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JBS



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

August 26, 1986

LEGISLATIVE REFERRAL MEMORANDUM

**SPECIAL**


**TO:** Department of Health & Human Services  
Department of State  
Department of the Treasury  
Department of Education (Title VI)  
General Services Administration (Title XI)

**SUBJECT:** Department of Justice 11-title legislative proposal  
to strengthen Federal laws related to drug enforcement.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with Circular A-19.

Please provide us with your views no later than September 3, 1986

Direct your questions to Gregory Jones (395-3454), of this office.

  
James C. Murr for  
Assistant Director for  
Legislative Reference

**Enclosures**

cc: Penny Jacobs      John Cooney      Richard Williams  
Frank Kalder      Peter Wallison      Naomi Sweeney, w/o attachment  
Karen Wilson      Ed Rea (Title XI)      Ron Peterson, w/o attachment  
Barbara Selfridge



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 22 1986

Honorable James C. Miller III  
Director  
Office of Management and Budget  
Washington, D. C. 20503

Dear Mr. Miller:

Enclosed for preliminary review is an 11-title legislative proposal designed to strengthen federal laws related to drug enforcement. It is our hope that the enclosed proposals, together with legislative proposals developed by other departments and agencies, will be folded together and transmitted to the Congress by the President as a comprehensive Administration anti-drug initiative. The Attorney General plans to put this package before the Domestic Policy Council in early September for review, and it is with the expectation that it will receive approval from that group and go forward that it is being sent to you at this early stage. We wish not to lose any time on this important set of initiatives. This strategy would appear to offer the best hope for ensuring maximum consideration of Administration anti-drug proposals by the Congress.

The measures incorporated in the enclosed package represent new initiatives. If the Administration does go forward with a comprehensive drug control initiative, we would wish to incorporate in the package three prior Department legislative proposals, all of which have been unanimously approved by the Senate: (1) Money Laundering Legislation, S. 2683; (2) Designer Drug Legislation, S. 1437; and (3) Technical Crime Bill Amendments, S. 1236.

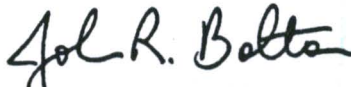
In addition, we may also wish to incorporate in an Administration drug control package certain Congressionally-initiated measures, such as Senator Specter's Armed Career Criminal Act Amendments, S. 2312, which we have supported. We will be analyzing recent Congressional initiatives to determine which, if any, merit Administration endorsement.

Finally, the Postal Inspection Service has recently supplied us with several drug-related proposals which we are in the process of reviewing.



Again, we believe that it is in our interest to submit an Administration drug control legislative initiative at the earliest possible date. We are, therefore, by copy of this letter, forwarding a copy of this package to Dr. Carlton Turner who we understand is heading up an effort of the Domestic Policy Staff to develop an Administration alternative to the drug control initiative expected to be approved by the House on September 10. We trust that you will advise if you have questions or require further information and look forward to working with you on this legislative initiative.

Sincerely,



John R. Bolton  
Assistant Attorney General

Enclosure

cc. Dr. Carlton Turner  
Becky Norton Dunlop



## DRUG BILL SUMMARY

Title I, the Drug Penalties Enhancement Act of 1986 would increase penalties for drug trafficking offenses to include five-year mandatory minimum prison terms for drug offenses and includes a mandatory term of up to twenty years for drug trafficking resulting in death.

Title II, the Drug Possession Penalty Act of 1986 increases the penalties for simple possession of controlled substances to a mandatory fine of not less than \$1,000 and not more than \$5,000 for a first offense, a mandatory fine of \$2,500 to \$5,000 plus a mandatory prison term of 15 days to two years for a second offense, and a mandatory fine of \$5,000 to \$25,000 and a mandatory prison term of 90 days to three years for a third offense.

Title III, the Continuing Drug Enterprise Penalty Act of 1986 would authorize the death penalty for a person who is the principal administrator, organizer or leader of a major drug trafficking ring.

Title IV, the International Forfeiture Enabling Act of 1986 would authorize U.S. authorities to seize and civilly forfeit property in the U.S. used in or derived from the violation of foreign drug laws.

Title V, the Repeal of the "Mansfield Amendment" would delete 22 U.S.C. 2291(c) which prohibits U.S. officials from participation in narcotics arrests in foreign countries and from being present during the interrogation of criminal suspects by foreign authorities.

Title VI, the Juvenile Drug Trafficking Act of 1986 would provide enhanced penalties for using juveniles in the furtherance of a drug distribution scheme and strengthen the existing law prohibiting the sale of drugs near schools.

Title VII, the Controlled Substances Import and Export Penalties Enhancement Act of 1986 makes amendments with respect to importation of controlled substances to track those set out in Title I above.

Title VIII, the Narcotic Trafficker Deportation Act of 1986 amends the Immigration and Nationality Act to facilitate deportation of aliens involved in drug trafficking.

Title IX, the Criminal Rules Sentencing Amendments would modify Rule 35 of the Federal Rules of Criminal Procedure clearly to authorize courts to lower a sentence upon the application of the Government where the defendant has provided substantial assistance to the Government in the investigation or prosecution of other crimes.

Title X, the Chemical Diversion and Trafficking Act of 1986 would establish controls over the production of drug precursors and chemicals essential to the manufacturing of controlled substances.

Title XI, the Assets Forfeiture Fund Amendments would strengthen the federal forfeiture program and thus enhance our ability to forfeit the assets and proceeds of drug trafficking enterprises.

TITLE I

DRUG PENALTIES ENHANCEMENT ACT OF 1986



Sec. 1. This title may be cited as the Drug Penalties Enhancement Act of 1986.

Sec. 2. Sections 401(b)(1)(A) and (B) of the Controlled Substances Act (21 U.S.C. 841 (b)(1)(A)) are amended to read as follows:

"(1)(A) In the case of a violation of subsection (a) of this section involving--

"(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

"(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

"(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

"(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

"(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

"(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);";

"(iii) 25 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

"(iv) 10 grams or more of phencyclidine (PCP) or 10 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

"(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD); or

"(vi) 40 grams or more of a mixture or substance containing a detectable amount of fentanyl or 10 grams or more of a mixture or substance containing a detectable amount of any analog of fentanyl;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death results from the use of such substance shall be not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding any other provision of law,

the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph nor shall the term of imprisonment imposed under this subparagraph run concurrently with any other term of imprisonment under this subparagraph or under any other provision of law. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein."

"(B) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$10,000,000 if



the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment. Notwithstanding the prior sentence, and notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death results, nor shall such a term of imprisonment run concurrently with any other term of imprisonment under this subparagraph or under any other provision of law, nor shall a person so sentenced be eligible for parole during the term of such a sentence."

Sec. 3. Section 401 of the Controlled Substances Act (21 U.S.C. 841) is further amended as follows:

(a) In subsection (b), paragraph (1)(C) is amended by striking out the phrase "a fine of not more than \$50,000" and inserting in lieu thereof "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is and individual or \$1,000,000 if the defendant is other than an individual", and by striking out the phrase "a fine of not more than \$100,000" and inserting in lieu thereof the phrase "a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or

\$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual";

(b) In subsection (b), paragraph (2) is amended by striking out the phrase "a fine of not more than \$25,000" and inserting in lieu thereof "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual", and by striking out the phrase "a fine of not more than \$50,000" and inserting in lieu thereof " a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual";

(c) In subsection (b), paragraph (3) is amended by striking out the phrase "a fine of not more than \$10,000" and inserting in lieu thereof "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$100,000 if the defendant is an individual or \$250,000 if the defendant is other than an individual", and by striking out the phrase a fine of not more than \$20,000" and inserting in lieu thereof "a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code or \$200,000 if the defendant is an individual or \$500,000 if the defendant is other than an individual";

(d) In subsection (b), paragraph (5) is amended to read as follows:

"(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed

"(A) the amount authorized in accordance with this section,

"(B) the amount authorized in accordance with the provisions of title 18,

"(C) \$500,000 if the defendant is an individual;  
or

"(D) \$1,000,000 if the defendant is other than an individual,

or both."; and

(e) subsection (d) is amended by striking out the phrase "a fine of not more than \$15,000" and inserting in lieu thereof "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual".

### Analysis

This title contains a series of amendments to the provision in Title 21 (21 U.S.C. 841) that sets out penalties for large-scale domestic drug trafficking.

Section two amends 21 U.S.C. 841(b)(1)(A) to lower the amounts of drugs required to trigger the maximum sentences. It also increases the maximum term of imprisonment authorized for



large scale drug trafficking from 20 to 40 years. Moreover, it provides mandatory minimum terms of five years for first offenses and ten years for second offenses. Fines are also increased to \$2,000,000 for first offenders who are individuals (\$5,000,000 for defendants other than individuals) and to \$4,000,000 and \$10,000,000 for repeat offenders. The fine provisions also cross-reference the Criminal Fine Enforcement Act of 1984 in title 18 to clarify that that Act's provisions, which can increase fines even beyond these levels to double the amount of the defendant's gain, are applicable.

Section two also contains mandatory terms of imprisonment for large scale drug traffickers in cases where death results from someone using their drugs. This provision was inspired by the death of basketball player Len Bias. Imprisonment in such a case would be not less than twenty years and could extend to life imprisonment. In a case where death resulted and the defendant already had another drug trafficking conviction (whether or not death had resulted from the events that gave rise to the earlier conviction) the defendant would have to be sentenced to life imprisonment.

Finally, section two's amendment of 21 U.S.C. 841(b)(1)(A) adds two new types of particularly dangerous controlled substances to those already listed in 21 U.S.C. 841(b)(1)(A) that require the most severe penalties. It would extend those penalties to persons trafficking in 25 grams or more of "crack" or a gram of fentanyl or any analog of this frequently deadly substance.

Section two also amends 21 U.S.C. 841(b)(1)(B) to raise the term of imprisonment for trafficking in smaller amounts of controlled substances from fifteen to twenty years. Fines are also increased for trafficking in smaller amounts. The fine would be the greater of \$1,000,000 or twice the gain for an individual and to \$5,000,000 or twice the gain for an entity other than an individual. For an individual sentenced under 841(b)(1)(B) who had a previous drug conviction, the fine would be the greater of \$2,000,000 or four times the gain, and the fine for an entity other than an individual that had a previous drug conviction would be the greater of four times the gain or \$10,000,000.

Section three makes a series of amendments to the fine provisions in 21 U.S.C. 841 that apply to trafficking in small amounts of drugs generally believed not to be quite as harmful as cocaine, heroin, and LSD.

Subsection 3(a) amends 21 U.S.C. 841(b)(1)(C). That provision presently authorizes a fine of up to the greater of \$50,000 (\$100,000 for a second offense) or that authorized in the Fine Enforcement Act. The amendment would raise the fine to the greater of \$250,000 or twice the gain for an individual and to \$1,000,000 or twice the gain for an entity other than an individual. For an individual sentenced under 841(b)(1)(C) who had a previous drug conviction, the fine would be the greater of \$500,000 or four times the gain, and the fine for an entity other than an individual that had a previous drug conviction would be the greater of four times the gain or \$2,000,000.



Subsection 3(b) amends 21 U.S.C. 841(b)(2) which sets out fines for trafficking in schedule IV controlled substances. The present authorized fine is the greater of \$25,000 (\$50,000 for a second offense) or that authorized in the Fine Enforcement Act. The amendment would raise the fine to the greater of \$250,000 or twice the gain for an individual and to \$1,000,000 or twice the gain for an entity other than an individual. For an individual sentenced under 841(b)(2) who had a previous drug conviction, the fine would be the greater of \$500,000 or four times the gain, and the fine for an entity other than an individual that had a previous drug conviction would be the greater of four times the gain or \$2,000,000.

Subsection 3(c) amends 21 U.S.C. 841(b)(3) which sets out fines for trafficking in schedule V controlled substances. The present authorized fine is the greater of \$10,000 (\$20,000 for a second offense) or that authorized in the Fine Enforcement Act. The amendment would raise the fine to the greater of \$100,000 or twice the gain for an individual and to \$250,000 or twice the gain for an entity other than an individual. For an individual sentenced under 841(b)(3) who had a previous drug conviction, the fine would be the greater of \$200,000 or four times the gain, and the fine for an entity other than an individual that had a previous drug conviction would be the greater of four times the gain or \$500,000.

Subsection 3(d) amends 21 U.S.C. 841(b)(5) which sets out fines for persons convicted of cultivating controlled substances on federal land. The fine is \$500,000 for individuals and



\$1,000,000 for entities other than individuals. Unlike most other parts of section 841, 841(b)(5) does not provide for enhanced fines for a second conviction. The amendment rewrites 841(b)(5) to clarify that persons who commit such an offense can be imprisoned as well as fined and to set out the maximum fine as that authorized in section 841 (which is now in excess of \$500,000 or \$1,000,000 for many offenses), that authorized pursuant to the Fine Enforcement Act in Title 18, or \$500,000 for individuals or \$1,000,000 for entities other than individuals.

Subsection 3(e) amends 21 U.S.C. 841(d) which sets out a fine of \$15,000 for possession of piperidine with intent to manufacture PCP. Of course the fine is actually that authorized by the Criminal Fine Enforcement Act, the greater of \$250,000 for individuals (\$500,000 for organizations) or double the defendant's gain. The effect of the amendment is to leave the fine for an individual at the greater of \$250,000 or twice the gain but to raise the fine authorized to the greater of \$1,000,000 or twice the gain for a defendant other than an individual.

TITLE II

DRUG POSSESSION PENALTY ACT OF 1986

Sec. 1. This title may be cited as the Drug Possession Penalty Act of 1986.

Sec. 2. Section 404 of the Controlled Substances Act (21 U.S.C. 844) is amended to read as follows:

§ 844. Penalty for simple possession

"(a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than one year, and shall be fined a minimum of \$1,000 but not more than \$5,000, or both, except that if he commits such offense after a prior conviction under this subsection, or a prior conviction for any drug or narcotic offense chargeable under the law of any state, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than two years, and shall be fined a minimum of \$2,500 but not more than \$10,000, except, further, that if he commits such offense after two or more prior convictions under this subsection, or two or more prior convictions for any drug or narcotic offense chargeable under the law of any state or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than ninety days but not more than



three years, and shall be fined a minimum of \$5,000 but not more than \$25,000. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be taxed the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in 28 U.S.C. §§1918, 1920\$, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provisions of title 18 that the defendant lacks the ability to pay.

"(b) As used in this section, the term "drug or narcotic offense" means any offense chargeable under the law of any state which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this chapter."

#### Analysis

This title rewrites the provisions of 21 U.S.C. 844 setting out the punishment for simple possession of controlled substances. It provides for the imposition of a mandatory fine of between \$1,000 and \$5,000 for a first offense, for a mandatory fine of between \$2,500 and \$5,000 if the defendant already has been convicted of one other state or federal narcotics offense, and for a mandatory fine

of between \$5,000 and \$25,000 if the defendant has previously been convicted of two other such offenses.

Moreover, the section would provide for a mandatory term of imprisonment of at least fifteen days and up to two years for persons guilty of simple possession who have a previous state or federal drug conviction. It provides for a mandatory term of imprisonment of between ninety days and three years for persons guilty of simple possession who have two or more previous state or federal drug convictions. The imposition or execution of mandatory minimum sentences under the section could not be suspended or deferred.

The revised section 844 would eliminate the provision in the current section whereby a first offender can be given pretrial diversion and for all practical purposes the offense does not appear as part of the person's criminal record.

The revisions to section 844 are designed to demonstrate the seriousness with which the federal government views drug use. In short, it sets the federal government squarely on record as opposing any notion that "social" or "recreational" use of drugs is acceptable behavior. While normally simple possession cases are prosecuted by the States, except in cases arising on federal enclaves, such a federal law would be helpful in certain cases and would set a good precedent which could be emulated by the States and municipalities.

TITLE III

CONTINUING DRUG ENTERPRISE PENALTY ACT OF 1986



Sec. 1. This title may be cited as the Continuing Drug Enterprise Penalty Act of 1986.

Sec. 2. Subsection 408(a) of the Controlled Substances Act (21 U.S.C.848(a) is amended as follows:

(a) by striking out the phrase "to a fine of not more than \$100,000," and inserting in lieu thereof "to a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual,"; and

(b) by striking out the phrase "to a fine of not more than \$200,000," and inserting in lieu thereof "to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of title 18, United States Code, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual".

Sec. 3. Section 408 of the Controlled Substances Act (21 U.S.C. 848) is further amended--

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

(b) by inserting the following new subsection after subsection (a):

"(b) Any person who engages in a continuing criminal enterprise shall be imprisoned for life or sentenced to death, and fined in accordance with subsection (a), if--

"(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of

several such principal administrators, organizers, or leaders; and

"(2) (A) the violation referred to in subsection (c) (1) involved at least 300 times the quantity of a substance described in section 401(b) (1) (A) of this Act, or

"(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received \$10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 401(b) (1) (A) of this Act."; and

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

"(e) A person who has been found guilty of an offense under this section shall be sentenced to death if, after consideration of the factors set forth in subsection (f) in the course of a hearing held pursuant to subsection (g), it is determined that imposition of a sentence of death is justified.

"(f) Factors to be considered in determining whether a sentence of death is justified

"(1) Mitigating Factors. -- In determining whether a sentence of death is justified, the jury, or if there is no jury, the court, shall consider each of the

following mitigating factors and determine which, if any, exist:

"(A) the defendant was less than eighteen years of age at the time of the offense;

"(B) the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense to prosecution; and

"(C) the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution.

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

"(2) Aggravating Factors. -- In determining whether a sentence of death is justified, the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any exist:

"(A) the defendant has previously been convicted of an offense under this subchapter, or of an offense under State law or under the law of a foreign country or political subdivision thereof, involving the manufacture, distribution, sale, or possession with intent to sell of a controlled substance as defined in this



subchapter, for which a sentence of death or life imprisonment was authorized;

"(B) in the commission of the offense the defendant knowingly caused the death of, or created a grave risk of death to, another person;

"(C) in the commission of the offense a person or persons with respect to whom the defendant occupies a position of organizer, a supervisory position, or any other position of management knowingly caused the death of another person and the defendant was aware of a substantial risk that such a death might occur;

"(D) the defendant, or any person with respect to whom the defendant occupies a position of organizer, a supervisory position, or any other position of management, engaged in any conduct and thereby caused bodily injury to another person or damaged the tangible property of another person with intent to retaliate against any person for providing information concerning the offense at any official proceeding or to a law enforcement officer."

"(E) the defendant knew or intended that the offense would result in the unlawful obtaining of controlled substances by persons under 21 years of age; and

"(F) in the course of the offense the defendant employed or made use of one or more persons under 21 years of age;

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

"(g) Special hearing to determine whether a sentence of death is justified

"(1) Notice by the Government. -- If, in a case involving an offense described in this section, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this section, he shall, a reasonable time before the trial, or before acceptance by the court of a plea of guilty, or at such time thereafter as the court may permit upon a showing of good cause, sign and file with the court, and serve on the defendant, a notice--

"(A) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this section; and

"(B) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The court may permit the attorney for the government to amend the notice upon a showing of good cause.

"(2) Hearing Before a Court or Jury. -- If the attorney for the government has filed a notice as required under paragraph (1) and the defendant is found guilty of an offense described in this section, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. Prior to such a hearing, no presentence report shall be prepared by the United States Probation Service, notwithstanding the provisions of Rule 32(e) of the Federal Rules of Criminal Procedure. The hearing shall be conducted--

"(A) before the jury that determined the defendant's guilty;

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

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

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

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

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



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

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

"(3) Proof of Mitigating and Aggravating Factors. -- At the hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under subsection (f). Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial. Any other information relevant to a mitigating or aggravating factor may be presented by either the attorney for the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The attorney for the government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence

of death. The attorney for the government shall open the argument. The defendant shall be permitted to reply. The attorney for the government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

"(4) Return of Special Findings. -- The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return a special finding as to each mitigating and aggravating factor, concerning which information is presented at the hearing, required to be considered under subsection (f). The jury must find the existence of a mitigating or aggravating factor by a unanimous vote.

"(5) Return of a Finding Concerning a Sentence of Death. -- If, in the case of an offense described in this section, an aggravating factor required to be considered under subsection (f) is found to exist, the jury, or if there is no jury, the court, shall then consider whether all the aggravating factors found to exist sufficiently outweigh all the mitigating factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factors alone are sufficient



to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall return a finding as to whether a sentence of death is justified.

"(6) Special Precaution to Assure Against Discrimination. -- In a hearing held before a jury, the court, prior to the return of a finding under paragraph (5), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, national origin, creed, or sex of the defendant. The jury, upon return of a finding under paragraph (5), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, national origin, creed, or sex of the defendant was not involved in reaching the juror's individual decision.

"(h) Imposition of a sentence of death

"Upon a finding under paragraph (5) of subsection (g) that a sentence of death is justified, the court shall sentence the defendant to death. Upon a finding under paragraph (5) of subsection (g) that a sentence of death is not justified, or under paragraph (4) of subsection (g) that no aggravating factor required to be found exists, the court shall impose a sentence of life imprisonment or life imprisonment without parole.

"(i) Review of a sentence of death



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

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

"(A) the evidence submitted during the trial;

"(B) the information submitted during the sentence hearing;

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

"(D) the special findings returned under paragraph (4) of subsection (g).

"(3) Decision and Disposition. --

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

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

"(ii) the information supports the special finding of the existence of an aggravating factor required to be considered under subsection (f)

it shall affirm the sentence.

"(B) In any other case, the court of appeals shall remand the case for consideration under subsection (g).

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

"(j) Implementation of a sentence of death

"A person who has been sentenced to death pursuant to the provisions of this section shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgement of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of such State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does not provide, and the sentence shall be implemented in the latter State in the manner prescribed by such law. A sentence of death shall not be carried out upon a woman while she is pregnant.

"(k) Use of State Facilities

"A United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a

person such an official employs for the purpose, and shall pay the costs thereof in an amount approved by the Attorney General."

Analysis

This title amends the Continuing Criminal Enterprise Statute (21 U.S.C. 848) to increase fines and to provide for the death penalty for persons found to be a major leader of a very large scale continuing drug enterprise.

Section two amends the fine provisions of the Continuing Criminal Enterprise statute to raise maximum authorized fines. The present law sets the fine levels at \$100,000 for a first conviction under the statute and \$200,000 for a second conviction. Of course the Criminal Fine Enforcement Act of 1984, which generally places fines at the lower of \$250,000 or double the gain obtained by the defendant in committing the offense, has effectively raised the maximum authorized fines.

Nevertheless, even the increased maximums authorized under that Act are not adequate. The provision would raise the maximum authorized fine to the greater of that authorized in the Criminal Fine Enforcement Act or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, in the case of a first conviction. In the case of a second conviction under the CCE statute the maximum authorized fine would be the greater of twice that authorized by the Criminal Fine Enforcement Act or \$4,000,000 for an individual or \$10,000,000 for an organization.



The section's reference to twice the amount authorized under the Criminal Fine Enforcement Act in title 18 for a second conviction ensures that a person convicted of a second offense could face a fine of up to four times the gain of the crime. This could result in an even higher fine than the \$4,000,000 (or \$10,000,000 for a defendant who is other than an individual) fine authorized by the CCE statute. The amendment thus blends together the salutary concept in the CCE statute that fines should be doubled for a second conviction and the equally salutary concept in the Criminal Fine Enforcement Act that authorized fines should be increased even beyond a dollar amount set out in the statute based on the gain derived by the defendant in committing the offense.

Section three of the bill provides for the death penalty as a possible punishment for the principal administrators, organizers or leaders of very large continuing criminal enterprises. The government may seek the death penalty in cases where the enterprise, as defined in section 848, received at least \$10 million in illegal drug money in a twelve-month period or where the violation involved trafficking in 300 times the quantity of controlled substances referred to in 21 U.S.C. 841(b)(1)(A) as justifying the maximum punishment. It also sets out detailed procedures which must be followed in cases in which the government seeks the death penalty. These procedures are patterned after death penalty bills that have been considered and approved by the Senate Judiciary Committee (and one of which, S. 1765 easily passed the Senate in the 98th Congress) which are

designed to reflect the holdings of the Supreme Court in cases in which it has upheld state death penalty provisions. If the government determines that the death penalty is warranted, it must, in advance of trial, give special notice of this to the defendant. Then, if the defendant is convicted, there is a post-verdict sentencing hearing at which the government must introduce evidence of aggravating factors and the defendant may introduce evidence of mitigating factors.

Aggravating factors listed in the section include such matters as that the defendant had previously been convicted of a drug felony for which a sentence of life imprisonment was authorized, that the defendant knowingly caused the death of another person in the course of the offense, or that the defendant knew or intended that the commission of the offense would result in the unlawful obtaining of controlled substances by persons under 21. Evidence of other aggravating factors may also be considered. Mitigating factors listed in the section are that the defendant was less than eighteen years old, under unusual duress, or had a significantly diminished mental capacity. The fact finder may consider whether other mitigating factors exist.

Following the introduction of evidence, the fact finder (usually the jury that determined guilt) must first determine whether any aggravating factor has been established beyond a reasonable doubt. If not, the death penalty may not be imposed. If, however, the fact finder finds an aggravating factor, it must consider whether any mitigating factor was established by a



preponderance of the evidence. Then, the jury must determine whether any aggravating factors found outweigh any mitigating factors found, or if no mitigating factors are found, whether any aggravating factor or factors alone justify the imposition of the death penalty. If the jury so finds, the defendant shall be sentenced to death.

In Coker v. Georgia, 433 U.S. 584 (1977), the Supreme Court struck down the death penalty for rape of an adult female. However, it did not hold that the death penalty cannot be imposed for any crime which does not result in death. For example, treason and espionage have long carried a death penalty, and both this Administration and the Senate Judiciary Committee have concluded that nothing in the Supreme Court's recent decisions would bar the imposition of the death penalty for these heinous crimes. See Sen. Rpt. No. 99-282, 99th Congress, 2nd Sess., pp. 9-10. The enormous and pervasive threat to the fabric and security of the United States posed by large scale drug trafficking is in our judgment as great or greater than that from espionage and treason. Consequently, we believe the death penalty provision for the leaders of the largest drug trafficking organizations operating in this country is justified and would likely be held constitutional.