.C. 4245** WHICH SETS OUT THE PROCEDURE TO BE FOLLOWED WHEN THE DIRECTOR OF THE BUREAU OF PRISONS FINDS THAT A PRISONER WAS INCOMPETENT AT TRIAL. THUS, THE DEFENDANT MAY FILE A **SECTION 2255** MOTION BASED UPON HIS INCOMPETENCY AT TRIAL, AND THE GOVERNMENT IS UNDER A CONTINUING DUTY TO NOTIFY THE COURT OF SUCH INFORMATION.
FN659 SEE  **UNITED STATES V. COOK, 418 F.2D 321(9TH CIR. 1969).**
FN660 IT HAS BEEN HELD THAT IT IS A DENIAL OF DUE PROCESS TO TRY A DEFENDANT WHO IS MENTALLY INCOMPETENT TO STAND TRIAL. SEE PATE V. ROBINSON, SUPRA NOTE 34;  **UNITED STATES V. HOROWITZ, 360 F.SUPP. 772 (E.D. PA. 1973).**
FN661 THROUGHOUT THE CHAPTER, REFERENCES ARE MADE TO REPORTS BEING SENT TO THE COUNSEL FOR THE DEFENDANT (RATHER THAN TO THE DEFENDANT) IN ORDER THAT COUNSEL MAY DETERMINE WHETHER IN HIS JUDGMENT IT IS APPROPRIATE OR USEFUL FOR THE DEFENDANT TO SEE THE REPORT, RECOGNIZING THAT THIS MAY BE INADVISABLE IN SOME CASES.
FN662 SEE  **UNITED STATES V. HUFF, 409 F.2D 1225(5TH CIR.), CERT. DENIED, 396 U.S. 857(1969); UNITED STATES V. DAVIS, 365 F.2D 251(6TH CIR. 1965).**
FN663 SUPRA NOTE 38.
FN664 PURSUANT TO **SECTION 4247(J)** THE ATTORNEY GENERAL IS AUTHORIZED TO CONTRACT FOR NON-FEDERAL FACILITIES IN ORDER TO HOSPITALIZE THE DEFENDANT.
FN665  **406 U.S. 715(1972).**
FN666 IF ALL CHARGES AGAINST A PRESENTLY MENTALLY DEFECTIVE DEFENDANT ARE


FN669 UNITED STATES V. DAVIS, SUPRA NOTE 48; UNITED STATES V. MILLER, 131 F.Supp. 88 (D. VT. 1955).

FN670 425 F.2D 916(1ST CIR. 1970).

FN671 SEE UNITED STATES V. MALCOLM, 475 F.2D 420(9TH CIR. 1973), AND CASES CITED THEREIN.


FN674 RULE 12.2.

FN675 THE SUBJECT IS WELL CANVASSED IN UNITED STATES V. MCCRACKEN, SUPRA NOTE 59, AT 415-425, WHICH NOTED THAT: 'TIME AN AGAIN FEDERAL COURTS HAVE DECRIED THIS Gaping STATUTORY HOLE * * * AND HAVE CALLED UPON CONGRESS TO TAKE REMEDIAL ACTION.'


FN678 SECTION 404 OF THE BILL, AS REPORTED CONTAINS TECHNICAL AMENDMENTS TO RULE 12.2.

FN679 SEE UNITED STATES V. MALCOLM, SUPRA NOTE 57.

FN680 WHILE THE OPINION OF THE PSYCHIATRIST OR PSYCHOLOGIST MAY BE IN HIS REPORT, HIS OPINION ON THE QUESTION OF THE DEFENDANT'S SANITY MAY NOT BE IMPARTED TO THE TRIER OF FACT IN ACCORDANCE WITH THE PROVISION OF SECTION 406 OF THIS BILL.

FN681 IT SHOULD BE NOTED THAT THE DISTRICT OF COLUMBIA CODE, SECTION 24-301(C), PROVIDES THAT THE JURY MUST STATE IN ITS VERDICT IF ACQUITTAL WAS SOLELY ON THE GROUNDS THAT THE DEFENDANT WAS INSANE AT THE TIME OF THE COMMISSION OF THE OFFENSE. SEE ALSO CRIMINAL JURY INSTRUCTIONS FOR THE
DISTRICT OF COLUMBIA, INSTRUCTIONS 5.07 AND 5.11 (1972).

FN682 SEE ALSO UNITED STATES V. MCCracken, supra note 59 at 418-421.
COMPARE INSTRUCTION 5.11 OF THE CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA (1972), WHICH STATES: 'IF THE DEFENDANT IS FOUND NOT GUILTY BY REASON OF INSANITY, IT BECOMES THE DUTY OF THE COURT TO COMMIT HIM TO ST. ELIZABETHS HOSPITAL. THERE WILL BE A HEARING WITHIN 50 DAYS TO DETERMINE WHETHER THE DEFENDANT WILL REMAIN IN CUSTODY, AND WILL BE ENTITLED TO RELEASE FROM CUSTODY ONLY IF THE COURT FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT HE IS NOT LIKELY TO INJURE HIMSELF OR OTHER PERSONS DUE TO MENTAL ILLNESS.'

FN683 UNITED STATES V. BRAWNER, supra note 8.
FN684 SEE UNITED STATES V. MALCOLM, supra note 57.
FN685 Ibid.
FN686 SEE ESTELLE V. SMITH, supra note 58.

FN687 THE DISTRICT OF COLUMBIA CODE (1973), SECTION 24-30(D), PROVIDES FOR THE AUTOMATIC COMMITMENT OF A PERSON ACQUITTED BY REASON OF INSANITY.


FN689 PUBLIC LAW 91-358, 84 STAT. 590.
FN690 D.C. CODE, SECTION 24-301(D).

FN691 THE COMMITTEE HAS INTENTIONALLY INCLUDED RISK OF SERIOUS DAMAGE TO THE PROPERTY OF ANOTHER AS PART OF THE CRITERIA FOR INSANITY UNDER THIS SECTION. CLEARLY, DANGER TO THE PUBLIC FROM A PERSON WHO IS INSANE NEED NOT BE LIMITED TO THE RISK OF PHYSICAL INJURY TO ANOTHER PERSON. JONES V. UNITED STATES, supra note 14.

FN692 THE COMMITTEE INTENDS THAT CRIME SUCH AS BURGLARY OR UNARMED ROBBERY WITH THEIR LIKELIHOOD TO PROVOKE VIOLENCE AND BODILY INJURY BE INCLUDED IN THE 'SUBSTANTIAL RISK' CATEGORY.

FN693 supra, note 14.
FN694 supra, note 32.
FN695 SEE JONES V. UNITED STATES, supra note 14 at 12-13 (SLIP OP.).
FN696 Ibid.
FN697 THIS TEST IS SIMILAR TO THAT IN 24 D.C.CODE 301(E) ('WILL NOT IN THE REASONABLE FUTURE BE DANGEROUS TO HIMSELF OR OTHERS'). SEE UNITED STATES V. ECKER, 543 F.2D 178 (D.C. CIR. 1976).

FN698 Ibid.

FN701 E.G. UNITED STATES EX REL. SCHUSTER V. HEROLD, 410 F.2D 1071(2D CIR.), CERT. DENIED, 396 U.S. 847(1969), AND CASES CITED THEREIN.


FN704 UNITED STATES EX REL. SCHUSTER V. HEROLD, SUPRA NOTE 87 AT 1078.

FN705 SEE HIGGINS V. UNITED STATES, 205 F.2D 650(9TH CIR. 1953).

FN706 SEE S. REPT. NO. 97-307, 97TH CONG., 1ST SESS.

FN707 21 U.S.C. 841(B)(6) PROVIDES FOR A MAXIMUM FINE OF $125,000 FOR OFFENSES INVOLVING IN EXCESS OF 1,000 POUNDS OF MARIHUANA.


FN709 A 'COUNTERFEIT SUBSTANCE' IS A CONTROLLED SUBSTANCE WHICH, OR THE CONTAINER OR LABELING OF WHICH, BEARS FALSE OR MISLEADING INFORMATION ABOUT THE TRUE MANUFACTURER, DISPENSER, OR DISTRIBUTOR. SEE 21 U.S.C. 802(7).

FN710 NO SPECIAL PAROLE TERM IS PRESCRIBED FOR AN OFFENSE INVOLVING A SCHEDULE V CONTROLLED SUBSTANCE.

FN711 SEE 21 U.S.S. 846.

FN712 SEE 21 U.S.S. 845.

FN713 THE TERM 'NARCOTIC DRUG' IS DEFINED IN 21 U.S.C. 802(16) AND INCLUDES OPIATES AND COCAINE. THE DEFINITION OF THIS TERM IS AMENDED IN SECTION 505 OF THE BILL TO GIVE A MORE COMPLETE DESCRIPTION OF THE TYPES OF DANGEROUS
SUBSTANCES IN THIS CATEGORY.

FN714 IN ADDITION, 21 U.S.C. 841(B)(4) PROVIDES THAT DISTRIBUTION OF A SMALL
AMOUNT OF MARIHUANA FOR NO REMUNERATION IS TO BE TREATED AS SIMPLE

FN715 MARIHUANA IS A NON-NARCOTIC SCHEDULE I SUBSTANCE.

FN716 PHENCYCLIDINE (PCP) IS A SCHEDULE II NON-NARCOTIC SUBSTANCE.

FN717 UNLIKE MOST OF THE OTHER PENALTY PROVISIONS OF 21 U.S.C. 841(B),
SECTION 841(B)(6) PRESCRIBES NO SPECIAL PAROLE TERM FOR OFFENSES INVOLVING
LARGE AMOUNTS OF MARIHUANA.

FN718 A SPECIAL PAROLE TERM OF NOT LESS THAN TWO YEARS APPLIES WHERE THE
OFFENSE INVOLVES A NON-NARCOTIC SCHEDULE I OR II SUBSTANCE OR A SCHEDULE
III SUBSTANCE. THE SPECIAL PAROLE TERM IS ONE YEAR IN THE CASE OF A SCHEDULE
IV SUBSTANCE.


FN721 AS NOTED ABOVE, ALTHOUGH MARIHUANA IS A NON-NARCOTIC SCHEDULE I
CONTROLLED SUBSTANCE, TRAFFICKING IN AMOUNTS OVER 1,000 POUNDS IS
CURRENTLY GOVERNED BY 21 U.S.C. 841(B)(6), AND DISTRIBUTION OF SMALL
AMOUNTS FOR NO REMUNERATION IS TREATED AS MERE POSSESSION UNDER 21

FN722 CRIME CONTROL ACT HEARINGS (STATEMENT OF THE DEPARTMENT OF JUSTICE,
P. 77).

FN723 Ibid.

FN724 21 U.S.C. 801 ET SEQ.

FN725 H.R. REPT. NO. 91-1444, 91ST CONG., 2D SESS., REPRINTED IN 1970 U.S.C.
CONG. & AD. NEWS, 4566, 4572.


FN728 CRIME CONTROL ACT HEARINGS (STATEMENT OF THE DEPARTMENT OF JUSTICE,
P. 79).

FN729 Ibid.

FN730 SEE 21 U.S.C. 823(F) AND 824(A).

FN731 21 U.S.C. 801 ET SEQ.

FN732 THE 'ISOMER DEFENSE' WAS SOUNDLY REJECTED IN UNITED STATES V. FINCE,
670 F.2D 1356(4TH CIR. 1982).

FN733 BECAUSE OF THE ADDITION OF THE DEFINITION OF 'ISOMER,' THE DEFINITION

FN734 ECOGINE IS ANOTHER COMPOUND FOUND IN COCA LEAVES.

FN735 21 U.S.C. 811(B).


FN737 21 U.S.C. 301 ET SEQ.


FN739 GENERAL ACCOUNTING OFFICE, RETAIL DIVERSION OF LEGAL DRUGS-- A MAJOR PROBLEM WITH NO EASY SOLUTION (WASHINGTON, D.C. 1978).

FN740 DRUG ENFORCEMENT ADMINISTRATION, COMPREHENSIVE FINAL REPORT ON STATE REGULATORY AGENCIES AND PROFESSIONAL ASSOCIATIONS (WASHINGTON, D.C. 1977).

FN741 THUS, IT WOULD NO LONGER BE NECESSARY THAT THE STATE AUTHORITY HAVE IN FACT REVOKED THE PRACTITIONER'S LICENSE OR REGISTRATION BEFORE FEDERAL REGISTRATION COULD BE DENIED.

FN742 THE CRITERIA OF PRIOR CONVICTION FOR A DRUG OFFENSE WOULD THUS NO LONGER BE LIMITED TO FELONY CONVICTIONS.

FN743 BY VIRTUE OF THE AMENDMENT TO 21 U.S.C. 824(A) IN SECTION 510 OF THE BILL, THESE FACTORS COULD ALSO SERVE AS THE BASIS FOR REVOCATION OR SUSPENSION OF REGISTRATION.

FN744 SEE 21 U.S.C. 823(A), (B), (D), AND (E).

FN745 REGISTRATION OF A PHYSICIAN UNDER THE CONTROLLED SUBSTANCES ACT IS A MATTER ENTIRELY SEPARATE FROM A PHYSICIAN'S STATE LICENSE TO PRACTICE MEDICINE. THEREFORE, REVOCATION OR REGISTRATION ONLY PRECLUDES A PHYSICIAN FROM DISPENSING SUBSTANCES CONTROLLED UNDER THE CONTROLLED SUBSTANCES ACT AND DOES NOT PRECLUDE HIS DISPENSING OTHER PRESCRIPTION DRUGS OR HIS CONTINUED PRACTICE OF MEDICINE.

FN746 CLEAR AUTHORITY TO FORFEIT CONTROLLED SUBSTANCES POSSESSED IN VIOLATION OF THE CONTROLLED SUBSTANCES ACT IS ADDED IN SECTION 517 OF THE BILL.


FN748 IBID.

FN749 THE AMENDMENT TO 21 U.S.C. 824 SET OUT IN SECTION 511 OF THE BILL REQUIRES THAT THE ATTORNEY GENERAL, WHEN PLACING UNDER SEAL CONTROLLED SUBSTANCES OF A REGISTRANT WHOSE REGISTRATION HAS EXPIRED OR CEASED TO
DO BUSINESS, HOLD THE SUBSTANCES FOR THE BENEFIT OF THE REGISTRANT FOR A PERIOD OF 90 DAYS. ONLY AFTER THE EXPIRATION OF THIS 90-DAY PERIOD MAY THE SUBSTANCES BE FORFEITED AND DISPOSED OF.

FN750 AN EXAMPLE OF A SCHEDULE III SUBSTANCE NOT NOW SUBJECT TO THE CONTROLS OF 21 U.S.C. 952(B)(2) IS PHENDIMETRAZINE, A HIGHLY ABUSED ANORETIC (APPETITE SUPPRESSANT) DRUG USED AS A SUBSTITUTE FOR AMPHETAMINES.

FN751 UNDER CURRENT 21 U.S.C. 957(A)(2), PERSONS EXPORTING SCHEDULE V CONTROLLED SUBSTANCES ARE NOT REQUIRED TO REGISTER. THIS PROVISION OF CURRENT LAW IS AMENDED IN SECTION 521 OF THE BILL TO REQUIRE REGISTRATION OF EXPORTERS OF SCHEDULE V CONTROLLED SUBSTANCES. THUS, SECTION 524'S AMENDMENT OF THE CRITERIA FOR REGISTRATION OF EXPORTERS UNDER 21 U.S.C. 958(C) ENCOMPASSES SCHEDULE V EXPORTERS AS WELL.

FN752 CURRENT SUBSECTIONS (D) THROUGH (H) OF 21 U.S.C. 958 ARE REDESIGNATED AS SUBSECTIONS (E) THROUGH (I).

FN753 5 U.S.C. 500 ET SEQ.

FN754 SEE, CRIME CONTROL ACT HEARINGS.


FN756 THE COMMITTEE, IN CONSIDERING S. 53, ADOPTED THE TEXT OF TITLE VIII OF S. 829 (WITH ONLY TECHNICAL CHANGES) AS AN AMENDMENT TO S. 53 IN THE NATURE OF A SUBSTITUTE. IT THEN ACCEPTED ADDITIONAL AMENDMENTS TO THAT TEXT. THIS TITLE, THEREFORE, CONSISTS OF THE TEXT OF TITLE VIII OF S. 829 AND, WITH ONLY MINOR VARIATIONS, THE ADDITIONAL AMENDMENTS TO THAT TEXT ADOPTED BY THE COMMITTEE AT THE TIME S. 53 WAS ORDERED FAVORABLY REPORTED.


FN758 SEE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT, CHAPTER 3 (1981) (HEREAFTER CITED AS TASK FORCE FINAL REPORT).

FN759 SEE GENERALLY, S. REPT. NO. 97-587, 97TH CONG., 2D SESS. (1982).

FN760 PRESIDENT'S MEMORANDUM OF DISAPPROVAL OF H.R. 3963, 19 WEEKLY COMP.PRES.DOC. 47 (JAN. 14, 1983); 129 CONG.REC.H1245 (DAILY ED. JAN. 25, 1983).

FN761 JUSTICE ASSISTANCE ACT HEARINGS, SUPRA NOTE 2 (STATEMENT OF STANLEY E. MORRIS, P. 8).

FN762 IN ADDITION TO THE ASSOCIATE DEPUTY ATTORNEY GENERAL, TESTIMONY WAS RECEIVED FROM: THE UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL SHERIFFS ASSOCIATION, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, POLICE EXECUTIVE RESEARCH FORUM, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL


FN766 SEE, JUSTICE ASSISTANCE ACT HEARINGS, SUPRA NOTE 2 (STATEMENT OF STANLEY E. MORRIS, P. 8).


FN768 THE TRAINING WHICH MIGHT BE FUNDED UNDER THE DISCRETIONARY GRANT PROGRAM INCLUDES THE TYPE PROVIDED AT THE FEDERAL LAW ENFORCEMENT TRAINING CENTER AT GLYNCO, GEORGIA, THE NATIONAL INSTITUTE OF CORRECTIONS TRAINING FACILITY AT BOULDER, COLORADO, AND THE FBI NATIONAL ACADEMY AT QUANTICO, VIRGINIA.

FN769 FOR ADDITIONAL VIEWS ON CORRECTIONAL FACILITY RENOVATION AND CONSTRUCTION, SEE S. REPT. NO. 98-220 (ADDITIONAL VIEWS OF SENATOR DOLE).

FN770 TASK FORCE FINAL REPORT, SUPRA NOTE 5, AT 77.


FN772 ACLU NATIONAL PRISON PROJECT, STATUS REPORT, MARCH 1983.

FN773 AS DEVELOPED BY THE AMERICAN CORRECTIONAL ASSOCIATION AND THE FORMER NATIONAL CLEARINGHOUSE ON CRIMINAL JUSTICE PLANNING AND ARCHITECTURE, ADVANCED PRACTICES ARE INTENDED TO MAKE CORRECTIONAL FACILITY DESIGNS MORE FLEXIBLE, EFFICIENT, AND RESPONSIVE TO ENVIRONMENTAL HEALTH, SECURITY, PERSONAL SAFETY, BASIC HUMAN ACTIVITY AND OTHER IMPORTANT INSTITUTIONAL AND SOCIETAL PURPOSES, AND LESS REFLECTIVE OF OBSOLETE DESIGNS RELYING ALMOST EXCLUSIVELY ON A MAXIMUM SECURITY HARDWARE APPROACH. FURTHERMORE, IN 1980, CONGRESS GRANTED THE DEPARTMENT OF JUSTICE LEGAL STANDING TO INTERVENE ON BEHALF OF PRISONERS SUING STATE AND LOCAL OFFICIALS BECAUSE OF UNCONSTITUTIONAL PRISON AND JAIL CONDITIONS. PUBLIC LAW 96-247, THE CIVIL RIGHTS OF INSTITUTIONALIZED
PERSONS ACT, STATED THAT ' * * * WHERE FEDERAL FUNDS ARE AVAILABLE FOR USE IN IMPROVING SUCH INSTITUTIONS, PRIORITY SHOULD BE GIVEN TO THE CORRECTION OR ELIMINATION OF SUCH UNCONSTITUTIONAL OR ILLEGAL CONDITIONS WHICH MAY EXIST.' 94 STAT. 349, AT 354.

FN774 MANY OF THE CONSTRUCTION AND NON-CONSTRUCTION STRATEGIES THAT STATES HAVE BEEN PURSUING TO REDUCE OVERCROWDING ARE CATALOGUED IN THE REPORT REDUCING PRISON CROWDING: AN OVERVIEW OF OPTIONS, NATIONAL INSTITUTE OF CORRECTIONS, SUBMITTED TO THE NATIONAL GOVERNORS ASSOCIATION, FEBRUARY 21, 1982.

FN775 S. REPT. NO. 97-322, 97TH CONG.,1ST SESS. (1982).

FN776 128 CONG.REC. S6119 (DAILY ED.). AN IDENTICAL BILL INTRODUCED THIS CONGRESS (S. 329) IS PENDING IN THE GOVERNMENTAL AFFAIRS COMMITTEE.


FN778 SEE, PART G OF TITLE I OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, AS AMENDED BY SECTION 601 OF THIS BILL, AND RELATED DISCUSSION IN THIS REPORT.

FN779 S. REPT. NO. 970322, SUPRA NOTE 1, AT 1-2.


FN782 129 CONG.REC.S. 3854 (MARCH 23, 1983 (DAILY ED.)).

FN783 ANOTHER IMPORTANT ENFORCEMENT ASPECT OF THE PROGRAM UNDER THE CURRENCY AND FOREIGN TRANSACTIONS REPORTING ACT IS TO PREVENT THE USING OF OFF-SHORE LAUNDERING SCHEMES TO SHIELD MONEY FROM TAXES. SEE GENERALLY, INVESTIGATIONS SUBCOMMITTEE STAFF STUDY AND HEARINGS, SUPRA NOTE 1.
IT SHOULD ALSO BE NOTED THAT PART B OF TITLE XII OF THIS BILL ADDS CURRENCY AND FOREIGN TRANSACTIONS REPORTING ACT VIOLATIONS TO THE LIST OF OFFENSES FOR WHICH A COURT ORDERED ELECTRONIC SURVEILLANCE MAY BE CONDUCTED.

SEE PUBLIC LAW 97-258, APPROVED SEPTEMBER 13, 1982. SUBCHAPTER II IS TITLE 'RECORDS AND REPORTS ON MONETARY INSTRUMENTS TRANSACTIONS'.

SEE UNITED STATES V. ROJAS, 671 F.2D 159(5TH CIR. 1982).


129 CONG.REC. 3855 (MARCH 23, 1983 (DAILY ED.)).

SEE CRIME CONTROL ACT HEARINGS (STATEMENT OF THE NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, P. 27).


THE COMMITTEE INTENDS THAT 'ANYTHING OF PECUNIARY VALUE' HAVE THE SAME MEANING AS IN SECTION 1952A.


IT IS USED IN THE ITAR STATUTE, BUT NO REPORTED PROSECUTIONS APPEAR TO HAVE BEEN BROUGHT UNDER THIS BRANCH OF 18 U.S.C. 1952.

FOR EXAMPLE, 'CRIME OF VIOLENCE' IS USED IN TITLE I (BAIL), IN SEVERAL OTHER PARTS OF TITLE X, AND IN TITLE XII, PART A (PROSECUTION OF CERTAIN JUVENILES AS ADULTS).

SEE S. 1630, AS REPORTED, SECTION 111; S. REPT. NO. 97-307.

18 U.S.C. 113(E).

18 U.S.C. 113(D).


FN805 SEE, ID AT 182-184.

FN806 THE TERM 'CRIME OF VIOLENCE' IS DEFINED IN PART A OF THIS TITLE AND THE DISCUSSION IN THIS REPORT THEREON SHOULD BE CONSULTED.


FN809 SEE E.G., NIGRO V. UNITED STATES, 117 F.2D 624(8TH CIR. 1941); UNITED STATES V. BRANDENBURG, 155 F.2D 110(8TH CIR. 1946) (PHYSICIAN CIRCULATING ILLEGAL NARCOTICS PRESCRIPTIONS GUILTY OF SALE BY INNOCENT DRUGGIST).

FN810 SIMPSON V. UNITED STATES, 435 U.S. 6, 10(1978).

FN811 UNITED STATES V. SUDDUTH, 457 F.2D 1198(9TH CIR. 1972); UNITED STATES V. GAINES, 594 F.2D 541(7TH CIR. 1979).

FN812 SUPRA, NOTE 1.

FN813 446 U.S. 398(1980).


FN815 18 U.S.C. 111.

FN816 SUPRA, NOTE 4 AT 407.


FN818 THE TERM 'CRIME OF VIOLENCE' IS DEFINED IN PART A OF THIS TITLE AND THE DISCUSSION IN THE REPORT THEREON SHOULD BE CONSULTED HERE. IN ESSENCE THE TERM INCLUDES ANY OFFENSES IN WHICH THE USE OF PHYSICAL FORCE IS AN ELEMENT AND ANY FELONY WHICH CARRIES A SUBSTANTIAL RISK OF SUCH FORCE. THUS, THE SECTION EXPANDS THE SCOPE OF PREDICATE OFFENSES, AS COMPARED WITH CURRENT LAW, BY INCLUDING SOME VIOLENT MISDEMEANORS, BUT RESTRICTS IT BY EXCLUDING NON-VIOLENT FELONIES.

FN819 EVIDENCE THAT THE DEFENDANT HAD A GUN IN HIS POCKET BUT DID NOT DISPLAY IT, OR REFER TO IT, COULD NEVERTHELESS SUPPORT A CONVICTION FOR 'CARRYING' A FIREARM IN RELATION TO THE CRIME IF FROM THE CIRCUMSTANCES OR
Otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape. The requirement in present section 924(c) that the gun be carried unlawfully, a fact usually proven by showing that the defendant was in violation of a state or local law, has been eliminated as unnecessary. The 'unlawfully' provision was added originally to section 924(c) because of congressional concern that without it policemen and persons licensed to carry firearms who committed federal felonies would be subjected to additional penalties, even where the weapon played no part in the crime, whereas the section was directed at persons who chose to carry a firearm as an offensive weapon for a specific criminal act. See United States v. Howard, 504 F.2d 1281, 1285-1286 (8th Cir. 1974). The committee has concluded that persons who are licensed to carry firearms and abuse that privilege by committing a crime with the weapon, as in the extremely rare case of the armed police officer who commits a crime, are as deserving of punishment as a person whose possession of the gun violates a state or local ordinance. Moreover, the requirement that the firearm's use or possession be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.

FN820 See e.g., S. 555 and S. 604 (98th Cong., 1st sess.)


FN822 The term 'crime of violence' is defined in Part A of this title and the discussion thereon in this report should be consulted. The specific reference to a crime which provides for an enhanced punishment if committed with a deadly or dangerous weapon is to ensure that the new section applies to carrying a handgun loaded with armor-piercing ammunition in offenses such as a bank robbery (18 U.S.C. 2113) and assault on a federal officer (18 U.S.C. 111) which have such provision. The committee wishes to ensure that the holdings of the Supreme Court in Simpson v. United States, 435 U.S. 6 (1978) and Busic v. United States, 446 U.S. 398 (1980) with respect to present section 924(c) do not apply here. See generally the discussion of Part D which amends section 924(c) to eliminate these problems.

FN823 The test procedure involves firing the bullet from the handgun used in the crime into Type II a body armor five meters away. The test is such that it could be conducted by any of a number of federal law enforcement agencies and many police departments. The committee intends that any competent law enforcement organization, state or federal, conduct the test. Whether or not a bullet has penetrated is, of course, a fact question to be answered ultimately by the jury, but the ballistics expert who conducts the test can express his opinion on penetration. See Rule 704, Federal Rules of Evidence.

FN824 See the discussion of Part D of Title X, supra.


FN827 517 F.2D 953(2ND CIR. 1975).

FN828 PUBLIC LAW 97-297.

FN829 AN ATTEMPTED ASSAULT IS NOT COVERED INASMUCH AS AN ATTEMPTED ASSAULT ON THE OFFICIAL HIMSELF, COMMITTED WITH THE SAME INTENT, IS NOT PROSCRIBED BY 18 U.S.C. 111.


FN831 IN MANY INSTANCES AN ATTEMPTED MURDER WOULD ALSO VIOLATE THE ASSAULT WITH A DANGEROUS WEAPON PROVISION WHICH WOULD ALLOW FOR UP TO TEN YEARS OF IMPRISONMENT.

FN832 THIS APPARENT ANOMALY WHICH PROVIDES GREATER PROTECTION FOR FAMILY MEMBERS OF FEDERAL EMPLOYEES THAN FOR THE EMPLOYEES THEMSELVES IS CURED BY PART K WHICH WOULD GIVE THE ATTORNEY GENERAL THE AUTHORITY TO ADD ADDITIONAL FEDERAL EMPLOYEES TO THE LIST IN 18 U.S.C. 1114 AS THE NEED ARISES.

FN833 THE TERM 'INDIAN COUNTRY' IS DEFINED IN 18 U.S.C. 1151 TO INCLUDE, INTER ALIA, INDIAN RESERVATIONS.


FN835 SEE ACT OF MARCH 3, 1885, SEC. 9, 23 STAT 385.

FN836 UNFORTUNATELY THIS DISCRIMINATES AGAINST INDIAN VICTIMS. THIS IS SO BECAUSE IF AN INDIAN COMMITTED ONE OF THESE CRIMES AGAINST A NON-INDIAN HE WOULD BE SUBJECT TO PROSECUTION UNDER 18 U.S.C. 1152 AND 114 IN THE CASE OF MAIMING OR UNDER 1152 AND 13 (THE ASSIMILATIVE CRIMES ACT), AND STATE LAW IN THE CASE OF SODOMY. ONLY WHEN THE VICTIM IS ANOTHER INDIAN IS THERE AN INABILITY TO BRING THE PERPETRATOR TO JUSTICE.

FN837 1 STAT 115.

FN838 SODOMY IS NOT EMBRACED WITHIN THE CONCEPT OF 'RAPE', WHICH EMBODIES ONLY THE COMMON LAW CRIME OF FORCIBLE INTERCOURSE BY A MALE WITH A FEMALE. SEE UNITED STATES V. SMITH, 574 F.2D 988, 990(9TH CIR.), CERT. DENIED, 439 U.S. 852(1978). LIKEWISE, ALTHOUGH 'INCEST,' AS DEFINED BY STATE LAW, IS INCLUDED WITHIN THE MAJOR CRIMES ACT, SODOMY IS A DISTINCT OFFENSE THAT IS NOT TYPICALLY COVERED BY STATE INCEST LAWS.

FN839 IT IS ALSO PROVIDED THAT INVOLUNTARY SODOMY, LIKE THE PRESENT MAJOR CRIMES OF BURGLARY AND INCEST, SHALL BE DEFINED AND PUNISHED IN ACCORDANCE WITH THE LAWS OF THE STATE IN WHICH THE OFFENSE WAS COMMITTED. THERE IS NO FEDERAL LAW DEFINING THESE OFFENSES BUT TITLE 18 PROVIDES DEFINITIONS (AT LEAST BY REFERENCE TO COMMON LAW) AND PUNISHMENTS FOR ALL THE OTHERS.

FN840 SEE, E.G., UNITED STATES V. GRISTEAU, 611 F.2D 181(7TH CIR. 1979), CERT.

FN841 SEE UNITED STATES V. GILBERT, 378 F.SUPP. 82, 89-93 (D. S. DAK. 1974).


FN844 129 CONG.REC.S. 895 (FEBRUARY 2, 1983 (DAILY ED.)).


FN846 PART F OF THIS TITLE WOULD AMEND THE FEDERAL KIDNAPING STATUTE, 18 U.S.C. 1201, TO MAKE A SIMILAR CROSS-REFERENCE TO SECTION 1114 AND THUS PROTECT THE PERSONS LISTED FROM KIDNAPING.

FN847 18 U.S.C. 1113 COVERS ATTEMPTED MURDER OR MANSLAUGHTER IN THE SPECIAL MARITIME AND TERRITORIAL JURISDICTION, WHILE SECTION 1116 PROVIDES AN ATTEMPT PROVISION FOR THE MURDER OR MANSLAUGHTER OF FOREIGN OFFICIALS.

FN848 SEE S. REPT. NO. 97-307, PP. 163-165.

FN849 ID. AT 166-167.

FN850 SEE 3 CFRP. 215 (1982).

FN851 E.G., CERTAIN EMPLOYEES IN THE CENSUS BUREAU.

FN852 E.G., CERTAIN ATTORNEYS IN THE CIVIL RIGHTS DIVISION OR THE ORGANIZED CRIME SECTION OF THE DEPARTMENT OF JUSTICE.

FN853 SEE THE DISCUSSION OF WHAT CONSTITUTES THE PERFORMANCE OF OFFICIAL DUTY IN CONNECTION WITH PART F, SUPRA.

FN854 SEE THE DISCUSSION OF TITLE IV OF THIS BILL FOR AN ANALYSIS OF THIS NEW SPECIAL VERDICT AND OF THE AUTOMATIC COMMITMENT FOR PURPOSES OF A MENTAL EXAMINATION TO DETERMINE PRESENT INSANITY AND DANGEROUSNESS OF PERSONS AS TO WHOM SUCH A VERDICT IS RETURNED.

FN855 SEE 28 SCR 522.11(D).

FN856 18 U.S.C. 751 HAS RECENTLY BEEN HELD NOT TO APPLY IN THIS SITUATION. SEE UNITED STATES V. BROWN AND GRANDSTAFF, CR. NO. 82-0358, D. ARIZ.

FN857 SEE UNITED STATES V. BAILEY, 444 U.S. 394(1980).

FN858 SEE UNITED STATES V. CLUCK, 542 F.2D 728, 731(8TH CIR. 1976) AND CASES THEREIN CITED. THE COMMITTEE ALSO INTENDS THAT THIS BROAD CONCEPT OF CUSTODY BE APPLICABLE TO ESCAPE FROM CUSTODY ORDERED PURSUANT TO 28 U.S.C. 1826. FOR EXAMPLE, A RECALCITRANT GRAND JURY WITNESS WHO WAS ORDERED TO SPEND NIGHTS AND WEEKENDS IN A HALFWAY HOUSE, OR IN HIS OWN HOUSE BUT FAILED TO DO SO WOULD BE IN VIOLATION OF THE NEW SUBSECTION.

FN860 THE PENALTY IF PERSONAL INJURY RESULTS IS UP TO TWENTY YEARS IMPRISONMENT AND A $20,000 FINE.

FN861 THE PENALTY IF DEATH RESULTS IS A FINE OF UP TO $20,000 AND IMPRISONMENT FOR ANY TERM OF YEARS UP TO LIFE.

FN862 SEE THE STATEMENT OF SENATOR GRASSLEY ON INTRODUCTION OF S. 1716, A BILL SUBSTANTIVELY IDENTICAL TO PART N, 129 CONG.REC.,S. 11275 (AUGUST 1, 1983 (DAILY ED.)).


FN864 SEE UNITED STATES V. BROWN, 688 F.2D 596(9TH CIR. 1982). BROWN INVOLVED A PROSECUTION UNDER 18 U.S.C. 1503 FOR CORRUPTLY ENDEAVORING TO IMPEDE THE DUE ADMINISTRATION OF JUSTICE. THE COURT OF APPEALS HELD, HOWEVER, THAT THAT STATUTE REACHES ONLY EFFORTS TO INTERFERE WITH A JUDICIAL PROCEEDING.

FN865 SEE, E.G., SECTIONS 1731 (THEFT) AND 1751 (COMMERCIAL BRIBERY) OF S. 1630 AND THE DISCUSSION AT PAGES 726 AND 803 OF S. REPT. NO. 97- 307(97TH CONG., 1ST SESS.)

FN866 SEE UNITED STATES V. HINTON, 683 F.2D 195(7TH CIR. 1982), CERT. GRANTED SUB NOM. DIXON V. UNITED STATES-- U.S.-- (1982) (NOS. 82-5279 AND 82-5331).

FN867 CONTRAST UNITED STATES V. LOSCHIAVO, 531 F.2D 659(2D CIR. 1976) AND UNITED STATES V. DEL TORO, 513 F.2D 656(2D CIR.), CERT. DENIED 423 U.S. 826(1975), REACHING THE OPPOSITE RESULT AS TO THE BRIBERY OF CERTAIN PERSONS ADMINISTERING FUNDS FROM ANOTHER HUD PROGRAM. SEE ALSO UNITED STATES V. MOSLEY, 659 F.2D 812(7TH CIR. 1981) (INVOLVING BRIBERY BY A STATE ADMINISTRATOR OF FUNDS FROM THE CETA PROGRAM).


FN869 ORGANIZED CRIME; SECURITIES THEFTS AND FRAUDS, HEARINGS BEFORE THE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS, UNITED STATES SENATE, 93RD CONG.,1ST SESS., PART 1, PP. 123-136.

FN870 SENATORS DECONCINI AND DENTON HAVE INTRODUCED LEGISLATION SUBSTANTIVELY VERY SIMILAR TO PROPOSED NEW SECTION 511. SEE S. 1558 AND S. 1710, 98TH CONG., 1ST SESS.

FN871 SEE, E.G., UNITED STATES V. KAPLAN, 586 F.2D 980(2D CIR. 1978); UNITED STATES V. TAVOULARIS, 515 F.2D 1070(2D CIR. 1975).

FN872 SEE S. REPT. NO. 97-307, PP. 796-797.


FN874 THE OTHER SPECIFIED INSTITUTIONS ARE A 'FEDERAL INTERMEDIATE CREDIT BANK' AND A NATIONAL AGRICULTURAL CREDIT CORPORATION.
FN875 SEE RYAN V. UNITED STATES, 278 F.2D 836(9TH CIR. 1960).

FN876 SEE UNITED STATES V. LANE, 464 F.2D 593(8TH CIR.), CERT. DENIED, 409 U.S. 876(1972).


FN878 102 S.CT. 2088(1982).

FN879 BELL V. UNITED STATES, -- U.S.-- (DECIDED JUNE 13, 1983).

FN880 SEE, E.G., UNITED STATES V. PARK, 521 F.2D 1381-1384(9TH CIR. 1975); UNITED STATES V. CHATMAN, 538 F.2D 567(4TH CIR. 1976); UNITED STATES V. BERRIGAN, 482 F.2D 171(3D CIR. 1973); UNITED STATES V. SWINDLER, 476 F.2D 167(10TH CIR.) AND CASES THEREIN CITED, CERT. DENIED, 414 U.S. 837(1973).

FN881 456 F.2D 448(8TH CIR. 1972).


FN883 S. 932.


FN887 UNITED STATES V. TAYLOR, 178 F.SUPP. 352 (E.D. WIS. 1959); CF. ALSO UNITED STATES V. PLOTT, 345 F.SUPP. 1229 (S.D.N.Y. 1972).

FN888 IT IS NOT CLEAR WHAT LIMITATIONS, IF ANY, ARE IMPLICIT IN THE PHRASE 'IN THE EXECUTION OR CONCEALMENT'. CONCEIVABLY, THOUGH BY NO MEANS NECESSARILY CORRECTLY, A COURT MIGHT CONSTRUE THIS TO MEAN THAT THE INTERSTATE TRAVEL MUST OCCUR IN THE CONSUMMATION PHASE OF THE CRIME RATHER THAN, E.G., DURING THE PLANNING STAGE.


FN890 SEE CUMMINGS V. UNITED STATES, 289 F.2D 904(10TH CIR.), CERT. DENIED, 368 U.S. 850(1961).

FN891 SEE REPT. NO. 97-307, PP. 707-716.

FN892 PUBLIC LAW NO. 93-415, 88 STAT. 1109.