Continued from previous folder

court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under rule 15 of the Federal Rules of Criminal Procedure.".

SEC. 604. Section 304 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 824) is amended by adding at the end of subsection (f) the following sentence: "All right, title, and interest in such controlled substances shall vest in the United States upon a revocation order becoming final.".

SEC. 605. Section 408 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 848) is amended—

(a) in subsection (a)—

(1) by striking out "(1)";

(2) by striking our "paragraph (2)" each time it appears, and inserting in lieu thereof "section 413 of this title"; and

(3) by striking out paragraph (2); and

(b) by striking out subsection (d).

SEC. 606. Section 511 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881) is amended—

(a) in subsection (a) by inserting at the end thereof the following new subsection:

"(7) All real property, including any appurtenances to or improvements on such property, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.";

(b) in subsection (b)—

(1) by inserting "civil or criminal" after "Any property subject to"; and

(2) by striking out in paragraph (4) "has been used or is intended to be used in violation of" and inserting in lieu thereof "is subject to civil or criminal forfeiture under";

(c) in subsection (c)—

(1) by inserting in the second sentence "any of" after "Whenever property is seized under"; and

(2) by inserting in paragraph (3) ", if practicable," after "remove it";

(d) in subsection (d) by inserting "any of" after "alleged to have been incurred, under";

(e) in subsection (e)—

(1) by inserting "civilly or criminally" in the first sentence after "Whenever property is"; and

(2) by striking out in paragraph (3) "remove it for disposition" and inserting in lieu thereof "and dispose of it"; and

(f) by inserting at the end thereof the following new subsections:

"(h) All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

"(i) Pending, or upon, the filing of an indictment or information charging a violation of this title or title III for which criminal forfeiture may be ordered under section 413 of this title, and alleging that property would, in the event of conviction, be subject to criminal forfeiture, any civil forfeiture proceeding concerning such property commenced under this section shall, for good cause shown, be stayed pending disposition of the criminal case.".

SEC. 607. Part A of title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is amended by adding at the end thereof the following new section:

"CRIMINAL FORFEITURES

"SEC. 1017. Section 413 of title II, relating to criminal forfeitures, shall apply in every respect to a violation of this title punishable by imprisonment for more than one year.".

SEC. 608. The table of contents of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is amended—

(a) by adding immediately after

"Sec. 412. Applicability of treaties and other international agreements."

the following new item:

"Sec. 413. Criminal forfeitures."; and

(b) by adding immediately after

"Sec. 1016. Authority of Secretary of the Treasury."

the following new item:

"Sec. 1017. Criminal forfeitures.".

PART C

SEC. 609. (a) Without regard to the provisions of section 3617 of the Revised Statutes (31 U.S.C. 484), the Drug Enforcement Administration is authorized to set aside 25 per centum of the net amount of money realized from the forfeiture of assets seized by it under any provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.) to be available for obligation and expenditure only for the purpose of paying awards of compensation with respect to such forfeitures as described in subsection (b). The amounts credited under this section shall be made available during the fiscal year in which moneys are realized, except for those proceeds realized from seizures occurring prior to September 30, 1984, which may remain available for the purpose of making awards related to forfeitures arising from such seizures. The remaining 75 per centum of the net amount of money realized from such forfeitures shall be paid to the miscellaneous receipts of the Treasury and any unobligated balances remaining at the end of each fiscal year of the 25 per centum set aside shall be paid into the miscellaneous receipts of the Treasury.

(b) From the amounts set aside under subsection (a), the Drug Enforcement Administration is authorized to pay, totally within its discretion, awards to any entity not an agency or instrumentality of the United States, or to any person not an officer or employee of the United States or of any State or local government, that provides information or assistance which leads to a forfeiture referred to in subsection (a). Such awards can be made in any amount up to 25 per centum of the net amount realized from the forfeiture, or $50,000, whichever is lesser, in any case, except that no award shall be made based on the value of the contraband.

(c) The authority provided by this section shall expire on September 30, 1984: *And provided further*, That the Attorney General shall conduct detailed financial audits, semiannually, of the expenditure of funds from this account.

TITLE VII—OFFENDERS WITH MENTAL DISEASE OR DEFECT

SEC. 701. (a) Chapter 313 of title 18, United States Code, is amended to read as follows:

"CHAPTER 313—OFFENDERS WITH MENTAL DISEASE OR DEFECT

"Sec.

"4241. Determination of Mental Competency to Stand Trial.

"4242. Determination of the Existence of Insanity at the Time of the Offense.

"4243. Hospitalization of a Person Acquitted by Reason of Insanity.

"4244. Hospitalization of a Convicted Person Suffering from Mental Disease or Defect.

"4245. Hospitalization of an Imprisoned Person Suffering from Mental Disease or Defect.

"4246. Hospitalization of a Person Due for Release but Suffering from Mental Disease or Defect.

"4247. General Provisions for Chapter.

"§ 4241. Determination of Mental Competency to Stant Trial

"(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, 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 in his defense.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—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 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, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

"(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

"(2) for an additional reasonable period of time until—

"(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

"(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

"(e) DISCHARGE.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall

send a copy of the certificate to the defendant's counsel and to the attorney for the government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

"(f) ADMISSIBILITY OF FINDING OF COMPETENCY.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

"§ 4242. Determination of the Existence of Insanity at the Time of the Offense

"(a) INSANITY DEFENSE.—It is a defense to a prosecution under any Federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense.

"(b) MOTION FOR PRETRIAL PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION.—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense set forth in subsection (a), the court, upon motion of the attorney for the government, may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) SPECIAL VERDICT.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find, the defendant—

"(1) guilty;

"(2) not guilty; or

"(3) not guilty only by reason of insanity.

"§ 4243. Hospitalization of a Person Acquitted by Reason of Insanity

"(a) DETERMINATION OF PRESENT MENTAL CONDITION OF ACQUITTED PERSON.—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (d).

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.—A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the acquitted 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, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility 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, psychiatric, or psychological 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 shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

"(e) DISCHARGE.—When the director of the facility in which an acquitted person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

"(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

"(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

"(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

"(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

"(f) REVOCATION OF CONDITIONAL DISCHARGE.—The director of a medical facility responsible for administering a regimen imposed on an acquitted person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, 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, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

"§ 4244. Hospitalization of a Convicted Person Suffering From Mental Disease or Defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF CONVICTED DEFENDANT.—A defendant found guilty of an offense, or the attorney for the government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be 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 shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be 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.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c). In addition to the information required to be included in the psychiatric or psychological report pursuant to the provisions of section 4247(c), if the report includes an opinion by the examiners that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody for care or treatment in a suitable facility, the report shall also include an opinion by the examiner concerning the sentencing alternatives available under chapter 227 of this title that could best accord the defendant the kind of treatment he does need.

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—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 that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum

term authorized by section 3581(b) for the offense committed.

"(e) DISCHARGE.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under chapter 227.

"§ 4245. Hospitalization of an Imprisoned Person Suffering From Mental Disease or Defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF IMPRISONED DEFENDANT.—If a defendant serving a sentence of imprisonment 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 defendant is imprisoned, may file a motion with the court for the district in which the facility is located for a hearing on the present mental condition of the defendant. The court shall grant the motion if there is reasonable cause to believe that the defendant may presently be 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. A motion filed under this subsection shall stay the release of the defendant pending completion of procedures contained in this section.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—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 for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of his sentence of imprisonment, whichever occurs earlier.

"(e) DISCHARGE.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the term of imprisonment imposed upon the defendant has not expired, the court shall order that the defendant be reimprisoned until the date of his release pursuant to section 3624.

"§ 4246. Hospitalization of a Person Due for Release but Suffering From Mental Disease or Defect

"(a) INSTITUTION OF PROCEEDING.—If the director of a facility in which a person is hospitalized certifies that a person 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 criminal charges have been dismissed solely for reasons related to the mental condition of 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, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing 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. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.—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 property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, 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, psychiatric, or psychological 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 shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

"(e) DISCHARGE.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines 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 property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the government. The court shall order the discharge of the person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

"(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

"(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

"(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

"(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

"(f) REVOCATION OF CONDITIONAL DISCHARGE.—The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, 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, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

"(g) RELEASE TO STATE OF CERTAIN OTHER PERSONS.—If the director of a facility in which a person is hospitalized pursuant to this subchapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of 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, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attor-

ney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than 10 days after certification by the director of the facility.

"§ 4247. General Provisions for Chapter

"(a) DEFINITIONS.—As used in this chapter—

"(1) 'rehabilitation program' includes—

"(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

"(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

"(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and

"(D) organized physical sports and recreation programs; and

"(2) 'suitable facility' means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION.—A psychiatric or psychological examination ordered pursuant to this chapter or section 3552(c) shall be conducted by a licensed or certified psychiatrist or clinical psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be—

"(1) designated by the court if the examination is ordered under section 3552(c), 4241, 4242, 4243, or 4244; or

"(2) designated by the court, and upon the request of the defendant, an additional examiner may be selected by the defendant, if the examination is ordered under section 4245 or 4246.

For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The Director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

"(c) PSYCHIATRIC OR PSYCHOLOGICAL REPORTS.—A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the government, and shall include—

"(1) the person's history and present symptoms;

"(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

"(3) the examiner's findings; and

"(4) the examiner's opinions as to diagnosis, prognosis, and—

"(A) if the examination is ordered under section 4241, 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;

"(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

"(C) if the examination is ordered under section 4243 or 4246, 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;

"(D) if the examination is ordered under section 4244 or 4245, 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; or

"(E) if the examination is ordered under section 3552(c), any recommendation the examiner may have as to application to the defendant of sentencing guidelines and policy statements relating to the mental condition of the defendant and as to how that mental condition should affect the sentence.

"(d) HEARING.—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

"(e) PERIODIC REPORT AND INFORMATION REQUIREMENTS.—(1) The director of the facility in which a person is hospitalized pursuant to—

"(A) section 4241 shall prepare semiannual reports; or

"(B) sections 4243, 4344, 4345, or 4246 shall prepare annual reports; concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct.

"(2) The director of the facility in which a person is hospitalized pursuant to sections 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

"(f) VIDEOTAPE RECORD.—Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

"(g) ADMISSIBILITY OF A DEFENDANT'S STATEMENT AT TRIAL.—A statement made by the defendant during the course of a psychiatric or psychological examination pursuant to sections 4241 or 4242 is not admissible as evidence against the accused on the issue of guilt or punishment in any criminal proceeding, unless the defendant waived his privilege against self incrimination, but is admissible on the issue whether the defendant suffers from a mental disease or defect.

"(h) HABEAS CORPUS UNIMPAIRED.—Nothing contained in sections 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of hebeas corpus the illegality of his detention.

"(i) DISCHARGE.—Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of sections 4241, 4243, 4244, 4245, or 4246, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the government.

"(j) AUTHORITY AND RESPONSIBILITY OF THE ATTORNEY GENERAL.—The Attorney General—

"(A) may contract with a State, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

"(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

"(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

"(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

"(k) This chapter does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.".

(b) The item relating to chapter 313 in the chapter analysis of Part III of title 18, United States Code, is amended to read as follows:

"313. Offenders with mental disease or defect.".

SEC. 702. Rule 12.2 of the Federal Rules of Criminal Procedure is amended—

(a) by deleting "crime" in subdivision (a) and inserting in lieu thereof "offense";

(b) by deleting "mental state" in subdivision (b) and inserting in lieu thereof "state of mind";

(c) by deleting "by a psychiatrist designated for this purpose in the order of the court" in subdivision (c) and inserting in lieu thereof "pursuant to 18 U.S.C. 4242; and

(d) by deleting "mental state" in subdivision (d) and inserting in lieu thereof "state of mind".

SEC. 703. Section 3006A of title 18, United States Code, is amended—

(a) in subsection (a), by deleting "or, (4)" and substituting "(4) whose mental condition is the subject of a hearing pursuant to chapter 313 of this title, or (5)"; and

(b) in subsection (g), by deleting "or section 4245 of title 18".

TITLE VIII—SURPLUS FEDERAL PROPERTY AMENDMENTS

SEC. 801. Section 203 of the Federal Property and Administrative Services Act of 1949 as amended (40 U.S.C. 484), is further amended by adding at the end thereof the following new subsection:

"(p)(1) Under such regulations as he may prescribe, the Administrator is authorized in his discretion to transfer or convey to the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, or any political subdivision or instrumentality thereof, surplus property determined by the Attorney General to be re-

quired for correctional facility use by the authorized transferee or grantee under an appropriate program or project for the care or rehabilitation of criminal offenders as approved by the Attorney General. Transfers or conveyance under this authority shall be made by the Administrator without monetary consideration to the United States.

"(2) The deed of conveyance of any surplus real property disposed of under the provisions of this subsection—

"(A) shall provide that all such property shall be used and maintained for the purpose for which it was conveyed in perpetuity, and that in the event the property ceases to be used or maintained for that purpose, all or any portion of the property shall, in its then existing condition, at the option of the United States, revert to the United States; and

"(B) may contain such additional terms, reservations, restrictions, and conditions as may be determined by the Administrator to be necessary to safeguard the interests of the United States.

"(3) With respect to surplus real property conveyed pursuant to this subsection, the Administrator is authorized and directed—

"(A) to determine and enforce compliance with the terms, conditions, reservations, and restrictions contained in any instrument by which such transfer was made;

"(B) to reform, correct, or amend any such instrument by the execution of a corrective reformative or amendatory instrument where necessary to correct such instrument or to conform such transfer to the requirements of applicable law; and

"(C) to (i) grant releases from any of the terms, conditions, reservations, and restrictions contained in, and (ii) convey, quitclaim, or release to the transferee or other eligible user any right or interest reserved to the United States by any instrument by which such transfer was made, if he determines that the property so transferred no longer serves the purpose for which it was transferred, or that such release, conveyance, or quitclaim deed will not prevent accomplishment of the purpose for which such property was so transferred: *Provided*, That any such release, conveyance, or quitclaim deed may be granted on, or made subject to, such terms and conditions as he or she shall deem necessary to protect or advance the interests of the United States.".

SEC. 902. THE FIRST SENTENCE OF SUBSECTION (O) OF SECTION 203 OF THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949, AS AMENDED (40 U.S.C. 484(O)), IS FURTHER AMENDED BY REVISING THE FIRST SENTENCE OF SUCH SUBSECTION TO READ AS FOLLOWS:

"(o) The Administrator with respect to personal property donated under subsection (j) of this section and with respect to personal or real property transferred or conveyanced under subsection (p) of this section, and the head of each executive agency disposing of real property under subsection (k) of this section, shall submit during the calendar quarter following the close of each fiscal year a report to the Senate (or to the Secretary of the Senate if the Senate is not in session) and to the House of Representatives (or to the Clerk of the House if the House is not in session) showing the acquisition cost of all personal property so donated and of all real property so disposed of during the preceding fiscal year.".

TITLE IX—MISCELLANEOUS CRIMINAL JUSTICE IMPROVEMENTS

PART A

SEC. 901. (a) Chapter 95 of title 18, United States Code, is amended by adding new sections 1952A and 1952B, following section 1952, as follows:

"§ 1952A. Use of interstate commerce facilities in the commission of murder-for-hire

"(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of anything of pecuniary value or for a promise to pay anything of pecuniary value, shall be fined not more than $10,000 or imprisoned for not more than five years, or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or by life imprisonment, or shall be fined not more than $50,000, or both.

"(b) As used in this section—

"(1) 'anything of pecuniary value' means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; and

"(2) 'facility of interstate commerce' includes means of transportation and communication.".

"§1952B. Violent crimes in aid of racketeering activity

"(a) Whoever, as consideration for the receipt of or as consideration for a promise or agreement to pay anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

"(1) for murder or kidnapping, by imprisonment for any term of years or for life or a fine of not more than $50,000, or both;

"(2) for maiming, by imprisonment for not more than thirty years or a fine of not more than $30,000, or both;

"(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine of not more than $20,000, or both;

"(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine of not more than $5,000, or both;

"(5) for attempting or conspiring to commit murder, by imprisonment for not more than ten years or a fine of not more than $10,000, or both; and

"(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine of not more than $3,000, or both.

"(b) As used in this section—

"(1) 'racketeering activity' has the meaning set forth in section 1961 of this title; and

"(2) 'enterprise' includes any partnership, corporation, association, or other 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.".

(b) The analysis at the beginning of the chapter is amended by adding after the item relating to section 1952 the following:

"1952A. Use of interstate commerce facilities in the commission of murder-for-hire.

"1952B. Violent crimes in aid of racketeering activity.".

PART B

SEC. 902. The Tariff Act of 1930 (19 U.S.C. 1202 et seq.) is amended as follows:

(a) Section 607 (19 U.S.C. 1607) is amended by—

(1) striking out "$10,000" in the caption and in the first place it appears in the text and inserting in lieu thereof "100,000"; and

(2) striking out the last sentence and inserting in lieu thereof the following: "For purposes of this section and section 610 of this Act, merchandise the importation of which is prohibited shall be held not to exceed $100,000 in value. For purposes of section 612 of this Act, merchandise the importation of which is prohibited shall be held not to exceed $10,000.".

(b) Section 608 (19 U.S.C. 1608) is amended by adding "or of ten percent of the appraised value of the articles so claimed, whichever is greater" after "of $250".

(c) Section 610 (19 U.S.C. 1610) is amended by striking out "$10,000" each place it appears in the caption and text and inserting in lieu thereof "$100,000".

PART C

SEC. 903. Section 844 of title 18 of the United States Code is amended as follows:

(1) In subsection (f), following the words "by means of an explosive", insert "or fire".

(2) In subsection (i), following the words "by means of an explosive" insert "or fire".

PART D

SEC. 904. Section 2510 of title 18 of the United States Code is amended—

(1) in paragraph (10), by striking out "and" at the end thereof;

(2) in paragraph (11), by striking out the period at the end thereof and inserting in lieu thereof a semicolon and "and"; and

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

"(12) 'surreptitious entry' means a physical entry upon a private place or premises to install, repair, reposition, replace, or remove any electronic, mechanical, or other device, and includes both covert entry and entry effected by means of a ruse or subterfuge.".

SEC. 905. Section 2518(1) of that title is amended—

(1) in paragraph (e), by striking out "and" at the end thereof;

(2) in paragraph (f), by striking out the period at the end thereof and inserting in lieu thereof a semicolon and "and"; and

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

"(g) a statement whether surreptitious entries are required to carry out the order.".

SEC. 906. Section 2518(4) of that title is amended—

(1) in paragraph (d), by striking out the "and" at the end thereof;

(2) in paragraph (e), by striking out the period at the end thereof and inserting in lieu thereof a semicolon and "and"; and

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

"(f) whether surreptitious entries are authorized or approved to carry out the order, and, if such entries are authorized or approved, the identity of the agency authorized to make the surreptitious entries.".

SEC. 907. Section 2518(7) of that title is amended—

(1) by amending paragraph (a) to read as follows:

"(a) an emergency situation exists that involves—

"(i) immediate danger of death or serious physical injury to any person,

"(ii) conspiratorial activities threatening the national security interest, or

"(iii) conspiratorial activities characteristic of organized crime,

that requires a wire or oral communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and"; and

(2) by inserting a comma and "and may make any surreptitious entry required to effect such interception," immediately before "if an application for an order".

SEC. 908. Section 2519(1) of that title is amended—

(1) by inserting immediately after paragraph (e) the following:

"(f) the fact that surreptitious entries to carry out the order were authorized or approved;"; and

(2) by redesignating paragraphs (f) and (g) as paragraphs (g) and (h), respectively.

SEC. 909. Section 2519(2) of that title is amended in paragraph (a) by striking out "(g)" and by inserting in lieu thereof "(h)".

PART E

SEC. 910. Section 5031 of title 18 of the United States Code is amended by striking the word "eighteenth" both places it appears and inserting in lieu thereof the word "seventeenth".

SEC. 911. Section 5032 of title 18 of the United States Code is amended—

(1) by striking out the word "or" preceding "(2)" in the first paragraph;

(2) by striking the period at the end of the first paragraph and inserting in lieu thereof ", or (3) that the offense charged is a felony and that there is a substantial federal interest in the case or the offense to warrant the exercise of federal jurisdiction."; and

(3) in the fourth paragraph, by striking "punishable by a maximum penalty of ten years imprisonment or more, life imprisonment or death," and insert in lieu thereof "that is a crime of violence or an offense described in sections 841, 952(a), 955, or 959 of title 21,"; and in the same paragraph, strike out "sixteen" and "sixteenth" and insert in lieu thereof "fourteen" and "fourteenth", respectively.

SEC. 912. Section 5038 of title 18 of the United States Code is amended by striking subsection (d) and inserting in lieu thereof the following:

"(d) Unless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture of any juvenile shall be made public by any medium of public information in connection with a juvenile delinquency proceeding.".

PART F

SEC. 913. Section 1201 of title 18 of the United States Code is amended—

(1) in subsection (a)(3), by deleting "or" at the end thereof;

(2) in subsection (a)(4), by deleting the comma at the end thereof and substituting "; or"; and

(3) by adding after subsection (a)(4) a new subsection (a)(5) to read as follows:

"(5) the person is among those officers and employees designated in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of his official duties,".

PART G

SEC. 914. Chapter 7 of title 18 of the United States Code is amended by adding a new section at the end thereof to read as follows:

"§ 115. Influencing, impeding, or retaliating against a federal official by threatening or injuring a family member

"(a) Whoever 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, United States judge, or federal law enforcement officer, with intent to impede, intimidate, interfere with, or retaliate against such 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).

"(b)(1) An assault in violation of this section shall be punished as provided in section 111 of this title;

"(2) a kidnapping or attempted kidnapping in violation of this section shall be punished as provided in section 1201 of this title;

"(3) a murder or attempted murder in violation of this section shall be punished as provided in sections 1111 and 1113 of this title;

"(4) a threat made in violation of this title shall be punished by a fine of not more than $5,000 or imprisonment for a term of not more than five years, or both, except that imprisonment for a threatened assault shall not exceed three years.

"(c) As used in this section, the term—

"(1) 'federal law enforcement officer' means 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 violation of federal criminal law;

"(2) 'immediate family member' of an individual means—

"(A) his spouse, parent, brother or sister, child, or person to whom he stands in loco parentis; or

"(B) any other person living in his household and related to him by blood or marriage;

"(3) 'United States judge' means any judicial officer of the United States, and includes a justice of the Supreme Court and a United States magistrate; and

"(4) 'United States official' means the President, President-elect, Vice President, Vice President-elect, a member of Congress, a member-elect of Congress, a member of the executive branch who is the head of a department listed in 5 U.S.C. 101, or the Director of Central Intelligence.".

PART H

SEC. 915. Section 31 of title 18 of the United States Code is amended in the definition of "motor vehicle" by striking out "or passengers and property;" and inserting in lieu thereof "passengers and property, or property or cargo;".

PART I

SEC. 916. (a) Section 207(a) of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 1056(a)) is amended by striking out "a civil penalty not exceeding $1,000" and inserting in lieu thereof "a civil penalty not exceeding $10,000".

(b) Section 209 of such Act (31 U.S.C. 1058) is amended by striking out "$1,000, or imprisonment not more than one year, or both" and inserting in lieu thereof "$50,000, or imprisonment not more than five years, or both".

(c) Section 231(a) of such Act (31 U.S.C. 1101(a)) is amended—

(1) by inserting ", or attempts to transport or cause to be transported," after "transports or causes to be transported" in paragraph (1); and

(2) by striking out "in an amount exceeding $5,000" and inserting in lieu thereof "in an amount exceeding $10,000".

"(d) Section 235 of such Act (31 U.S.C. 1105) is amended—

(1) by redesignating subsection (b) as subsection (c); and

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

"(b) A customs officer may stop and search, without a search warrant, a vehicle, vessel, aircraft, or other conveyance, envelope or other container, or person entering or departing from the United States with respect to which or whom the officer has reasonable cause to believe there is a monetary instrument being transported in violation of section 231.".

"(e)(1) Chapter 1 of such Act is amended by adding the following new section at the end thereof:

"§ 214. Rewards for Informants

"(a) The Secretary may pay a reward to an individual who provides original information which leads to a recovery of a criminal fine, civil penalty, or forfeiture, which exceeds $50,000, for a violation of this title.

"(b) The Secretary shall determine the amount of a reward under this section. The Secretary may not award more than 25 per centum of the net amount of the fine, penalty, or forfeiture collected or $250,000, whichever is less.

"(c) An officer or employee of the United States, a State, or a local government who provides information described in subsection (a) in the performance of official duties is not eligible for a reward under this section.

"(d) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.".

(2) The table of contents of such chapter is amended by adding the following new item after the item relating to section 213:

"214. Rewards for informants.".

SEC. 917. Section 1961(1) of title 18, United States Code, is amended—

(1) by striking out "or" after "(relating to embezzlement from union funds),"; and

(2) by inserting before the semicolon at the end thereof the following: ", or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act".

PART J

SEC. 918. (a) Chapter 103 of title 18 of the United States Code is amended by adding at the end thereof a new section as follows:

"§ 2118. Robbery of a Pharmacy

"(a) Whoever takes property from a pharmacy or a person registered with the Drug Enforcement Administration under section 302 of the Controlled Substances Act (21 U.S.C. 822) by force or violence, or by intimidation, shall be imprisoned for not more than ten years, or fined not more than $5,000, or both.

"(b) For purposes of this section, the term 'property' means a controlled substance, consisting of a narcotic, amphetamine, or barbiturate that is listed in Schedules I through IV established by section 202 of the Controlled Substances Act (21 U.S.C. 812).".

(b) The analysis for chapter 103 of title 18 of the United States Code is amended by adding at the end thereof the following:

"2118. Robbery of a pharmacy.".

PART K

SEC. 919. (a) Chapter 19 of title 18 of the United States Code is amended by adding at the end thereof the following new section:

"§ 373. Solicitation to Commit Crime of Violence

"(a) OFFENSE.—Whoever, with intent that another person engage in conduct constituting a federal crime of violence, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be

imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by death, shall be imprisoned for not more than twenty years.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not 'voluntary and complete' if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for the commission of the crime, because he was incompetent or irresponsible, or because he is immune from prosecution or otherwise not subject to prosecution.".

(b) Chapter 1 of title 18 of the United States Code is amended by adding at the end thereof a new section as follows:

"§ 16. Crime of Violence Defined

"Except as otherwise expressly provided, as used in this title 'crime of violence' means—

"(1) an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or

"(2) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.".

PART L

SEC. 920. Section 1111 of title 18 of the United States Code is amended by adding after the word "arson" the words "escape, murder, kidnapping, treason, espionage, sabotage,".

PART M

SEC. 921(a). Whereas the problem of drug abuse continues to worsen in most parts of the world;

Whereas the number of drug abusers has risen and abuse has spread geographically;

Whereas the number, variety, and potency of illicitly used narcotics, drugs, and pyschotropic substances have increased;

Whereas illicit production has expanded and trafficking flourishes; and

Whereas a declaration by the United Nations of an International Year Against Drug Abuse would serve as a catalyst for interest and action at all international levels involving families, communities, neighborhoods, schools, religious institutions, and public, private, and voluntary associations: Now, therefore, be it

Resolved, That it is the sense of the Congress that the President is urged to promote a declaration by the United Nations of an International Year Against Drug Abuse.

(b) The Secretary of the Senate shall transmit copies of this resolution to the President.

PART N

SEC. 922(a) Part D of the Controlled Substances Act is amended by adding after section 405 the following new section:

"DISTRIBUTION IN OR NEAR SCHOOLS

"SEC. 405A. (a) Any person who violates section 401(aX1) by distributing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary or secondary school is (except as provided in subsection (b)) punishable (1) by a term of imprisonment, or fine, or both up to twice that authorized by section 841(b) of this title and (2) at least twice any special parole term authorized by section 401(b) for a first offense involving the same controlled substance and schedule.

"(b) Any person who violates section 401(aX1) by distributing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary or secondary school after a prior conviction or convictions under subsection (a) have become final is punishable (1) by a term of imprisonment of not less than three years and not more than twenty years and (2) at least three times any special term authorized by section 401(b) for a second or subsequent offense involving the same controlled substance and schedule.

"(c) In the case of any sentence imposed under subsection (b) imposition or execution of such sentence shall not be suspended and probation shall not be granted. An individual convicted under subsection (b) shall not be eligible for parole under section 4202 of title 18 of the United States Code until the individual has served the minimum sentence required by such subsection."

(b) Section 401(b) of such Act (21 U.S.C. 841(b)) is amended by inserting "or 405A" after "405".

(c) Section 401(c) of such Act is amended by inserting "or 405A" after "405" each place it occurs.

(d) Section 405 of such Act (21 U.S.C. 845) is amended by striking out "Any" in subsections (a) and (b) and inserting in lieu thereof "Except as provided in section 405A, any".

PART O

SEC. 923. Notwithstanding any other provision of this Act, all contracts entered into pursuant to the authority granted in this Act shall be effective for any fiscal year only to such an extent or in such amounts as are provided in appropriation Acts.

VIOLENT CRIME AND DRUG ENFORCEMENT IMPROVEMENTS ACT OF 1982

TITLE I—BAIL REFORM

This title of the bill contains provisions essentially the same as S. 1554 (pending on the Senate calendar; Senate Report 97-317). It amends the Bail Reform Act of 1966 to, among other things, (1) permit danger to the community to be considered in determining whether to release a defendant pending trial, or, if release is appropriate, in determining conditions for release; (2) tighten significantly the criteria for post-conviction release pending sentencing and appeal; (3) provide procedure for revocation of release and contempt of court prosecution for committing a crime while on release; (4) provide consecutive sentences for crimes committed on pretrial release; and (5) increase the penalties for bail jumping. It also includes a presumption that a particular individual is a danger to the community if he committed a serious drug trafficking offense or used a firearm in a violent crime.

There are safeguards to ensure that due process rights of individuals are protected. A hearing before a judicial officer is required. The defendant has a right to counsel, to present information and witnesses, to be given written findings or statement of conditions, and to testify in his own behalf.

TITLE II—WITNESS-VICTIM PROTECTION

This title is substantially the same as S. 2420 introduced earlier this Congress by Senators Heinz, Laxalt, and 39 of their colleagues. It would require a presentence report to include a "victim impact statement" to advise the judge on this important factor in sentencing the defendant. It would make it a crime, punishable by imprisonment for 6 years or $25,000, or both, to hinder, harm, annoy, or injure any victim or witness who is involved in the criminal justice process. It also makes it a crime to retaliate against a witness or victim after the completion of the criminal justice process.

The Attorney General is given additional authority to relocate and protect witnesses, to reimburse witnesses for expenses, and to institute a civil action to restrain a person from intimidating a victim or witness. Finally, there is a provision that would permit a civil cause of action by a victim against the United States for personal injury or property loss caused by a dangerous person at large in the community due to the gross negligence of an employee or agent of the United States.

TITLE III—COMPREHENSIVE DRUG PENALTIES AMENDMENTS

This title is drawn from a number of bills that have already been introduced in the Senate, as well as from comments by the Department of Justice. It has at least four significant features: (1) it increases substantially the fine levels for drug trafficking; (2) it increases significantly the penalties for trafficking in large amounts of the most dangerous drugs; (3) it increases the penalties for offenses involving the most dangerous non-narcotic drugs, such as LSD, PCP, and the amphetamines, to bring them into line with the penalties for offenses involving narcotics, such as heroin and the opiates; and (4) it cures certain inconsistencies between the Control Substances Act and the Controlled Substances Import and Export Act and permits State and foreign felony drug convictions to be considered under the enhanced sentencing provisions for repeat drug offenders.

TITLE IV—PROTECTION OF FEDERAL OFFICIALS

This title is identical to S. 907 (Senate Report 97-320) as it passed the Senate. It amends sections 351 and 1751 of title 18, United States Code, to make it a Federal crime to kill, kidnap, or assault certain senior White House officials, a member of the cabinet and his next in command, and a Justice of the Supreme Court.

TITLE V—SENTENCING REFORM

This title incorporates the basic and widely-supported sentencing provisions of the criminal code bill (See Senate Report 97-307) which made fundamental changes in the sentencing system of current law.

The major features include for the first time setting forth the purposes of sentencing and changing the sentencing system to a determinate system, with no parole and limited good time credits. A seven-member sentencing commission would be responsible, subject to review by Congress, for promulgating sentencing guidelines for the courts to use in determining an appropriate sentence. The court must explain the basis for sentences outside the guidelines. The defendant may appeal a sentence more lenient, than the applicable guideline. So-called "safety net" provisions are included to provide, after service of a specified portion of the sentence, an opportunity for review and modification of a long sentence in unusual circumstances.

TITLE VI—CRIMINAL FORFEITURE

This title is substantially identical to the Administration proposal in S. 2320, designed to strengthen the current criminal forfeiture provisions relating to racketeering and drug trafficking offenses. This title would, among other things, (1) make it clear that proceeds of racketeering activity are forfeitable and defines with greater specificity other types of property currently forfeitable property, or its equivalent value, notwithstanding efforts to conceal, transfer, or remove the forfeitable property; (3) provide judicial power to issue appropriate preindictment protective orders; (4) provide for orderly consideration and disposition of third-party claims; (5) extend criminal forfeiture to all serious drug trafficking offenses by enacting provisions parallel to RICO for felony drug violations; and (6) establish a pilot program to set aside 25 percent of the funds realized through forfeiture under the drug laws for awards relating to obtaining information and assistance to facilitate forfeiture.

TITLE VII—INSANITY DEFENSE AND MENTAL COMPETENCY AMENDMENTS

This title contains the non-controversial modernized procedural provisions in subchapter B of chapter 36 of the criminal code bill (See Senate Report 97-307) impacting on mentally ill persons in the Federal criminal justice system. One feature of this part of the title closes a loop hole in current law by providing a Federal commitment procedure for a dangerous Federal defendant found not guilty by reason of insanity if no State will commit him.

One aspect of this title patterned on S 1558, but not included in the criminal code bill, would replace the current Federal insanity defense with a narrower defense applicable only to those individuals who were so mentally ill that they could not form the mental state required for the crime.

TITLE VII—SURPLUS FEDERAL PROPERTY AMENDMENTS

This title is identical to S. 1422 (Senate Report 97-322), pending on the Senate calendar. It provides authority for the Administrator of the General Services Administration to convey to State and local governments surplus Federal property determined by the Attorney General to be required for use as an authorized correctional facility. The transfer would be without reimbursement to the Federal government. The government would be able to determine conditions for the conveyance and retain a reversionary interest if it can be shown that it is in the interest of the United States to do so.

TITLE IX—MISCELLANEOUS CRIMINAL JUSTICE IMPROVEMENTS

This title is made up of a number of important, but relatively minor, amendments to improve the ability of the Federal government to deal more effectively with violent crime and drug offenses. It includes:

Murder for hire based on Travel Act jurisdiction;

Crimes of violence in aid of racketeering activity;

Expand explosives offenses to cover arson;

Administrative forfeiture procedures for property valued at less than $100,000;

Permit emergency electronic surveillance in life endangering situations;

Strengthen federal juvenile justice provisions;

Extend kidnapping jurisdiction to protect federal officials listed in 18 U.S.C. 1114 if connected with performance of official duties;

Protection of the immediate families of certain federal officials from acts of violence perpetrated to coerce action by or retaliate against such official;

Expand the offenses relating to destruction of interstate motor vehicles to include cargo carrying vehicles;

Amendments to the currency and foreign transactions reporting act to enhance the anti-drug trafficking provisions;

Robbery of a pharmacy of a controlled substance;

Make it a crime to solicit the commission of a federal crime of violence;

Expand the list of dangerous crimes applicable to felony-murder to include escape, murder, kidnapping, treason, espionage, and sabotage;

Increase the penalties for distributing controlled substances in or on, or within 1,000 feet of, an elementary or secondary school;

Congressional resolution to promote United Nations International Year against Drug Abuse.

Mr. THURMOND. I also ask unanimous consent that a section-by-section analysis of the bill be printed following the text of the bill.

There being no objection, the section-by-section analysis was ordered to be printed in the RECORD, as follows:

SECTION-BY-SECTION ANALYSIS—S. 2572, THE VIOLENT CRIME AND DRUG ENFORCEMENT IMPROVEMENTS ACT

TITLE I—BAIL REFORM

I. Introduction

Title I of the bill substantially revises the Bail Reform Act of 1966 (18 U.S.C. 3146 et seq.) and is based, with only minor modifications, on S. 1554 as reported by the Judiciary Committee (S. Rept. No. 97-317, 97th Cong., 2d Sess. (1982)). The purpose of this title is to address such problems as the need to consider community safety in setting nonfinancial conditions of release, the need to expand the list of statutory release conditions, the need to permit the pretrial detention of defendants as to whom no conditions of release will assume their appearance at trial or assure the safety of the community or of other persons, the need for a more appropriate basis for deciding on post-conviction release, the need to permit temporary detention of persons who are arrested while on a form of conditional release, and the need to provide procedures for revocation of release for violation of a condition of release.

Clearly, the most fundamental part of this title is its provision for pretrial detention based on defendant dangerousness. The Judiciary Committee's Report on S. 1554 (S. Rept. No. 97-317, supra) contains an extensive discussion of the pretrial detention issue and should be referred to for a fuller discussion of this matter. Briefly, in determining that federal bail laws must be amended to give the courts the authority to deny release to the minority of defendants who are so dangerous that no form of conditional release would be sufficient to reasonably assure the safety of the community or other persons, the Committee reached the following conclusions. First, as a general matter, considerations of defendant dangerousness should be placed on an equal footing with currently permitted considerations of risk of flight. Second, the commission of crimes by those released on bail is a serious problem that can and should be addressed in federal law. Third, judges can, with an acceptable degree of accuracy, identify that minority of defendants who pose such a danger to others that no form of conditional release is appropriate. Fourth, pretrial detention based on dangerousness is not unconstitutional if appropriately limited in application and if available only in the framework of reasonable procedural safeguards. Fifth, it is likely that a substantial number of dangerous federal defendants are now detained pending trial through the use of high money bond, and this practice, to the extent that it exists, may be effectively replaced by a carefully drawn pretrial detention statute that would not only permit the courts to address the issue of defendant dangerousness squarely and honestly, but would also be fairer to defendants than the use of money bond to achieve detention of particularly dangerous defendants.

While the pretrial detention provision and certain other aspects of this title represent a departure from the Bail Reform Act of 1966, many of the improvements worked by that Act have been retained.

II. Section-by-section analysis

Set out below is a brief section-by-section analysis of title I. The section-by-section analysis in the Judiciary Committee's report on S. 1554 should be consulted for a more in-depth description of these provisions.

Section 101

Section 101 provides that this title may be cited as the "Bail Reform Act of 1982."

Section 102

Section 102 repeals current sections 3141 through 3151 of title 18, United States Code, and inserts in their place new sections 3141 through 3150. Each of these new sections is analyzed below:

Section 3141. Release and Detention Authority Generally

This section, like current 18 U.S.C. 3141, specifies which judicial officers have the authority to order the release or detention of persons pending trial (subsection (a)) or pending sentence or appeal (subsection (b)). The authority set out in current law has, with only two minor modifications, been carried forward.

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 adopted the concept that in non-capital cases a person is to be ordered released under the minimum conditions reasonably required to assure his presence at trial. Danger to the community and the protection of society are not to be considered in making release decisions under current law.

Considerable criticism has been leveled at the Bail Reform Act for its failure to recognize the problem of crimes committed by those on pretrial release. (S. Rept. No. 97-317, supra, at 36-37.) The constraints of the Bail Reform Act prevent the courts from imposing conditions of release geared toward assuring community safety, or from denying release to those defendants who pose an especially severe risk to others. It is intolerable that the law denies judges the tools to make honest and appropriate decisions regarding the release of such defendants. To address this problem, section 3142 departs from current law in two significant ways. First, it permits an assessment of a defendant's dangerousness in setting any conditions of release, a concept that has been widely supported. (See S. Rept. No. 97-317, supra, at 37.) Second, as noted above, the courts are given the authority, in limited circumstances, to deny release to defendants as to whom even the most stringent form of conditional release would be insufficient to reasonably assure community safety. (The need for pretrail detention is discussed at length in the report on S. 1554, S. Rept. No. 97-314, supra; see especially pp. 38-42.) 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 discussed in detail below:

Subsection (a) provides that when a person charged with an offense is brought before a judicial officer, the judicial officer is to pursue one of four alternative courses of action set out in subsections (b) through (e).

Subsection (b) requires the judicial officer to release the person on his personal recognizance or upon execution of an unsecured appearance bond unless he determines that such release (1) will not reasonably assure the appearance of the person or (2) will endanger the safety of any other person or the community. As in current law, this is the favored form of release. However, unlike current law, this provision permits a consideration of defendant dangerousness. If released pursuant to this provision, the defendant is subject to the mandatory condition that he not commit another offense while on release. Those released pursuant to the conditions enumerated in subsection (c) are subject to the same mandatory condition.

Subsection (c) provides that if the judicial officer determines that release on personal recognizance or on an unsecured appearance bond will not give the necessary assurances, he is to release the person pursuant to the least restrictive condition or combination of conditions that will give the required assurances concerning appearance and community safety. Except for financial conditions of release, which may be imposed only to assure the defendant's appearance, any of the discretionary conditions of release set out in subsection (c)(2) may be imposed to assure either appearance or community safety. These discretionary conditions carry forward those now listed in 18 U.S.C. 3146, and incorporate nine more.

The final sentence of section 3142(c) retains the current authority set forth in 18 U.S.C. 3146(e) for the court to amend the release order at any time.

Subsection (d) permits the judge to detain a defendant for a period of up to ten days if the person was arrested while already on a form of conditional release, such as bail, probation, or parole. The purpose of this provision is to allow the government time to notify the original releasing authorities so that they may take whatever action may be appropriate in light of the defendant's arrest. This provision is based largely on a similar provision in the D.C. Code. (See S. Rept. No. 97-317, supra, at 47-48, for further discussion of this provision.)

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 is contained in subsection (e), which provides that the judicial officer is to order the person detained if, after a hearing pursuant to subsection (f), he determines 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 or who threaten witnesses or jurors, but also creates new authority to detain persons who pose especially serious dangers to community safety.

Generally, subsection (e) does not specify the kinds of information that will support the findings necessary to deny release. However, it does specify two sets of circumstances which, if established, create a rebuttable presumption that no form of conditional release will be adequate. The first is where the defendant has a history of having committed a serious offense while on release. The second is where the defendant is charged (and an appropriate probable cause determination is made) with either one of the most serious drug trafficking offenses or the use of a firearm in the commission of a felony (18 U.S.C. 924(c)). Further discussion of these rebuttable presumptions is set out in S. Rept. No. 97-317, supra, at 49-50.

Subsection (f) describes, in paragraphs (1) through (6), the circumstances under which a detention hearing may be held. Under paragraphs (1) through (3), a detention hearing may be held if the defendant is charged with (1) a crime of violence; (2) an offense punishable by death or life imprisonment; or (3) a major drug trafficking offense. These offenses are essentially the same categories of offense for which a pretrial detention hearing may be held under the D.C. Code.

Subsections (f)(4), (f)(5), and (f)(6) describe the other cases in which a pretrial detention hearing may be held. The first two types of cases, those involving either a serious risk that the defendant will flee or that he will obstruct justice or threaten or injure witnesses or jurors, reflect the scope of current case law authority permitting denial of release. The third type of case is that in which a defendant charged with a serious offense has a substantial history of committing dangerous offenses.

It should be noted that S. 1554, as reported, required a pretrial detention hearing in the circumstances described in subsections (f)(1), (f)(2), and (f)(3). The advisability of this requirement, even when the government and court agreed that detention was unnecessary, which might result in the unnecessary expenditure of strained judicial and prosecutive resources, has been questioned, and thus is deleted in this title.

The procedural requirements for the pretrial detention hearing are set forth in section 3142(f) and track those of the analogous provision of the D.C. Code. For a further discussion of this and other aspects of subsection (f), see S. Rept. No. 97-317, supra, at 50-53.

Subsection (g) enumerates the factors that are to be considered by the court in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of other persons and the community. Most of these factors are drawn from current law. Subsection (g) also contains a new provision making clear the authority of the courts to conduct a hearing into the source of property used to post bond. Experience has shown that where money bond is financed through the proceeds of crime it is generally ineffective in assuring the defendant's appearance. This provision makes clear the authority of the courts to inquire into the source of property used to post bond (now called Nebbia hearings) and to decline to accept the bond if they are not satisfied as to its source.

For a further discussion of subsection (g) see S. Rept. No. 97-317, supra, pp. 53-55.

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. He is also required to advise the person of the penalties for a violation of a condition of release. A similar provision exists in current law. See 18 U.S.C. 3146(c).

Subsection (i) requires that an order of detention include written findings of fact and a written statement of the reasons for the detention. The court's order must also direct that the person be confined in a facility separate from convicted offenders, if practicable, and permit the person a reasonable opportunity for private consultation with counsel while confined.

Section 3143. Release or Detention of a Defendant Pending Sentence or Appeal

This section makes several revisions in that portion of current 18 U.S.C. 3148 which concerns post-conviction release. The basic distinction between the existing provision and section 3143 is one of presumption. Under current 18 U.S.C. 3148, the judicial officer is instructed to treat a person who has already been convicted according to the release standards of 18 U.S.C. 3146 that apply to a person who has not been convicted, unless he has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.

The current presumption favoring post-conviction release should be eliminated. Once guilt of a crime has been established, there is no reason to favor release pending imposition of sentence or appeal. The conviction, by which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law. Also, 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 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) covers those awaiting the execution of sentence as well as its imposition.

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. Under the current 18 U.S.C. 3148, release can be denied if it appears that the appeal is frivolous or taken for delay. Subsection (b) is based on the release pending appeal provision of the D.C. Code (section 23-1325).

Subsection (c) concerns release pending appeal by the government from an order of dismissal of an indictment or information or suppression of evidence pursuant to 18 U.S.C. 3731. As both of these kinds of appeals contemplate a situation in which the defendant has not been convicted, the defendant is to be treated under section 3142, the general provision governing release or detention pending trial. Subsection (c) is a new provision derived from 18 U.S.C. 3731.

For further discussion of this provision see S. Rept. No. 97-317, *supra*, at 56-57.

Section 3144. Release or Detention of a Material Witness

This section carries forward, with two changes, current 18 U.S.C. 3149, which concerns the release of a material witness.

The first change in current law is that 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. A witness could not be detained for inability to comply with a condition of release if his testimony could be adequately secured by deposition and if detention is not required to prevent a failure of justice. 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 officer.

The other change 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 also 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.

For further discussion of this provision see S. Rept. No. 97-317, *supra*, at 58.

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).

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.

Although based in part on current 18 U.S.C. 3147, section 3145 makes two substantive changes in present law. First, section 3145 permits review of all release and detention orders. Second, it permits the government to appeal release decisions. For further discussion of this provision see S. Rept. No. 97-317, supra, at 59-60.

Section 3146. Penalty for Failure to Appear

Section 3146 basically continues the current law offense of bail jumping (18 U.S.C. 3150), although the maximum penalty has been increased to more nearly parallel that of the underlying offense with which the defendant was charged. This increased penalty 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. Subsection (a) provides that a person commits an offense if, after having been released pursuant to the provisions of chapter 207 of title 18 as amended by the bill: (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.

Subsection (c) provides that it is an affirmative defense that "uncontrollable circumstances prevented the defendant from appearing or surrendering, that the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement that he appear or surrender, and that the defendant appeared or surrendered as soon as such circumstances ceased to exist."

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 property he has pledged to secure his release if he has failed to appear.

Section 3147. Penalty for an Offense Committeed 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 bill and to punish those who indeed are convicted of another offense. Accordingly, this section prescribes a penalty in addition to any sentence ordered for an offense committed while on release. This additonal penalty is a term of imprisonment of at least two years and not more than ten years 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 a Release Condition

Section 3148 provides in subsection (a) for two distinct sanctions that are applicable for persons released pursuant to section 3142 who violate a condition of their release—revocation of release and an order of detention, and a prosecution for contempt of court.

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. Generally, 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, which is a violation of a mandatory condition imposed on all released persons, 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 of any other person or the community, or that no condition or combination of conditions will assure that the person will abide by reasonable conditions.

Since the establishment of probable cause to believe that the defendant has committed a serious crime while on release constitutes compelling evidence that the defendant poses a danger to the community, 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, section 3148(b) provides 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 arises 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 current 18 U.S.C. 3142. The section provides that, If a person is released on an appearnace 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.

Section 3150. Applicability to a Case Removed from a State Court.

This section specifies that the release provisions of chapter 207 of title 18, United States Code, as amended by this title, are to apply to a case removed to a federal court from a State court.

Section 103 contains two technical amendments to 18 U.S.C. 3041 and 3042; deletes section 3043 (security for peace and good behavior), a provision litle used and unnecessary in light of this title's grant of authority to consider dangerousness in release decisions; and creates new section 3062.

Section 3062 grants to a law enforcement officer who is authorized to make arrests for offenses committed in his presence the authority to arrest a person released under this Act if the officer has reasonable grounds to believe the person is violating certain release conditions in his presence. Since a violation of a release condition constitutes contempt, it is likely that officers have such authority currently. However, this provision will assure that law enforcement officers with arrest authority for offenses committed in their presence are made especially aware of the importance of arresting a person on release who is subject to one of the conditions that is aimed primarily at preventing further crimes by the defendant and assuring against harm to victims and witneses.

Section 104 amends 18 U.S.C. 3731 to permit, in accordance with new 18 U.S.C. 3146(c), the government to appeal release decisions.

Section 105 sets out a conforming amendment to 18 U.S.C. 3772.

Section 106 sets out a conforming amendment to 18 U.S.C. 4282.

Section 107 sets out a conforming amendment to 28 U.S.C. 636.

Section 108 sets out what are, for the most part, technical or conforming amendments to the Federal Rules of Criminal Procedure. The amendment to Rule 46(e)(2) adds language emphasizing that a surety's surrender of a bail jumper into custody may be an appropriate basis for setting aside forfeiture of all or part of the bond. New Rule 46(h) makes it clear that, when authorized by statute or regulation, minor charges may be disposed of by ordering the forfeiture of collateral. This procedure is currently used to dispose of minor offenses, such as traffic violations, and permits those charged with such offenses to forego appearing at an official proceeding if they so wish. See Rule 4(a) of the Rules of Procedure for the trial of misdemeanors before United States Magistrates.

Section 109 amends Rule 9(c) of the Federal Rules of Appellate Procedure to provide that a convicted person seeking release pending appeal is to bear the burden of proof both with respect to the issues of his appearance and considerations of community safety and with respect to the merit of his appeal.

TITLE II—WITNESS VICTIM PROTECTION

1. Introduction

Title II of the bill is substantially the same as S. 2420, introduced earlier this Congress by Senators Heinz and Laxalt and 39 of their colleagues. It represents a legislative response to the serious law enforcement and social problems generated by the intimidation of victims and witnesses. The purpose of this title is to enhance the role of victims and witnesses in our criminal justice system. Too often, they have been the system's forgotten persons.

2. Section-by-section analysis of title II

Section 202 amends Rule 32(c)(2) of the Federal Rules of Criminal Procedure to require that presentence reports include a "Victim Impact Statement". Today, because so many cases are disposed of by plea rather than trial, the sentencing judge has no opportunity to hear from the victim concerning the crime and its consequences. Under this section, the judge would be informed of the impact of defendant's crime on the victim, and could take that consideration into account in fashioning an appropriate sentence. This procedure in currently being used in the Baltimore Federal courts with success.

Section 203 deals with the problem of victim-witness intimidation. The American Bar Association, after extensive research and hearings, drafted a model victim-witness intimidation package. This, in turn, has been re-drafted in the form of two Federal criminal statutes, similar to provisions included in the Criminal Code Reform Act. Two offenses are created: First, proposed 18 U.S.C. 1512 applies to offenses against witnesses, victims, or informants that occur before the witness testifies or the informant communicates with law enforcement officers. Second, proposed 18 U.S.C. 1513 applies to retaliation against witnesses or informants for their testimony or report to law enforcement. See, S. Rept. No. 97-307, pages 349-358.

Proposed section 3521 of title 18 concerns witness relocation and protection. Under current law, the Attorney General is only authorized to relocate and protect witnesses in narcotics and other organized crime cases. This section gives the Attorney General the discretion to order whatever degree of protection he deems necessary, regardless of the underlying offense. Often, extraordinary measures such as change of identity and relocation are not only unnecessary, but actually encourage the potential witnesses to forego testifying simply because the resulting disruption would be so great.

Proposed section 3522 permits the Attorney General to condition the provision of assistance on complete or partial reimbursement to the United States of the expenses incurred by the United States.

Proposed 18 U.S.C. 3523 is new to Federal law and would permit the Attorney General to initiate a civil proceeding to obtain a court order prohibiting intimidation or harassment of a witness or a victim. This provision allows the court to order the defendant, or any other person before the court, to maintain a prescribed distance from a specified witness or victim and not to communicate with him. Violation of the court's order could result in revocation of the defendant's pretrial release or the invocation of the contempt powers of the court. See, S. Rept. No. 97-307, pages 1265-1266.

Finally, there is a new provision, Part C of Title II, similar to a bill introduced in the last Congress by Senator Laxalt, which would provide a cause of action and, hence, a legal remedy, to those citizens who are victimized by those who are prematurely released from Federal custody through the gross negligence of government employees. Today, the government pleads sovereign immunity. This doctrine ignores a citizen's implied right to be free of the consequences of the outrageous conduct of government officials. Under this section, for example, the Parole Commission or the Bureau of Prisons, not their members in their individual capacities, would be civilly liable. It is expected that these agencies and departments will, therefore, be less inclined to release prematurely those criminals with a history of violent crime.

TITLE III—CONTROLLED SUBSTANCES PENALTIES

I. Introduction

The purpose of Title III of the bill is to provide a more rational penalty structure for the major drug trafficking offenses punishable under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.). Trafficking in illicit drugs is one of the most serious crime problems facing the country, yet the present penalties for major drug offenses are often inconsistent or inadequate. This title primarily focuses on three major problems with current drug penalties.

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 of distribution, another important factor is the amount of the drug involved. Without the inclusion of this factor, penalties for traffickers 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 reported by the Senate this year (S. Rep. No. 97-307), addressed this problem by punishing as a Class B felony (up to twenty-five 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 are a addressed by this title 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 generated, woefully 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 distribution of large amounts of marihuana (21 U.S.C. 841(b)(6)), the maximum fine that may be imposed is $25,000. This title provides more realistic fine levels that can serve as appropriate punishments for and deterrents to, these tremendously lucrative crimes.

A third problem addressed by this title 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 5 years' imprisonment and a $15,000 fine. The same penalty is applicable is 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 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 this Congress, and this concept is included in this title.

II. Section-by-section analysis

Section 301 provides that this title may be cited as the "Controlled Substances Penalties Amendments Act of 1982."

Section 302 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. Although marihuana is a Schedule I controlled substance, trafficking in amounts over 1,000 lbs. 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 U.S.C. 841(b)(4). Currently, offenses involving narcotic Schedule I and II substances (narcotic Schedule I and II controlled substances are opiates and cocaine; see 21 U.S.C. 802(16)) 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). This part of the amendment would redesignate these subparagraphs as subparagraphs (B) and (C) and create 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); (iii) 500 grams or more of PCP; or (iv) 5 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 had 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) has been amended 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 Schedule 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. 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 15 years/$125,000 fine level. Similary, offenses involving Schedule III substances and lesser amounts of marihuana, hashish, and hashish oil, governed in the amendment by section 302(1)(C), are punishable at the current level of 5 years' imprisonment, but the maximum fine has been

raised from $15,000 to $50,000. See supra. Marihuana is currently treated in the same manner as a Schedule III controlled substance when the amount involved is less than 1,000 lbs. Thus, this formula is generally consistent with current law.

Paragraph (2) amends section 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, felonu drug convictions as prior convictions for the purpose of existing enhanced sentencing provisions.

Paragraph (3) amends section 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 reflecting the redesignation of current section 841(b)(1)(B) as section 841(b)(1)(C).

Paragraph (5) deletes paragraphs (5) and (6) or 841(b). Current paragraph (5) provides special penalties for violations involving PCP. Since PCP has not been designated as a Schedule II substance, this special provision is no longer necessary. Current paragraph (6) provides for heightened penalties for trafficking in large amounts of marihuana. Since these amendments provide 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 303 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 the amendments to 21 U.S.C. 841(b) discussed above. Each of the paragraphs of this section is discussed below:

Paragraph (1) creates a new section 960(b)(1) which provides for heightened penalties for importation offenses involving large amounts of extemely of extremely dangerous drugs. This section is analogous to the new section 841(b)(1)(A) added by paragraph (1) of section 302 of the amendment.

Paragraph (2), as was done with respect to section 841(b)(1) in section 302 of the amendment, consolidates the treatment of offenses involving all Schedules I an II substances except lesser amounts of marihuana and hashish. The current 15-year level of imprisonment is retained, but the fine is elevated from $25,000 to $125,000, as was done with respect to the analogous offense under section 841(b)(1).

Paragraph (3) amends current section 960(b)(2) (redesignated as section 960(b)(3) in the amendment) 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 terms of imprisonment, and 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 involved Schedule IV and V substances.

Section 304 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.

TITLE IV—PROTECTION OF FEDERAL OFFICIALS

I. Introduction

Title IV would close a gap in the present law whereby, with few exceptions, it is not a federal offense to kill, assault, or kidnap a Cabinet officer or senior Presidential or Vice Presidential staff member such as the White House Chief of Staff or Press Secretary. Such an offense would today normally have to be prosecuted under State law with an attendant wide variation in standards of proof and sentences that could be given. In addition, this title would assert federal jurisdiction over violent crimes committed against Supreme Court Justices and the second in command to cabinet level positions. It is extremely doubtful whether Supreme Court Justices are presently afforded this protection. This title is identical to S. 907, which was favorably reported by the Committee on the Judiciary on March 10, 1982 (S. Rept. No. 97-320), and passed the Senate on May 5, 1982.

Section 401, amends section 351(a) of title 18 of the United States Code to make it a Federal crime to kill a Cabinet officer, defined as "a member of the Executive Branch of the governmemt who is the head of a department listed in 5 U.S.C. 101", the second ranking official in each such department, or a Supreme Court Justice or nominee. This protection of federal law in presently accorded by section 351 to Members of Congress and Members-of-Congress-elect.

Since present subsections (b), (c), (d), and (e) refer to the kidnapping, attempted killing or kidnapping, conspiracy to kill or kidnap, and assaults upon persons named in subsection (a), the effect of this section would be to create federal jurisdication over these offenses as well when directed at a Supreme Court Justice or nominee, a Cabinet officer, or his principal deputy. The penalties would presently extend to life imprisonment for the murder, kidnapping, attempted murder or kidnapping, or conspiracy to murder or kidnap such a person. The penalty for an assault on such a person would be fine of not more than $5,000 or imprisonment for up to one year or both, but if personal injury results the penalty for assault could extend to a $10,000 fine and imprisonment for up to ten years or both.

Subsection (F) contains a conforming amendment to 18 U.S.C. 2516, which specifies the offenses for which the Attorney General may authorize an application for a warrant to intercept oral or wire communications.

Section 402 amends section 1751 of title 18 to extend to the most senior officials in the Executive Office of the President and in the Office of the Vice President the same protection presently given to the President and Vice President with respect to murder, manslaughter, kidnaping, and an attempt or conspiracy to commit these crimes. For any of these offenses the penalty could extend to life imprisonment under current law. The officials so protected are persons employed in the Executive Office of the President or in the Office of the Vice President authorized to receive pay at the rate which applies for positions at level II of the Executive Schedule.

Subsection (b) amends subsection 1751(e), dealing with the penalty for assault. The penalty for assault on the President, President-elect, Vice President, Vice President-elect or person next in line to the Presidency, if there is no Vice President, will continue to be up to 10 years' imprisonment and a $10,000 fine. However, the penalty for assaulting one of the Presidential or Vice Presidential aides, added to section 1751(a) by this bill, would be 10 years' imprisonment and a $10,000 fine, or both, only if personal injury results. In other cases, the maximum penalty for an assault on one of the Presidential or Vice Presidential aides would be a $5,000 fine and imprisonment for 1 year, or both. This makes the penalty for assault on a Presidential aide consistent with that for an assault on a Cabinet officer or Supreme Court Justice under section 351.

Subsection (c) amends subsection (g) of section 1751, which provides that the Attorney General in his discretion is authorized to pay up to $100,000 for information and services concerning a violation of the section. Subsection (c) would preclude the application of subsection (g) of section 1751 to those individuals added by the proposed amendment to S. 907.

Subsection (g) contains a conforming amendment to 17 U.S.C. 2516.

TITLE V—SENTENCING REFORM

I. Introduction

Sentencing, the culmination of the criminal trial process, is the act by which the justice system gives formal expression to the seriousness, or lack of seriousness, with which the defendant's criminal conduct is viewed. Ideally it should express society's moral standards as applicable to the behavior of the defendant in an individual case, and as necessary to deter future criminal conduct by others.

Over the past decade, a consensus has developed among persons of different political views that the current federal sentencing system is riddled with serious shortcomings. More recently, there has also developed a substantial agreement, although not a unanimous one, as to a practical approach by which the shortcomings might be remedied. The following discussion outlines the perceived shortcomings and the new approach taken in title V of the bill, which is derived from the sentencing provisions of the Criminal Code Reform Act of this Congress. See S. Rept. No. 97-307.

II. Sentencing under Current Law and Practice

A. The Sentencing Process

Sentencing today is left to the discretion of federal judges who are trained in the law but who have no special competence in ascertaining the values of society and applying them to sentencing in individual criminal cases. In employing their discretion, the judges are left to their own devices and philosophies. Congress has provided no general statutory guidance as to the purposes to be achieved by the sentencing process, has set forth no sentencing philosophy (other than occasional hints at rehabilitation), and has given no direction concerning factors to be considered in determining an appropriate sentence. The only real legislative guidance is that provided by the maximum sentences specified in the penal statutes—and these only indicate the Congressional view of the appropriate sentence for the most serious offense under the provision. In imposing sentences, judges are not required to state any rationale, and few do.

B. Sentencing Options

While the current statutes provide sentencing alternatives of probation, fines, and imprisonment, each is encumbered.

1. Probation

Probation is treated as a suspension of the imposition or execution of a sentence rather than as a sentence itself, and partly for that reason there is little incentive to impose conditions or probation that might make it a more effective punitive or remedial sanction. It tends to be viewed as a vehicle for rehabilitation only.

2. Fines

The maximum fine levels carried by penal offenses vary inexplicably. They usually also reflect penalty levels of previous centuries, and today are much too low to be considered a realistic measure of the gravity

of most offenses. Even when fines are imposed, statutory processes for collection rely too heavily on cumbersome state procedures to assure collection.

3. Imprisonment

Imprisonment under current laws is a two-step process. First, the sentencing judge sets the outside limit of the period of time that he believes appropriate for the defendant to spend in prison. Second, the parole authorities decide what portion of the imposed term the defendant actually should serve. The practice is based upon a 19th Century rehabilitative theory that has proved to be faulty.

a. The theory: The theory underlying current imprisonment practices is that criminality is a disease to be cured through rehabilitative programs in a prison setting. The purpose of a sentence to imprisonment is to rehabilitate. At the time of sentencing, however, no one knows how long a defendant's rehabilitation will take. Therefore, a defendant should be sentenced to a considerably more lengthy term than is probably necessary in order to ensure that he will remain imprisoned long enough to be rehabilitated. Later, the parole authorities will examine the defendant's behavior in prison, and, when they find that he has become rehabilitated, will then release him before the expiration of his imposed term.

b. Problems with the theory: There are two principal problems with the theory.

First, many sentences to imprisonment are not designed to rehabilitate, but to deter, incapacitate, or punish. Sentences imposed for these purposes do not require any review of the defendant's prison behavior by parole authorities in order to set the proper length of the term. Such sentences logically should be set by the court for a definite term, and should not be subject to later variation.

Second, the theory is unsoundly predicated even for sentences designed to rehabilitate. Behavioral scientists have recently concluded that there exists no satisfactory means of inducing rehabilitation on a regular basis. More importantly, they have also concluded that no one can tell from a prisoner's behavior whether he has become rehabilitated. Consequently, the basic reason for an indeterminate sentence that may be adjusted by parole authorities—for the existence of parole boards—has disappeared.

C. Adaptation of the System to the Demise of the Theory: The federal Parole Commission today acknowledges that it cannot tell from a prisoner's behavior when he has become rehabilitated. It therefore no longer even attempts to accord its practice with the original theory. Instead, with few exceptions, it releases prisoners at the times specified by the Commission's self-developed guidelines—guidelines that are based upon factors known at the time of sentencing. Since the Commission's release determinations need no longer await an opportunity to observe the prisoner's conduct in confinement, there is no reason why the Commission cannot inform a prisoner of his proposed release date at about the time of his incarceration—and this in fact is just what the Commission now does.

The imprisonment process today, therefore, involves two branches of government—acting at approximately the same time and basing their determinations on essentially the same information—solemnly announcing quite different sentences to be served by the same defendant. The result is not just an awkward adaptation of practice to an anachronistic theory; it leaves the judges attempting to adjust their sentences so as to overcome what they preceive as inappropriatley harsh or lenient consequences of the parole process, and leaves the parole authorities regularly ignoring the actual sentences meted out by judges.

C. Review of Sentences

There is no mechanism today for securing review of sentences that appear either unusually harsh or unusually lenient.

D. Consequences of the Current System

As might be expected, numerous studies have documented considerable disparity in sentences meted out by federal judges to similarly situated defendants who have committed like offenses. Various attempts to reduce such disparity have been ineffective. The perception of this disparity tends to encourage defendants to engage in continual relitigation of the issue of their guilt. It also, in combination with the artificial process by which judges impose lengthy sentences and parole authorities grant early release a short time thereafter, serves to leave the public jaded about the efficacy of the whole criminal justice system, and to rob the system of whatever potential deterrrent effect it might otherwise be capable of producing.

III. Sentencing Under Title V

Title V of the bill completely revises current law as to the purposes of sentencing, the process by which the judge determines the appropriate sentence in a particular case, and review of sentence to assure its legality and reasonableness.

A. Legislatively Prescribed Purposes

The bill gives legislative recognition for the first time to the appropriate purposes of sentencing. The stated purposes specifically include assurance of just punishment, deterrence of criminal conduct by others, and protection of the public, and lessen the previously implied emphasis on rehabilitation. (Proposed 18 U.S.C. 3553(a)(2).)

B. The Sentencing Process

Judges are directed to sentence with the above purposes in mind, pursuant to guidelines established by a Sentencing Commission.

1. The sentencing commission

The Sentencing Commission is to be an independent agency in the judicial branch consisting of four members appointed by the President; three members designated by the President from a list submitted by the Judicial Conference; and, as an ex-officio, non-voting member, the Attorney General. The Commission is directed to draft guidelines for use by federal judges, taking into consideration all offender and offense characteristics that appear relevant to the specified purposes of sentencing. For each federal offense, the guidelines will be expected to specify a variety of appropriate sentencing ranges, depending upon different combinations of offender and offense characteristics. Development of the guidelines is subject to the public hearing process of the Administrative Procedure Act. The initial guidelines, and all subsequent modifications, are to be transmitted by the Commission to the Congress for review and possible modification. If the Congress does not act to change the Commission's proposed guidelines within the specified time period, they would go into effect without change. (Proposed chapter 58 of title 28, United States Code.)

In a few areas (involving, e.g., recidivists, organized crime offenders, first offenders) the bill provides general legislative guidance to the Commission as to the kind of sentence and degree of severity that would seem to be appropriate for inclusion in the guidelines. These provisions are intended to accord some direction to the Commission without so circumscribing its consideration of occasional countervailing factors as to prove unduly rigid. The provisions are limited to subject areas that otherwise would be considered likely candidates for legislatively directed mandatory sentences to imprisonment, or legislatively directed presumptions in favor of probation.

2. The guidelines

For each federal offense, the guidelines will specify a variety of appropriate sentencing ranges—encompassing imprisonment, fines, and probation—depending upon the particular history and characteristics of the defendant in the case and the particular circumstances under which the offense is committed. Each offense, therefore, may have a dozen or so sentencing ranges specified, only one of which will fit a given case. (Proposed 28 U.S.C. 994(a).)

3. Judicial application of the guidelines

After a sentencing hearing, a judge will determine the particular guideline range that is applicable to the offender and the offense. He will then be expected to sentence within the narrow range specified. The judge may, however, sentence above or below the specified guideline range in unusual circumstances, but must give specific reasons for such a sentence.

C. Sentencing Options

1. Probation

Probation is cast by title V as a penalty in itself, rather than as a deferred penalty. A judge is required to impose as a condition of probation in a felony case a condition that the defendant pay a fine or make restitution to the victim or that he engage in community service. The judge is required, for every crime, to impose a prohibition against the defendant's committing another crime during the probationary period. A variety of potentially useful discretionary conditions of probation (including undertaking vocational training or undergoing medical or psychiatric treatment) are set forth by the bill for the consideration of the Sentencing Commission and the judges. (Proposed subchapter B of chapter 227 of title 18.)

2. Fines

The maximum fine levels under title V are dramatically increased. The maximums specified for felonies are up to a quarter of a million dollars for an individual defendant, and up to half a million dollars for an organizational defendant, although the actual amount imposed is to be predicated upon the defendant's ability to pay as well as upon the gravity of the offense and related considerations. (Proposed subchapter C of chapter 227 of title 18.) Lien procedures, like those in the tax laws, are provided to assure an effective means of collecting imposed fines. (Proposed subchapter B of chapter 229 of title 18.)

3. Imprisonment

The bill makes a major change in sentences to imprisonment. It moves to a determinate system abolishing early release on parole and providing for the first time that the sentence announced by the sentencing judge will be for almost all cases the sentence actually served by the defendant (except for a potential 10 percent credit for "good time"). Such sentences will not need to involve the artificially lengthy terms that are imposed today in the expectation that they will be shortened later by parole authorities. Although early release on parole is abolished, in a case in which a judge believes that a defendant should be supervised for a period after the expiration of his term of imprisonment, he may order a term of post-release supervision. (Proposed subchapter D of chapter 227 of title 18.)

Terms of imprisonment ordinarily will not be subject to later adjustment. However, an exception is made in the case of an unusually long term of imprisonment. A defendant serving a term of imprisonment longer than five years will be entitled after five years to petition the sentencing judge for reexamination of the sentence, and the judge will be empowered to reduce the sentence upon a finding of the existence of extraordinary and compelling reasons and a finding of compatibility of such a reduction with Sentencing Commission standards. (Proposed 18 U.S.C. 3582(c).) A defendant sentenced to an unusually long sentence that is above the applicable guideline will be able to obtain a second review, for which the same standards will apply, after he has served the maximum time specified in the applicable guideline.

4. Collateral sentencing orders

In addition to the penalties traditionally applicable, a court is empowered by the bill to order a convicted defendant found guilty of an offense causing bodily injury, or property damage or loss, to make direct restitution to the victim of the offense, even if a term of imprisonment is also imposed. (Proposed 18 U.S.C. 3556.) This is not possible under current law. A court is further empowered to order a defendant convicted of fraud (a situation in which an appropriate amount of restitution might be difficult ot ascertain in an ordinary sentencing hearing) to give notice of the conviction to the victims of the offense (who may not be known to anyone other than the defendant) in order to facilitate their bringing of whatever private recovery actions might prove to be appropriate. (Proposed 18 U.S.C. 3555.)

D. Review process

The bill contains an appellate process to review sentence propriety in questionable cases. By incorporating the appeal procedures into the general structure of the guideline sentencing system, the bill assures that the extremes of sentencing that most deserve review may be called to the attention of an appellate court, without overburdening the court with a flood of challenges to sentences well within the bounds of what would generally be considered reasonable under all of the circumstances. The defendant is permittted to appeal a term of imprisonment, a restrictive condition of probation, or a fine, that falls above the range specified in the applicable guideline, and to appeal a restitution order or a notice order. Recognizing that sentence disparity reaches in two directions, the bill also permits the government, on behalf of the public, to seek review of a sentence that falls below the applicable guideline range in a case in which the Attorney General approves the filing of such an appeal. In both situations, the question on appeal is whether the sentence imposed is, under the circumstances, "clearly unreasonable." (Proposed 18 U.S.C. 3742.)

IV. Section-by-section analysis of title V

Section 501 of the bill specifies that title V may be cited as the "Sentencing Reform Act of 1982".

Section 502(a)(1) redesignates a number of sentencing provisions in current law with new section numbers in order to preserve them.

Section 502(a)(2) repeals current chapters 227, 229, and 231 of title 18, United States Code, and replaces them with totally new sentencing provisions. New chapter 227 of title 18 describes in some detail the kinds of sentences available, and new chapter 229 of title 18 describes the means of implementing those sentences.

Chapter 227—Sentences

Subchapter A (General provisions) of proposed chapter 227 of title 18

Subchapter A 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 pre-sentence 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 refer to other provisions of title 18 relating to appellate review and implementation of sentences. Section 3559 classifies all federal offenses according to the grading system set forth in section 3581.

Section 3551, Authorized Sentences, outlines the authorized sentences for defendants found guilty of federal offenses, other than offenses described in an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice. It requires that each federal offender be sentenced in accord with the provisions of chapter 227 of title 18 in order to achieve the general purposes of sentencing set out in section 3553(a)(2). 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 these sentences. It further states that a fine may be imposed in addition to any other sentence, as may any of the other sanctions authorized by section 3554, 3555, and 3556. Subsection (c) requires that an organization that is convicted of a federal offense be sentenced to a term of probation or to pay a fine, or both. At least one of these 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.

Section 3552 Presentence Reports, 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. Subsection (b) of section 3552 carries forward the provisions 18 U.S.C. 4205(c), which provides that, if the court desires more information concerning a convicted defendant, either before or after receiving the presentence report and any report concerning the defendant's mental condition, it may assign the offender to the custody of the Bureau of Prisons for a period of study and preparation of a report concerning matters appropriate to the sentencing decision. The bill amends current law by reducing the maximum period for the study from six months to 120 days in order to advance the time for final sentencing while still allowing an adequate period for study. The bill also amends current law to specifically require that the court order for a study specify the information sought by the court. Subsection (c) adds a new provision to the law that specifically permits the court to order a presentence examination by a psychiatric or psychological examiner concerning the current mental condition of the defendant. The examination would be conducted pursuant to section 4247, and the court would be provided with a written report by the examiner. See S. Rept. No. 97-307, pages 982-987.

Section 3553 Imposition of a Sentence, sets out the factors that judges be required to consider in selecting the type of sentence to be imposed in a particular case, and the length or amount of such sentence. Subsection (a)(1) directs the judge to consider "the nature and circumstances of the offense and the history and characteristics of the defendant". Subsection (a)(2) requires that the judge consider the need for the sentence imposed to carry out the four purposes of sentencing: the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from furhter crimes of the offender; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. (See S. Rept. No. 97-307, pages 987-989). Subsection (a)(3) requires the judge to consider the kinds of sentences available. Subsection (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 sentencing guidelines issued pursuant to 28 U.S.C. 994(a), as that provision is enacted by section 507 of this bill. Subsection (a)(6) requires the judge to consider "the need to need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct".

Subsection (b) requires the sentencing judge to impose a sentence consistent with the sentencing guidelines unless he finds that there is an aggravating or mitigating circumstance present in the case that was not adequately considered in the formulation of the sentencing guidelines and that the circumstance should result in a different sentence. The provsion is designed to achieve the goal of avoiding unwarranted disparity—sentences that are not justified by differences among offenses or offenders. At the same time, the provision provides the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines.

Subsection (c) contains a new requirement that the court, at the time of sentencing, state the reasons for the imposition of the sentence in each case. It also requires that, if the sentence is within the guidelines, the court state the reason for imposing sentence at a particular point within the range, and that, if the sentence is of a different kind or outside the range set out in the sentencing guidelines, the court state the specific reason that the sentence imposed differs from the guidelines. This statement would essentially indicate why the court felt that the guidelines did not adequately take into account all the pertinent circumstances of the case at hand. If the sentencing court felt the case was an entirely typical one for the applicable guideline category, it would have no adequate justification for deviating from the recommended range. See S. Rept. 97-307, page 991. The statement of reasons for a sentence outside the guidelines would assist the appellate court, in a case in which the defendant or the government appealed the sentence pursuant to section 3742, to evaluate whether the sentence was "clearly unreasonable" or not. The statement of reasons would also inform the defendant and the public of the reasons for the sentence, and aid probation and prison officials in fashioning an appropriate program for a defendant.

Subsection (d) requires that the court give prior notice to the defendant and the government that it is considering imposing an order of notice under section 3555 or an order of restitution under section 3556 as part of the sentence. The purpose of the notice 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, permit the parties to submit affidavits and written memoranda concerning matters relevant to the imposition of an order of notice or restitution (e.g.,) identification of individual, or classes of, victims, evaluation issues, and defenses that a defendant could assert in a civil action with respect to any victim); afford counsel an opportunity to address in open court the issue of the appropriateness of such an order; and include in its statement of reasons for the sentence specific reasons for imposing the order. See S. Rept. 97-307, pages 992 and 993.

Section 3554, Order of Criminal Forfeiture, specifies that the court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of title 18, relating to racketeering activity, or an offense described in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, relating to drug trafficking, order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accord with the provisions of section 1963 of title 18 or section 413 of the Comprehensive Drug Abuse and Control Act of 1970, as those provisions are amended by title VI of this bill.

Section 3555, Order of Notice to Victims, is a new provision that 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. the provision should facilitate any private actions that may be warranted for recovery of losses from the offense. 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 to visit a doctor in time for proper medical attention). In order to avoid the possibility of the offender's making only token efforts of giving notice, the court is empowered to designate the advertising areas and media in which notice is to be given. The judge is required, in determining whether to require notice, to consider 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 bill limits to $20,000 the amount that the court may require the defendant to pay for such notice. These provisions are intended to assure that the order of notice requires only such publication as is reasonable under the circumstances of the case. See S. Rept. No. 97-3207, pages 896-899.

Section 3556, Order of Restitution, permits the court, for the first time, to order payment of restitution in addition to any other sentence imposed pursuant to section 3551. Under subsection (a), in a case causing bodily injury or death, the court may order restitution in an amount that does not exceed the expenses necessarily incurred by the victim for medical expenses or by his estate for funeral and burial expenses. In a case involving unlawful obtaining, damaging, or destruction of property, the order of restitution could require that the defendant restore the property to the victim, or make restitution to the victim in an amount that does not exceed the value of the property. The provision is drafted to assure that the restitution determination will not unduly complicate the sentencing proceedings. Subsection (b) specifies that restitution should not be ordered in any situation where the victim is bound by a civil judgment relating to the same injury or damage. It also provides that any amount paid to a person under an order of restitution should be set off against any civil damages.

Section 3557, Review of a Sentence, provides that the review of a sentence imposed pursuant to section 3551 is governed by the provisions of section 3742, which are enacted by section 503(a) of the bill.

Section 3558, Implementation of a Sentence, provides that the implementation of a sentence imposed pursuant to section 3551 is governed by the provisions of chapter 229 of title 18, which are enacted by section 502(a) of this bill.

Section 3559, Sentencing Classification of Offenses, Subsection (a) of section 3559 creates a grading scheme for offenses described in sections that specify a maximum sentence rather than a letter grade for the offense. The purpose of the provision is to indicate more clearly how the sentencing provisions of subchapters B, C, and D of this chapter apply to offenses with particular maximum sentences today. The provisions also serve to eliminate some of the unevenness existing in current law in the maximum terms of imprisonment. Under subsection (a)(1), if the maximum term of imprisonment authorized for the offense is life imprisonment, or if the maximum penalty is death, the offense becomes a Class A felony. Under subsection (a)(1)(B), if a term of years of twenty years or more is specified as the maximum sentence, the offense becomes a Class B felony. Under subsection (a)(1)(C), if the maximum specified in current law is less than twenty years but ten or more years, the offense becomes a Class C felony. Under subsection (a)(1)(D), if the maximum specified in current law is less than ten years but five or more years, the offense becomes a Class D felony. Under subsection (a)(1)(E), if the maximum specified in current law is less than five years but three or more years, the offense is a Class E Felony. For the misdemeanor level offenses, if current law provides a sentence that is equal to the sentence specified in section 3581 for the grade of offense, or is less than that amount but more than the maximum specified for the next lower grade, the offense is designated as an offense of the grade equal to or just above that specified in current law.

Subsection (b) provides that current law offenses classified by operation of subsection (a) carry all the incidents assigned to the applicable letter designation, unless the maximum fine in current law is higher, in which case the higher fine level applies.

Subchapter B (probation) of chapter 227 of title 18

This subchapter governs the imposition, conditions, and possible revocation of the 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, authorizes the imposition of a sentence to a term of probation in all cases, unless the case involves a Class A 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 that the maximum term of probation for a felony is five years, and the minimum is one year. The maximum term of probation for a misdemeanor is two years, and for an infraction is one year, with no minimum term specified for these offenses.

Section 3562, Imposition of a Sentence of Probation, 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. Subsection (a) 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 terms 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. These include the history and characteristics of the offender and the nature of the offense, the four purposes of sentencing set forth in section 3553(a)(2), and the sentencing guidelines and policies of the Sentencing Commission created under proposed 28 U.S.C. 994. Subsection (b) codifies current judicial decisions that 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 non-compliance with those conditions, and is subject to modification, extension, or early termination in certain situations. See S. Rept. No. 97-307, pages 1007-1010.

Section 3563, Conditions of Probation, specifies that the court is required to provide, as a condition of probation for any federal offense, that the defendant not commit another federal, State, or local crime during the term of probation, and to provide 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.

Subsection (b) sets out optional conditions which may be imposed, the last of which makes clear that the enumeration is suggested only, and is not intended as a limitation on the court's authority to consider and impose other appropriate conditions. The subsection indicates that the discretionary conditions on probationary freedom must be reasonably related to the nature and circumstances of the offense, the history and characteristics of the offender, and the four purposes of sentences. If a condition involves a deprivation of property or liberty, the condition must be reasonably necessary to carry out the purposes of sentencing set forth in section 3553(a)(2). In addition, under subsection (a), the policy statements and sentencing guidelines promulgated by the Sentencing Commission should 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 the current statute. Among the discretionary conditions are conditions that the defendant pay a fine in accord with subchapter (c), make restitution to a victim of the offense pursuant to section 3556, give notice to the victims of the offense pursuant to section 3555, remain in the custody of the Bureau of Pris-

ons during nights, weekends, or other intervals of time, or participate in community service as directed by the court. For a detailed discussion of these and the other discretionary conditions of probation, see Senate Report 97-307, pages 1011-1015.

Subsection (c) permits the court to modify, reduce, or enlarge the conditions of a sentence of probation at any time before its expiration, and requires that the court hold a hearing before making such a modification.

Subsection (d) requries that the probation officer provide the defendant with a written statement of the conditions to which he is subject, and requres that statement to be sufficiently clear and specific to serve as a guide to the defendant's conduct and for such supervision as is required.

Section 3564, Running of a Term of Probation, governs 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.

Subsection (a) 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; consequently, 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 during which the defendant is imprisoned in connection with a conviction for any other offense, except, of course, during limited periods of confinement as a condition of probation or supervised release.

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. See S. Rept. No. 97-307, page 1018.

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 the term of probation, unless the maximum term was previously imposed, at any time prior to its expiration or termination.

Subsection (e) provides that a term of probation remains subject to revocation during it continuance.

Section 3565, Revocation of Probation, 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.

Subsection (a) provides that if the 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 modification to the term or conditions of probation as it deems appropriate, or may revoke probation and impose any other sentence that could have been imposed at the time of the initial sentencing.

Subsection (b) provides that revocation of probation and imposition of another sentence may occur after the term of probation has expired if a violation of the condition occurred prior to its expiration, if the adjudication occurs within a reasonable period of time, and if a warrant or summons on the basis of an allegation of such a violation was issued prior to the expiration of the term of probation.

Section 3566, Implementation of a Sentence of Probation, which has no counterpart in current law, directs attention to the fact that provisions governing the implementation of probation are contained in subchapter A of chapter 229.

Subchapter C (Fines) of Chapter 227 of Title 18

This subchapter sets the maximum monetary fines that may be imposed for the various levels of criminal offenses, specifies the criteria to be considered before imposition of fines, and provides for the subsequent modification or remission of fines previously imposed.

Fines generally have been an inappropriately underused penalty in American criminal law, even though there are many instances in which a fine in a measured amount could constitute a highly effective means of achieving one or more of the goals of the criminal justice system. Part of the reason for the under-utilization of fines as a criminal sanction is the fact that the levels of fines under current law, with rare exceptions, are so low that the courts are not able to use them effectively as a sentencing option. These statutory limits are largely the product of an earlier era when the average wage-earner achieved a yearly income considerably lower than that of today, and when inflation had not yet reduced the value of currency to its present level. See S. Rept. No. 97-307, pages 1021-1029.

Section 3571, Sentence of Fine, 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, a misdemeanor, or an 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.

Subsection (a) authorizes the use of fines in criminal sentencing. There are no offenses for which a fine may not be imposed. Payment of a fine may also be made a discretionary condition of probation for any offense, or a mandatory condition of probation for a convicted felon. See proposed section 3562.

Subsection (b) establishes the maximum limits of fines for felonies, misdemeanors, and infractions. Under the provisions of proposed 18 U.S.C. 3559, the fine levels specified in subsection (b) apply to existing offenses unless current law specifies a higher maximum fine. The maximum fines specified in subsection (b) for an individual defendant are $250,000 for a felony or for a misdemeanor resulting in the loss of human life, $25,000 for any other misdemeanor, and $1,000 for an infraction. The maximum fine levels set forth in the subsection for organizations are higher than those for individuals, following the New York model, in order to take cognizance of the fact that a sum of money that is sufficient to penalize or deter an individual may not necessarily 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. For an organization, subsection (b) provides a maximum fine for a felony, or for a misdemeanor that results in loss of human life of $500,000; for any other misdemeanor a maximum fine of $100,000; and for an infraction, not more than $10,000. See S. Rept. No. 97-307, pages 1022-1025.

Section 3572, Imposition of a Sentence of Fine, sets out factors that the court must consider in imposing a fine, specifies the degree to which the 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 the payment of the fine, precludes the imposition at the time a sentence is imposed of an alternative sentence to be served if an imposed fine is not paid, provides notice that agents of an organization who are authorized to disperse its assets are individually responsible for payment from the funds of the organization, 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 permitted under applicable State law.

Subsection (a) specifies the factors to be considered by the court in determining whether to impose a fine, and in determining its amount and the means of payment. In addition to the factors set forth in section 3553(a), the court is required to consider the ability of the defendant to pay the fine, the nature of the burden the payment of the fine will impose on the defendant and on any person dependent on him, any restitution or reparation made by the defendant to the victim of the offense, and, if the defendant is an organization, any measure taken by the organization to discipline the persons responsible for the offense or ensure against the recurrence of the offense.

Subsection (b) provides that 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 included to avoid the possibility that for some offenses, particularly regulatory offenses, an ongoing pattern of conduct might constitute numerous minor offenses that did not warrant a maximum fine equal to the aggregate fine for all of the minor offenses.

Subsection (c) makes clear that, even though a fine imposed by the sentencing judge may be modified or remitted, or corrected or appealed pursuant to section 3742, the judgment of conviction that includes a fine is final for all other purposes.

Subsection (d) permits the court to authorize payment of a fine within a specified period of time or in installments. This provision gives necessary flexibility to the fine provisions by permitting the imposition of a relatively high fine on a defendant who can pay it over a period of time if that is a preferable sentence to imprisonment.

Subsection (e) prohibits the 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 appropriate remedy after the non-payment occurs. See S. Rept. 97-307, page 1027.

Subsection (f) makes clear that, if an organization is fined, it is the duty of each of the organization's employees or agents who is authorized to make disbursements of the assets of the organization to pay the fine from those assets. The subsection also bars payment of a fine imposed on an agent or shareholder of an organization from assets of the organization, unless State law expresly permits such payments.

Section 3573, Modification or Remission of Fine, permits modification or remission

of a fine if there have been changes in the financial condition of a defendant. Since section 3572 specifies that ability to pay is relevant to the amount of the fine, a modification or remission of the fine should be available when that ability lessens. The section permits the courts to adjust the fine of a well-intentioned defendant in order to avoid creating unjustifiable improverishment. However, an unexcused failure to pay a fine may still be prosecuted as any other criminal contempt.

Section 3574, Implementation of a Sentence of fine, states that the provisions concerning implementation of a sentence to pay a fine are contained in subchapter B of chapter 229.

Subchapter D Imprisonment, of chapter 227 of title 18

Subchapter D sets forth the basic considerations governing the imposition of sentences of imprisonment. It creates the frame of reference used to determine the applicability of sentence provisions to offenses throughout the United States Code. 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, provides that a defendant convicted of an offense may be sentenced to a term of imprisonment. It also creates nine classes of offenses, 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 30 days, and an infraction category that carries a maximum of five days' imprisonment. See S. Rept. 97-307, pages 1034-1036.

Section 3582

Imposition of a Sentence of Imprisonment, specifies for the first time in the federal criminal law the factors that a court must consider in imposing a sentence of imprisonment. These include the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to provide just punishment, a deterrent effect, incapacitation, and an opportunity for rehabilitation; and the guidelines and policy statements of the Sentencing Commission that apply to the case. Subsection (a) also specifies that, in light of current knowledge, 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 statement is designed to discourage the employment of a term of imprisonment on the grounds that the 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.

Subsection (b) makes clear that a judgment of conviction is final even though it includes a sentence that may be modified pursuant to the provisions of section 3742.

Subsection (c) provides that a court may not modify a sentence of imprisonment unless one of three conditions warrant the use of a "safety valve" for modification of the sentence.

The first "safety valve" permits the modification of the sentence in 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, 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.

The second "safety valve" permits a defendant with an unusually long sentence—one that is over six years in length—to file a motion with the court after he has served six years of that term, for reduction of the term of imprisonment. The Director of the Bureau of Prisons may also file such a motion for the prisoner. The court may grant the motion if, after considering the factors set forth in section 3553(a), it finds that extraordinary and compelling reasons require such a reduction and that a reduction is consistent with applicable policy statements issued by the Sentencing Commission. An additional review of the sentence may be sought by a defendant with an unusually long prison term who is sentenced above the maximum applicable sentencing guideline. Such a defendant may seek a second review of his sentence after he has served the maximum applicable guideline sentence, and the same review standards apply as apply to the first review.

The third "safety valve" permits the reduction of the sentence of a defendant who was sentenced to a term of imprisonment under sentencing guidelines that were later reduced by the Sentencing Commission, if such a reduction is appropriate considering the factors set forth in section 3553(a) and if it is consistent with applicable policy statements issued by the Sentencing Commission. It is expected that the Sentencing Commission would, whenever it revised its sentencing guidelines as to a particular offense, indicate its views as to the appropriate situations in which a sentence should be reduced for persons previously sentenced under earlier guidelines.

Subsection (d) permits the court to include in the sentence of a drug trafficker or racketeer an order that the defendant not associate or communicate with a specified person, other than his attorney, if there has been a showing of probable cause to believe that such association or communication would be for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise. The provision is designed to prohibit a manager of a criminal enterprise from continuing to manage that enterprise while he serves his term of imprisonment.

Section 3583, Inclusion of a Term of Supervised Release After Imprisonment, 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 after imprisonment. Unlike current parole law, the question whether the defendant will be supervised following his term of imprisonment is dependent on whether the judge concludes that the defendant needs supervision, rather than on the question whether a particular amount of the term of imprisonment happens to remain. The term of supervised release would be a separate part of a defendant's sentence, rather than being the end of the term of imprisonment.

Subsection (b) specifies the authorized terms of supervised release, with the terms ranging from a term of not more than 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 the defedant's term of imprisonment that remains before he is due to be released.

Subsection (c) describes the factors that the judge is required to consider in determining whether to include a term of supervised release as a part of the defendant's sentence, and if a term of supervised release is included, the length of that term. The judge is required to consider the history and characteristics of the defendant, the nature and circumstances of his offense, the need for the sentence to protect the public from further crimes of the defendant and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner, the applicable sentencing guidelines and policy statements, and the need to avoid unwarrented sentencing disparity.

Subsection (b) describes the conditions that the judge may impose on the term of supervised release. The court is required to order, as a condition of supervised release, that the defendant not commit another crime during the period of supervision. It may also order any of the conditions set forth as conditions of probation in section 3563 (bX1) through (bX10) and (bX12) through (bX19), and any other condition it considers appropriate, if the condition is reasonably related to the history and characteristics of the offender and the nature and circumstances of the offense, the need for the sentence to protect the public from further crimes of the defendant, and the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. The condition also may not involve a greater deprivation of liberty than is necessary to protect the public and to provide needed rehabilitation or corrections programs, and must be consistent with any pertinent policy statement issued by the Sentencing Commission. For a further discussion of the available conditions of supervised release, see S. Rept. 97-307, pages 1010-1016.

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 or, after a hearing, to extend the term of supervised release (if less than the maximum term authorized was originally imposed) or to modify, reduce, or enlarge the conditions of release.

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.

Section 3584, Multiple Sentences of Imprisonment, provides the rules for determining the length of the term of imprisonment for a person convicted of more than one offense. It specifies the factors to be considered in determining whether to impose concurrent or consecutive sentences, and provides that consecutive sentences shall be treated for administrative purposes as a single aggregate of imprisonmment.

Section 358, Calculation of a Term of Imprisonment, This section provides the method of calculating the beginning of a term of imprisonment and contains provisions for crediting an offender for time served in prior custody. Under subsection (a), the sentence commences on the date that the defendant is received into custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the

sentence is to be served. Subsection (b) provides credit towards the service of an imprisonment term for any time the defendant has been in official custody prior to the date the sentence was imposed if 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 the defendant was arrested after commission of the current offense. No credit would be given if such time had already been credited toward the service of another sentence.

Section 3585, Implementation of a Sentence of Imprisonment, provides a cross-reference to the provisions concerning implementation of a sentence of imprisonment contained in subchapter C of chapter 229, and, if the sentence includes a term of supervised release, by the provisions of subchapter A of chapter 229.

Chapter 229—Post-Sentence Administration

Chapter 229 consists of three subchapters which cover the administration of the various types of sentences imposed under subchapters B, C, and D of chapter 227. Subchapter A of chapter 229 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 chapter 227. Subchapter C sets forth the procedures governing those persons sentenced to a prison term.

Subchapter A, Probation, of chapter 229 of title 18

This subchapter contains the provisions for implementation of a sentence to probation pursuant to subchapter B of chapter 227, the placement of juvenile delinquents on probation, and the placement of an individual on supervised release pursuant to section 3583. The subchapter, for the most part, carries forward current law concerning the appointment of probation officers by the court and the powers and duties of probation officers.

Section 3601, Supervision of Probation, requires that a person sentenced to a term of probation under subchapter B of chapter 227, placed on probation pursuant to the provisions of chapter 403, or placed on supervised release pursuant to the provisions of section 3583, be supervised by a probation officer to the degree warranted by the condition specified by the sentencing court.

Section 3602, Appointment of Probation Officers, is largely derived from current 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. The change was made upon the recommendation of the Probation Committee of the Judicial Conference. Voluntary probation officers serving without compensation remain subject to removal at the discretion of the court. The requirement that probation officers be "qualified" as well as "suitable" is added to the law in order to emphasize that probation officers who will be supervising innovative conditions of probation permitted under the probation subchapter should be qualified by their training or background to be probation officers. There may even be circumstances where a probation officer should be a "specialist" who might be made available, as the need arose, to any one of several courts. For example, such a probation officer might be needed if a union or brokerage house, rather than a street criminal, were under supervision.

Section 3603, Duties of Probation Officers, carries forward the provisons of current 18 U.S.C. 3655 relating to the duties of probation officers with respect to supervision of probation and the keeping of records and making of reports, and modifies the provisions to refer to persons released on supervised release following a term of imprisonment pursuant to section 3583. The section includes a number of specific requirements not in current law, including the requirements that the probation officer be responsible for supervision of any probationer or person under supervised release known to be within the judicial district (in order to clarify supervisory authority over probationers and persons on supervised release transferred into his district or temporarily present in the district), and that, when requested, the probation officer supervise and furnish information about persons on work release, furlough, or other authorized release or in pre-release custody pursuant to section 3624(c).

Section 3604, Transportation of a Probationer, carries forward the provisions of current 18 U.S.C. 4283 permitting a court to order a United States marshal to furnish to a person placed on probation, transportation to the place where he is required to go as a condition of probation. The provision also removes the dollar limitation on the amount of subsistence expenses that may be paid for a probationer while travelling to his destination, substituting a provision that permits the Attorney General to prescribe reasonable subsistence payments.

Section 3605, Transfer of Jurisdiction Over a Probationer, relating to transfer of jurisdiction over a probationer or person on supervised release from one court to another, is derived from current 18 U.S.C. 3653. Both current law and section 3605 require the concurrence of the court receiving jurisdiction over a probationer to the transfer of jurisdiction. Section 3605 expands current law to cover persons on supervised release and provides that the transfer of a probationer or a 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, unlike current law which provides for transfer of a probationer only "from the district in which he is being supervised". The section would also permit a court to which jurisdiction over a probationer or a person on supervised release was transferred to exercise all the powers over the probationer or releasee that are permitted by this subchapter or subchapter B of chapter 227. This differs from current law, which requires the consent of the sentencing court to a change in the period of probation. See S. Rept. 97-307, pages 1233 and 1234.

Section 3606, Arrest and Return of a Probationer, continues the provisions of current 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 the condition of probation, and expands the provisions to refer to persons on supervised release pursuant to section 3583. See S. Rept. 97-307, page 1234.

Section 3607, Special Probation and Expungement Procedures for Drug Possessers, carries forward the provisions of 21 U.S.C. 844(b) relating to special probation without entry of judgment for first offenders found guilty of violating a drug possession statute if there has been no previous conviction of an offense under a federal or State law relating to controlled substances. The section also permits, as does current law, expungement of records of persons placed on probation under the section if they were under the age of 21 at the time of the offense and did not violate a condition of probation.

Subchapter B, Fines, of chapter 229 of title 18

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 a judgment to pay a criminal fine "may be enforced by execution against the property of the defendant in like manner of 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 by the United States in recent years of only 60 to 70 percent of the amount of fines imposed. 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 amount of the fine without litigation.

The collection procedures of the subchapter are also made applicable to execution of orders to pay restitution pursuant to section 3556.

Section 3611, Payment of a Fine, provides for the payment of a fine imposed under subchapter C of chapter 227 to the clerk for 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.

Section 3612, Collection of an Unpaid Fine, requires the sentencing court, whenever a fine is imposed, to provide the Attorney General with certain certified information. The Attorney General is then responsible for collecting the fine if it is not paid at the time required. See S. Rept. 97-307, page 1236.

Section 3613, Lien Provisions for Satisfaction of an Unpaid Fine, establishes the procedure by which the Attorney General is to make collection of unpaid funds. This section significantly improves current practices by providing a federal collection procedure independent of State laws that is patterned on the collection procedures utilized by the Internal Revenue Service.

Subsection (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 judgment and continues until the liability has been satisfied or set aside, or until it becomes unenforceable pursuant to subsection (b). See S. Rept. 97-307, page 1238.

Subsection (b) changes current law by imposing a 20-year statute of limitations on the collection of a criminal fine. Under existing law, the government's right to seek execution of a criminal sentence, including a fine, is not subject to any time limit. Thus, a criminal fine may be satisfied 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 the collection of fines is unlikely. The period for collection may be extended by a written agreement entered into by the defendant and the Attorney General prior to expiration of the

period, as is permitted in similar provisions in the tax area. Subsection (b) also provides that the running of the 20-year statute of limitations is to be suspended "during any interval for which the running of the period of the limitation for collection of a tax would be suspended" pursuant to several provisions of the tax laws.

Subsection (c) provides that certain sections of the Internal Revenue Code of 1954, as amended, apply to a fine and to the lien imposed under 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. See S. Rept. 97-307, pages 1239-1242, for a description of those provisions.

Subsection (d) provides that a notice of a lien imposed under 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 the notice of a tax lien.

Subchapter C, Imprisonment, of chapter 229 of Title 18

Subchapter C contains the provisions for implementation of a sentence of imprisonment imposed under subchapter D of chapter 227. The subchapter generally follows existing law, except that custody of federal prisoners is placed in the Bureau of Prisons directly rather than in the Attorney General, thus giving the Bureau of Prisons direct authority to determine matters, such as the place of confinement of a prisoner, which are presently determined by the Attorney General. The subchapter also substantially revises the method by which the release date of an imprisoned person is determined.

Section 3621, Imprisonment of a Convicted Prisoner, is derived from existing law.

Subsection (a) is derived from 18 U.S.C. 4082(a), except that the new provision places custody of federal prisoners directly in the Bureau of Prisons rather than in the Attorney General. See S. Rept. 97-307, page 1243.

Subsection (b) follows existing law in providing that the authority to designate the place of confinement for federal prisoners rests in the Bureau of Prisons. The designated penal or correctional facility need not be in the judicial district in which the prisoner was convicted and need not be maintained by the federal government. Subsection (b) adds a new requirement that a facility meet minimum standards of health and habitability established by the Bureau of Prisons.

Section 3622, Temporary Release of the Prisoner, is derived from current 18 U.S.C. 4032(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 by "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 purposes for which the sentence was imposed, with any pertinent policy statements of the Sentencing Commission. This places emphasis on factors important to the overall correctional program for the defendant, rather than limiting the factors to be considered to the probability of the prisoner's return to the facility at the appropriate time. In addition to the current law list of purposes for which a prisoner may be released, such as attending a funeral or working at paid employment or participating in a training program in the community on a voluntary basis, subsection (b) includes a new provision permitting temporary release to participate in an educational program, to make it clear that release may be for such things 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. This will give the Bureau of Prisons more flexibility than provided in current law in developing work programs in appropriate cases. Subsection (c) carries forward the provisions of current law that require that work in the community must be at the same rate and under the same conditions as for similar employment in the community involved. Subsection (c)(2) amends current law to require that, rather than permit, a prisoner pay costs incident to his detention as a condition of work release. See S. Rept. 97-307, page 1245.

Section 3623, Transfer of a Prisoner to State Authority, delineates the circumstances under which the Director of the Bureau of Prisons must order the transfer of a federal prisoner to a State facility prior to his release from the federal facility. Like current 18 U.S.C. 4085, section 3623 provides that the Director of the Bureau of Prisons must order that a prisoner be transferred to an official detention facility within a State prior to the prisoner's release from the federal prison if certain requirements are satisfied. First, the prisoner must have been charged in an indictment or in an information with a felony or have been convicted of a felony in that State. Second, the transfer must have been requested by the governor or other executive authority of the State. Next, the State must send to the Director, usually along with the request, a certified copy of the indictment, information, or judgment of conviction. Finally, the Director must find that the transfer would be in the public interest. Finally, the section provides that the costs of transferring a prisoner to a State authority will be borne by the State requesting the transfer. See S. Rept. 97-307, pages 1245-1246.

Section 3624, Release of a Prisoner, in subsection (a), describes the method by which the release date of a prisoner is determined. It replaces a confusing array of statutes and administrative procedures now governing 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 results from the parallel determinations. First, current 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. 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. (Other release date statutes apply to prisoners who are serving less than one year in prison.) See S. Rept. 97-307, page 1247. Subsection (a) replaces the multiplicity of release dates statutes with a single provision that describes the mechanism for setting release dates. It 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 title of the bill, 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 to allow for the operation of the parole system, which has no role as to prisoners sentenced under the revised statutes.

A prisoner may be subject on release to a term of supervised release pursuant to section 3583 if his term of imprisonment exceeded one year in length.

Subsection (b) of Section 3624 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 provision also substantially simplifies the computation of credit toward early release over the computation required under current law. See S. Rept. 97-307, page 1249.

Subsection (c) is new. It provides that, to the extent practicable, the last ten percent of the 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. The Bureau of Prisons would have a substantial amount of discretion in determining what opportunity for reentry needs to be made available in each particular case. The probation system is required, to the extent practicable, to offer assistance to prisoners at this pre-release stage.

Subsection (d), relating to the allotment of clothing, transportation, and funds to a prisoner at the expiration of his term of imprisonment, amends current law to increase to $500 the amount of money furnished to a prisoner, and to omit provisions for loans to prisoners. The loan provisions in existing law have not proved successful, having caused greater administrative costs and difficulties than the amount of money involved justifies. The Director of the Bureau of Prisons is to determine the amount of money to be given to each prisoner, and a new provision is added to require that the determination be made in accord with the public interest and the need of the prisoner.

As in 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 designated by the Director of the Bureau of Prisons.

Subsection (2) provides that a prisoner whose sentence includes a term of supervised release shall be released to the supervision of the probation officer. It also specifies that the term of supervised release begins on the date of release and runs concurrently with any other term of supervised release, probation, or parole unless the person is in prison other than for a brief period as a condition of probation or supervised release.

Section 3625, Inapplicability of the Administrative Procedure Act, 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. This result is in accord with recent case law, 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 constitutional challenges by prisoners under the appropriate provisions of law. The phrase "determination, decision, or order" in the provision is

intended to mean adjudication of specific cases as opposed to general rulemaking.

Section 502(a)(3) adds two new sections at the end of chapter 232 of title 18, United States Code. The first section, new section 3671, requires the Attorney General to establish procedures under which a federal government agency may transfer personal property that is useful for law enforcement purposes to a State or local law enforcement agency if the property was forfeited to the United States pursuant to a statute that provides for forfeiture of property used, intended for use, or possessed, in connection with the federal offense, and the property is not needed by a federal law enforcement agency.

New section 3672 of title 18 contains definitions of the terms "found guilty", "commission of an offense", and "law enforcement officer", for use in the sentencing provisions contained in chapters 227 and 229 of title 18, United States Code.

Section 502(a)(4) of the bill enacts the caption and section analysis for new chapter 232 of title 18, United States Code, the chapter that was created by section 501(a)(1).

Section 502(b) amends the chapter analysis of Part II of title 18.

Section 503(a) adds to chapter 235 of title 18 a new section 3742, which relates to appellate review of sentencing. The section describes the circumstances in which a defendant or the government can appeal a sentence in the federal criminal justice system.

Under subsection (a), the defendant can file a notice of appeal in the district court for review of an otherwise final sentence if the sentence was imposed in violation of law, was imposed as a result of an incorrect application of the guidelines, or, if it was imposed for a felony or a Class A misdemeanor, was greater than the sentence specified in the guidelines and not consistent with a plea agreement and was unreasonable. Similarly, under subsection (b), the government may appeal a sentence that was imposed in violation of law, was imposed as a result of an incorrect application of the sentencing guidelines, or was imposed for a felony or a class A misdemeanor and is less than the applicable guidelines and not consistent with a plea agreement. Before the government may appeal a sentence, the Attorney General or the Solicitor General must personally approve the filing of a notice of appeal. For a discussion of the constitutionality of government appeal of sentence, see S. Rept. 97-307, pages 1226-27.

It should be noted that, under current law, there is specific authority in Rule 35 of the Federal Rules of Criminal Procedure for the trial judge to correct an illegal sentence. In order to be sure that all sentencing issues can be raised in a single proceeding, a proceeding which goes beyond the appellate review of sentencing provided in current law, the bill combines review of issues relating to illegality of sentences with all other issues relating to sentencing. Thus, if the trial judge were to discover that he had made an error in a sentence that made it illegal, he could notify the counsel for the defendant and the counsel for the government in order to permit them to raise that issue as part of any sentencing appeal they might file.

Subsection (c) of section 3742 indicates the record on which the appeal is based.

Subsection (d) requires the court of appeals to determine upon review of the record whether the sentence was imposed in violation of law, imposed as a result of incorrect application of the sentencing guidelines, or, if it is outside the range of the applicable guideline, is unreasonable. Under subsection (e), if the court of appeals determines that the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, it is required to remand the case for further sentencing proceedings or to correct the sentence. If the court determines that the sentence is outside the range of the applicable sentencing guidelines and is unreasonable, it is required to state specific reasons for its conclusions and to remand the case or correct the sentence. If the sentence was appealed by the defendant and is too high, the court may remand the case for further sentencing proceedings or for imposition of a lower sentence, or impose a lesser sentence itself. If the sentence was appealed by the government and is too low, the court may remand the case for further sentencing proceedings or for imposition of a higher sentence, or impose a higher sentence itself. If none of these is found by the court of appeals, the court, of course, would affirm the sentence.

Section 503(f) makes a technical correction in the sectional analysis of chapter 235.

Section 504 amends chapter 403 of title 18, United States Code, relating to juvenile delinquency.

Section 504(a) of the bill amends 5037 of title 18, United States Code, by replacing current subsections (a) and (b), relating to disposition after a finding of juvenile delinquency, with the disposition provisions from S. 1630. See S. Rept. 97-307, pages 1184-1189.

Under subsection (a) of amended section 5037, if the court finds that a juvenile is a juvenile delinquent, the court is required to hold a disposition hearing which must be held, as under current law, the disposition hearing must be held within 20 court 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.

Subsection (b) sets forth the probation terms for juveniles. If the juvenile is less than 17 years old, the probation term may not extend beyond the date when the juvenile becomes twenty-one or the maximum term that would be authorized under the adult probation statute if the juvenile had been tried and convicted as an adult. If the juvenile is between the ages of 17 and 21, the probation may not extend beyond three years or the maximum that would be authorized for an adult.

Subsection (c) provides the maximum periods for official detention of a juvenile found to be a juvenile delinquent. It parallels the 1974 Act provision set forth in current law for juveniles under 18 at the time of the proceeding. However, for juveniles between the age of 17 and 21 at the time of the proceeding, the bill specifies that the term of official detention for a Class A, B, or C felony is a maximum of five years and for any other offense the maximum term is the lesser of three years or the maximum sentence applicable to an adult offender.

Section 504(b) repeals section 5041 of title 18, United States Code, in light of the abolition of the parole system in federal law.

Section 504(c) amends section 5042 of title 18 by striking out references to parole and parolees.

Section 504(d) amends the sectional analysis to accord with the other amendments made by section 504.

Section 505 of the bill contains a number of amendments to the Federal Rules of Criminal Procedure that are necessitated by the amendments of the sentencing provisions of title 18, United States Code.

Section 505(a) amends Rule 32 in several respects. First, it amends subdivision (a)(1) of the Rule to require that, before the sentencing hearing, the court make available to counsel for the defendant and the attorney for the government notice of the probation officer's determination, pursuant to the revised provisions of subdivision (c)(2)(B), as to the sentencing classification and sentencing guidelines range believed to be applicable to the case. The sentencing hearing will then focus on any questions that arise as to the accuracy of the probation officer's determination on those questions. In addition, the subdivision is amended to permit the postponement of imposition of sentence for a reasonable time, upon a motion jointly filed by the defendant and by the attorney for the government that asserts that a factor important to the determination is not capable of being resolved at that time. The purpose of this amendment is to permit the sentencing determination to be delayed somewhat if, for example, a factor in the sentencing gudielines is the cooperation of the defendant with the government in prosecution of another person, and delay is necessary to assure that such cooperation actually occurs.

Subdivision (c)(1) is amended 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 to accurately apply the sentencing guidelines.

Subdivision (c)(2) of Rule 32 is amended 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. See S. Rept. 97-307, pages 1303-1304.

Section 505(b) amends Rule 35 of the Federal Rules of Criminal Procedure to accord with the provisions of proposed section 3742 of title 18, United States Code, concerning appellate review of sentence. New subdivision (a) of the rule requires the court to correct a sentence that is determined on appeal under 18 U.S.C. 3742 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 senence within one year after its imposition to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committeed an offense, to the extent that such assistance is a factor recognized in applicable guidelines or policy statements issued by the Sentencing Commission.

Section 505(c) amends Rule 38 of the Federal Rules of Criminal Procedure to make technical changes in the rule necessitated by the enactment of provisions for appellate review of sentences. See S. Rept. 97-307, page 1306.

Section 505(c) also adds two new subdivisions to Rule 38. New subdivision (e) relates to the stay of an order of criminal forfeiture, notice to victims, or restitution, if an appeal of the conviction or sentence is taken.

New subdivision (f) of Rule 38 provides for the stay of a civil or employment disability that arises under a federal statute by reason

of the defendant's conviction or sentence if an appeal is taken from the conviction or sentence.

Section 505(d) makes a correction in a cross-reference in Rule 40 of the Federal Rules of Criminal Procedure.

Section 505(e) amends Rule 54 to re-define the term "petty offense" in subdivision (c) to refer to the class structure of offenses created in 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 or fine, a misdemeanor resulted in the loss of human life.

Section 505(f) amends the table of rules of the Federal Rules of Criminal Procedure to accord with the other amendments to the rules.

Section 506 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 fact that title V amends title 18 of the United States Code to impose a grading structure on federal offenses.

Section 507 adds in subsection (a) 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

Proposed section 991 of title 28, United States Code, creates the United States Sentencing Commission and spells out its purposes. The Commission is established as an independent commission in the judicial branch consisting of seven voting members, four of whom are appointed by the President by and with the advice and consent of the Senate, and three of whom are appointed by the President from among a list of at least ten judges submitted to him by the Judicial Conference. The Attorney General, or his designee, is an ex officio non-voting member of the Commission.

Under subsection (b) the purposes of the Sentencing Commission are to establish sentencing policies and practices for the federal criminal justice system that assure the meeting of the purposes of sentencing, provide certainty and fairness in meeting those purposes, avoid unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar criminal conduct, and reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process. In addition, subsection (b) requires the Commission to develop means of measuring the degree to which sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing. See S. Rept. 97-3907, pages 1327-1330.

Section 992.—Terms of office; compensation

Proposed Section 992 of title 28, United States Code, sets up, in subsection (a), 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. Subsection (b) of proposed section 992 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 the term. Subsection (c) of proposed section 992 sets the compensation of voting members at the rate of court of appeals judges. A federal judge is specifically authorized to be designated, or appointed, as a member of the Commission without having to resign his appointment as a federal judge. The salary for a federal judge on the Commission would be that of a court of appeals judge only so long as he was on the Commission. See S. Rept. 97-307, page 1331.

Section 993.—Powers and duties of chairman

Proposed section 993 of title 28 provides that the Chairman, who is appointed as such by the President, with the advice and consent of the Senate, is to call and preside at meetings, and to direct the preparation of appropriations requests and the use of funds made available to the Commission.

Section 994.—Duties of the Commission

Proposed section 994 of title 28 spells out the duties of the Sentencing Commission.

Subsection (a) requires the Sentencing Commission to promulgate sentencing guidelines and policy statements to be used by the sentencing judge 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 and to be consistent with all pertinent provisions of titles 18 and 28. Guidelines and policy statements must be adopted by an 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 a sentence to probation, to pay a fine, or to term of imprisonment. See S. Rept. 97-307, pages 1331-1333.

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 a 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 chapter 227 of title 18, 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 was sentenced to a term of imprisonment should be required to serve a term of supervised release, and if so, what length of term is appropriate.

Finally, subsection (a)(1)(D) requires that the sentencing guidelines include recommendations as to whether sentences to terms of imprisonment should be ordered to run concurrently or consecutively.

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 achieve the purposes of sentencing. Policy statements are required to address the questions of the appropriate use of the sanctions of order of criminal forfeiture, order of restitution, and order of notice to victims; conditions of probation and supervised release; sentence modification provisions for fines, probation, and imprisonment; authority under Rule 11(e) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement; and temporary release under section 3622 of title 18 and pre-release custody under 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 did not exist sufficiently frequently to be incorporated in the guidelines themselves. The policy statements might also address such issues as the kind of recommendations a judge might make pursuant to section 3582(a) of title 18 to the Bureau of Prisons as to an appropriate prison facility for a defendant committed to its custody. One important function of the policy statements might be to alert federal district judges to existing disparities which have not adequately been cured by the guidelines, while offering recommendations as to how these situations should be treated in the future. An additional area in which the Sentencing Commission might wish to issue general policy statements concerns the imposition of sentence upon organizations convicted of criminal offenses. See S. Rept. 97-307, page 1334.

Under subsection (a)(3) of section 994, the Sentencing Commission is required to issue either guidelines or policy statements concerning the appropriate use of probation revocation under section 3565 of title 18 and use of the provisions for modification of the term or conditions of probation or supervised release set forth in sections 3563(c), 3564(d), and 3583(e) of title 18.

Under subsection (b) of section 994, the Commission is to devise categories based on characteristics of the offense and categories based on characteristics of the offender. 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 contemplates a detailed set of sentencing guidelines, to be used as indicated in subsection (a) and in chapter 227 of title 18, as amended by this bill, that are designed to achieve the purposes of sentencing set forth in title 18. The subsection further requires that, if the guidelines recommend a term of imprisonment for a particular combination of offense and offender characteristics, the maximum of the sentencing range recommended may not exceed the minimum of that range by more than 25 percent. See S. Rept. 97-307, page 1336.

Subsection (c) of section 994 lists a number of offense characteristics which 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 in policy statements dealing with the nature, extent, location, 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 as to the kind of sentence that should be imposed; the size of the 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. The Sentencing Commission is also required under subsection (c) to determine whether other factors not specifically listed are relevant to the sentencing decision. For a detailed discussion of the various factors the Commission is required to consider, see S. Rept. 97-307, pages 1337-1339.

Subsection (d) contains a list of 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 in policy statements concerning the nature, extent, location, or other incidents of an appropriate sentence. The subsection parallels subsection (c) in its description of the issues that the Commission is required to examine. It also contains a specific provision that "the Commission shall assure that the guidelines and policy statements are entirely neutral as to race, sex, national origin, creed, and socioeconomic status of offenders."

Subsection (d)(1) specifies that the Commission should 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 provision of subsection (d)(1) is intended to require that consideration of youth in determining the appropriate sentence be employed in a 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 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, location, and other incidents of an appropriate sentence. For a discussion of the other factors listed in subsection (d), see S. Rept. 97-307, pages 1340-1342.

Subsection (e) specifically requires that the Sentencing Commission ensure 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. See S. Rept. 97-307, page 1342.

Subsections (f) through (l) contain a number of provisions giving general guidance to the Sentencing Commission concerning the considerations that the Congress believes to be appropriate in establishing the sentencing guidelines. Subsection (f) emphasizes the importance of providing certainty and fairness in sentencing and reducing unwarranted sentencing disparities. Subsection (g) requires the Commission to take into account the nature and capacity of the penal, correctional, and other facilities and services available to the federal criminal justice system. Subsection (h) requires that the Commission guidlines specify a sentence to a substantial term of imprisonment for serious repeat offenders, career criminals, and drug traffickers. Subsection (i) indicates that the guidelines should reflect the general appropriateness of not imposing a sentence of imprisonment in cases in which a defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and, conversely, that the guidelines reflect the general appropriateness of imposing a sentence of imprisonment in a case involving a crime of violence that results in serious bodily injury. The words "general appropriateness" are intended to make clear that there may be exceptions to this general statement, and that it is intended only to provide general guidance to the Sentencing Commission. Subsection (j) requires that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational and vocational training, medical care, or other correctional treatment. Subsection (k) is designed to ensure that the guidelines reflect the appropriateness of imposing incrememtal penalties for multiple offenses, and the general inappropriateness of imposing consecutive terms for a conspiracy or solicitation and for the offense that was the sole object of the conspiracy or solicitation. Subsection (l) requires the Commission to review the average sentences imposed in categories of cases under current practice, including the average term of imprisonment, but makes clear that the Commission is not bound by these averages.

Subsection (m) requires the Commission to continually 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. The provision mandates that the Commission constantly monitor the implementation of the guidelines in order to determine whether sentencing disparity is effectively being dealt with. In a very real way, the subsection complements the appellate review sections 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 guideline system to determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes.

Subsection (n) requires that proposed amendments to the guidelines be reported, along with the 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. It provides that the amendments will take effect 180 days after the Commission reports them, except to the extent that the effective date is enlarged or the guidelines are disapproved or modified by Act of Congress. The provision is modeled after section 3771 of title 18, United States Code, relating to amendments to the Federal Rules of Criminal Procedure.

Subsection (o) 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.

Subsection (p) requires the Sentencing Commission to evaluate the impact of the sentencing guidelines on prosecutorial discretion, plea bargaining, sentencing disparity, and the use of incarceration.

Subsection (q) requires the Commission to make recommendations to the Congress concerning raising or lowering of grades for offenses, or otherwise modifying the maximum penalties for offenses. This provision is especially important in light of the fact that the sentencing provisions are now contained in an amendment to title 18 that does not revise the definitions of offenses and regrade them according to their relative seriousness. Thus, it is probable that the Commission will find in promulgating its guidelines that the maximum sentences for some offenses do not adequately reflect the relative seriousness of those offenses, with some maximum sentences being too high relative to those for similar offenses while others are too low. It is expected that the Commission will promulgate its guidelines according to what it believes the sentences should be for a given combination of offense and offender characteristics, and if such recommendation necessitates an amendment of the statutory maximum sentence for a particular offense, that the Commission will recommend such a change in the law.

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 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.

Subsection (s) requires the Commission to describe the "extraordinary and compelling reasons" that would justify a reduction of a particularly long sentence pursuant to section 3582(c)(2) of title 18. The subsection specifically states, consistent with the rejection of the rehabilitation theory as the basis for determining the length of a term of imprisonment, that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" for reducing the sentence.

Subsection (t) requires the Sentencing Commission, in reducing sentence for a particular category of offense, to specify by what amount the sentence of a prisoner sentenced outside the guidelines might be reduced if the person was sentenced before the reduction. This specification would then be used by the court in assessing a prisoner's petition pursuant to section 3582(c)(3).

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.

Subsection (v) provides that the appropriate judge or officier 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. 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 these provisions and any recommendations for legislation that the analysis indicates is warranted.

Subsection (w) makes provisions of 5 U.S.C. 553, the provisions of the Administrative Procedure Act that relate to rulemaking, applicable to the promulgation of guidelines pursuant to section 994. This is an exemption th the rule that the Administrative Procedure Act is not generally applicable to the judicial branch and also to the rule that the Federal Register is not generally used by that branch for publication required under the Act.

Section 995—Powers of the Commission

Section 995 describes the powers of the Sentencing Commission. Subsection (a) enumerates 21 specific powers of the Commission that may be exercised by majority vote of the members present and voting, 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 under section 3553(a) of title 18, and to permit others involved in the federal criminal justice system to meet their related responsibilities.

The first eight paragraphs of subsection (a) contain general administrative powers necessary to carry out the functions of the Commission. See S. Rept. 97-307, pages 1348 through 1349.

In addition, 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.

Under subsection (a)(9), the Sentencing Commission has authority to monitor the performance of probation officers with respect to sentencing recommendations, including those relating to application of guidelines and policy statements. Under subsection (a)(10), the Commission is authorized to issue instructions to probation officers concerning the application of guidelines and policy statements of the Commission. See S. Rept. 97-307, page 1349.

A number of additional provisions provide for extensive research and data collection and dissemination authority in the sentencing area. 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, 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.

Subsection (b) of section 995 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), other than the issuance of general policies and promulgation of rules and regulations pursuant to section 995(a)(1), and other than 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 to coordinate certain of its activities, to the extent practicable, with any related activities of the Administrative Office of the United States Courts and the Federal Judicial Center in order to avoid unnecessary duplication.

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.

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

Section 996 of title 28 describes the authority of the staff director to supervise the activities of the Commission employees and perform other duties assigned by the Commission, and 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. It is intended 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, United States Code, except for the benefits provided in chapters 81 through 89.

Section 997.—Annual report

Section 997 of title 28 requires the Commission to report annually to the Judicial Conference, the Congress, and the President on the activities of the Commission.

Section 998.—Definitions

Section 998 of title 28 contains definitions necessary to the understanding of chapter 58 of title 28.

Repealers

Section 508(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 chapter 227.

Chapter 309, relating to good time allowances and release dates, is repealed as covered by the release provisions of section 3624 of title 18, as enacted by this bill.

Chapter 311, relating to parole, is repealed as replaced by the new sentencing provisions.

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 chapter 229.

Chapter 402, the Federal Youth Corrections Act, is repealed as covered by the sentencing guidelines provisions, particularly 28 U.S.C. 994(d)(1).

Sections 508 (b) through (e) contain technical amendments to various analyses contained in title 18 to reflect the repeal of these sections and chapters.

Section 509(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.

Technical and conforming amendments

Section 510(a) amends section 212(a)(9) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(9)) to reflect the deletion of the concept of petty offense.

Section 510(b) amends section 242(h) of the Immigration ad 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 511 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 512 amends section 9 of the Act of October 8, 1964, to reflect the authority of the United States magistrate to try and sentence persons charged with the commission of misdemeanors and infractions, as defined in section 3581 of title 18.

Section 513(a) amends section 924(a) of title 18 to delete a reference to parole, since parole is abolished.

Section 513 (b) amends to section 1161 of title 18 to update a cross-reference.

Section 513(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 513(d) amends section 1963 of title 18 in order to reflect the enactment in title VI of this bill of substantial amendments to the criminal forfeiture provisions.

Section 513(e) amends section 3006A of title 18 to reflect the new grading scheme in the sentencing provisions and to delete references to revocation of parole, since parole is abolished by this bill.

Section 513(f) of the bill amends section 3143 of title 18, as amended by this Act, to preclude the detention pending sentencing of a person for whom the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonent, and to reflect the enactment of section 3742, relating to government appeal of sentence.

Section 513(g) amends section 3147 of title 18, as amended by this act, to delete minimum sentence language that is not needed in light of the sentencing guideline provisions enacted by title V of the bill.

Subsections (h), (i), and (j) of section 513 amend sections 3156(b)(2), 3172(2), and 3401(h), to reflect the new grading scheme set forth in section 3581 of title 18.

Section 3401 is also amended 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 513(k) of the bill amends cross-references in section 3668 (formerly section 3619) of title 18.

Section 513(l) of the bill deletes a reference to parole officers in section 4004.

Section 513(m) 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 subchapter B of chapter 227. Third, it amends section 4105(c) to bring a reference in paragraph (1) into conformity with the revised provisions relating to credit towards service of sentence for satisfactory behavior contained in section 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 section 3624, and to amend paragraph (4) to delete references to forfeiture of good time as inconsistent with the provisions of section 3624. Section 4106 is amended to place offenders 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 is abolished by title V of the bill, and to provide that an offender transferred to serve a term of imprisonment shall be released in accord with the provisions of section 3624(a) of title 18 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. Sentence review procedures of section 3742 are made applicable to a sentence 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 jurisdic-

tion to review the sentence as though it had been imposed by the district court. Section 4106(c) is repealed, since it relates to parole release and parole has been abolished. Section 4108(c) is amended to require that, when an offender's consent to transfer to the United States is verified, the offender be informed of the applicable guideline sentence for this offense.

Section 513(n) of the bill amends section 4321 of title 18 to delete a reference to parole.

Section 513(o) of the bill amends section 4351(b) 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 513(p) of the bill amends section 5002 of title 18 make the Chairman of the Sentencing Commission a member of the Advisory Corrections Council, and to delete references to the Parole Commission.

Section 514 amends section 401(b)(1)(A), (b)(1)(B), (b)(2), (b)(5), and (c) of the Controlled Substances Act to delete references to a special parole term for various drug trafficking offenses. Sections 404 and 405A, as added by title IX of the bill, are amended similarly. Section 408(c) is amended to delete a reference to parole.

Section 515 deletes references in the Controlled Substances Import and Export Act to special parole terms.

Section 516 amends section 114(b) of title 23, United States Code, to add a reference to a term of supervised release.

Section 517 amends section 5871 of the Internal Revenue Code of 1954 to delete a reference to eligibility for parole.

Section 518 amends section 509 of title 28 to delete a reference to the Parole Commission and amends section 591 of title 28 to conform to the grading of misdemeanors and infractions.

Section 518(c) amends section 2901 of title 28 to add a reference to a term of supervised release and to conform a cross-reference to chapter 227.

Section 519 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 for the district in which the offense was committed may, under the amendment, make the decision upon motion of the Department of Justice. Section 504(a) is also amended to specify that decisions under the section are to be made pursuant to sentencing guidelines and policy statements promulgated pursuant to 28 U.S.C. 994(a), as enacted by this title of the bill. Section 504(a) is further conformed to the bill 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 519 of the bill to section 411(a) of the Employee Retirement Income Security Act of 1974. In addition, section 411(c)(3) is amended to add a reference to a term of supervised release after a reference to parole.

Section 521 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 522(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 522 amends section 343(d) of the Public Health Service Act to add a reference to a term of supervised release after the reference to parole.

Section 523 of the bill amends section 11507 of title 49, United States Code, to add a reference to a term of supervised release after the reference to parole.

Section 524 amends section 10(b)(7) of the Military Selective Service Act (50 USC App. 460(b)(7)) to substitute a reference to "release" for a reference to "parole".

Section 525.—Efective date

Section 525 of the bill is the effective date provision for title V of the bill. Subsection (a)(1)(A) makes the repeal of chapter 402 of title 18, United States Code, effective on the date of enactment. Subsection (a)(1)(B) makes the provisions of chapter 58, of title 28, United States Code, relating to the creation and responsibilities of the United States Sentencing Commission, effective on the date of enactment. It also specifies that the Sentencing Commission shall submit the initial sentencing guidelines promulgated pursuant to 28 U.S.C. 994(a)(1) to the Congress within 18 months of the date of enactment. The sentencing guidelines, and the provisions of sections 3581, 3583, and 3624 of title 18, United States Code, do not go into effect until after the Sentencing Commission has submitted the initial set of guidelines, the General Accounting Office has had three months to study them and report to Congress, and the Congress has had six months from the date of submission of the guidelines by the Sentencing Commission to examine them and consider comments. All other provisions of title V go into effect on the first day of the first calendar month beginning twenty-four months after the date of enactment.

Section 525(a)(2) provides that, for purposes of determining when the terms of office of the first members of the Sentencing Commission expire, their terms are deemed to begin to run when the sentencing guidelines first go into effect.

Section 525(b) specifies that certain provisions of current law relating to sentencing will continue to apply to individuals convicted of an offense or adjudicated to be a juvenile delinquent before the effective date and as to a term of imprisonment imposed during the period described in subsection (a)(1)(B) (relating to the effective date of the initial set of sentencing guidelines). This will assure that the length of a term of imprisonment, and the parole and good time statutes, will remain in effect as to any prisoner sentenced before the sentencing guidelines and the provisions of proposed 18 U.S.C. 3553 and 3624 go into effect. All other aspects of the sentencing provisions will go into effect 24 months after the date of enactment.

Most of those individuals incarcerated under the old system will be released during the five-year period. As to those individuals who have not been released at that time, the Parole Commission must set a release date prior to the expiration of the five years that is the earliest date that applies to the prisoner under the applicable parole guidelines. (It is intended that, in setting release dates under this provision, the Parole Commission give the prisoner the benefit of an applicable new sentencing guideline if it is lower than the minimum parole guideline.)

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 the Chairman will remain a member of the Advisory Corrections Council ex officio and be an ex officio member of the Sentencing Commission.

TITLE VI—CRIMINAL FORFEITURE

I. Introduction

Title VI of the bill is designed to enhance the use of forfeiture, and in particular the sanction of criminal forfeiture, as a law enforcement tool in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking.

There are presently two types of forfeiture statutes in federal law. The first provides for civil forfeiture, a civil in rem action, brought directly against property which is unlawful or contraband, or which has been used for an unlawful purpose. The majority of drug-related property, including drug profits, must be forfeited civilly under 21 U.S.C. 881. While this civil forfeiture statute has been an extremely useful tool in the effort to combat drug trafficking, a significant drawback is the requirement that a separate civil suit be filed in each district in which forfeitable property is located. Where the property to be forfeited is the property of a person charged with a drug violation, and that violation constitutes the basis for forfeiture, a more efficient way of achieving forfeiture would be to employ the second type of forfeiture statute, a criminal forfeiture statute.

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. Criminal forfeiture is now available under two statutes: the Racketeer Influenced and Corrupt Organizations statute (18 U.S.C. 1960 et seq., hereinafter referred to as RICO) and the Continuing Criminal Enterprise statute (21 U.S.C. 848, hereinafter referred to as CCE), which punishes those who conduct drug trafficking organizations.

In the last decade, there has been an increasing awareness of the extremely lucrative nature of drug trafficking and of the illicit economy which it generates and through which it is sustained, and thus, of the importance of effective tools for attacking the economic aspects of such crime. A similar awareness with respect to racketeering led to the enactment of the RICO and CCE statutes more than ten years ago.

Both civil and criminal forfeiture hold significant promise as important law enforcement tools in separating racketeers and drug traffickers from their ill-gotten profits and the economic power bases through which they operate. However, because of limitations of and ambiguities in present forfeiture statutes, the law enforcement potential of forfeiture in these areas has not been fully realized. Title VI is designed to address these problems, and is based with only minor modifications on S. 2320, the forfeiture bill prepared by the Administration which was the subject of a hearing before the Judiciary Committee's Subcommittee on Security and Terrorism on April 23, 1982.

This title is divided into three parts. The first, designated Part A, sets forth an amended version of 18 U.S.C. 1963, the provision of current law governing the penal-

ties, including criminal forfeiture, for violations of the RICO offenses described in 18 U.S.C. 1962. The most significant of the proposed changes in the current RICO forfeiture provisions are in two areas. First, language is included to make it clear that property which constitutes, or is derived from, the proceeds of racketeering activity punishable under 18 U.S.C. 1962 is subject to an order of criminal forfeiture. Although the Department of Justice has taken the position that such proceeds are already subject to forfeiture under 18 U.S.C. 1963, several courts have rejected this position. Other of the more significant amendments to section 1963 are designed to address the problem of defendants defeating forfeiture actions by removing, concealing, or transferring forfeitable assets prior to conviction. These amendments include a provision expanding to the pre-indictment stage courts' authority to enter restraining orders, a provision setting out clear authority voiding such transfers in the context of criminal forfeiture actions, and a provision permitting the court to order the defendant to forfeit substitute assets when the property originally subject to forfeiture is no longer available at the time of conviction.

The second part of this title makes several amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970. The most significant of the amendments in Part B is the creation in section 603 of a new criminal forfeiture statute that would be applicable in all cases involving major criminal violations of the Act. This new statute would provide for the criminal forfeiture of the proceeds of drug offenses as well as other property used in the commission of such offenses, and would reduce the need to pursue parallel criminal prosecutions and civil forfeiture actions. This forfeiture statute would also include several of the improvements proposed with respect to the RICO criminal forfeiture statute in part A of this title. Part B would also amend the civil forfeiture provisions of the narcotics laws (21 U.S.C. 881) to allow, in certain new circumstances, the forfeiture of real property, and to require the stay of civil forfeiture proceedings pending disposition of a criminal case in those instances where the criminal prosecution and forfeiture action cannot, or should not, be consolidated.

The final part of this title would establish, for a two-year period, a program under which twenty-five percent of the proceeds of forfeitures under the Comprehensive Drug Abuse Prevention and Control Act would be set aside to be used exclusively for the payment of awards to compensate those who have provided information or other assistance that has resulted in forfeiture under the Act.

II. Section-by-Section Analysis

Section 601 provides that this title may be cited as the "Comprehensive Criminal Forfeiture Act of 1982."

PART A

Section 602 amends 18 U.S.C. 1963, the provision which sets out the penalties for a violation of the RICO statute (18 U.S.C. 1962). The current penalties of fine and imprisonment are retained, but the provisions relating to criminal forfeiture have been amended and expanded. Each of the subsections of 18 U.S.C. 1963, as it would be amended by section 802, is discussed below:

18 U.S.C. 1963(a)

Section 1963(a) sets out the penalties for a violation of 18 U.S.C. 1962. Paragraph (1) carries forward the current fine and imprisonment levels. Paragraph (2) describes the property of the defendant that is subject to an order of criminal forfeiture. The substantive change worked by paragraph (2) is that it will specifically provide for the forfeiture of the profits generated by racketeering activity that serves as the basis for a RICO prosecution. Several courts have held that such profits are not currently forfeitable under RICO, and this limiting interpretation has significantly diminished the utility of the statutes' criminal forfeiture sanction. The criminal forfeiture provisions of the criminal code reform bill also provided for the forefeiture of proceeds. See S. Rept. 97-307, page 948.

18 U.S.C. 1963(b)

The title's amended 18 U.S.C. 1963(b) emphasizes that property subject to civil forfeiture may be either real property or tangible or intangible personal property, and underscores an intent, consistent with current law (see, *e.g., United States* v. *Rubin*, 559 F.2d 975 (5th Cir. 1977)), that the concept of "property" as used in section 1963 is to be broadly construed.

18 U.S.C. 1963(c)

Subsection (c) of section 1963, as amended, is a codification of the "taint" theory long recognized in forfeiture cases. Under this theory, forfeiture relates back to the time of the illegal acts which give rise to the forfeiture. From that time forward, the property is tainted and remains subject to forfeiture regardless of any subsequent disposition. Absent such a principle, a defendant could avoid forfeiture simply by transferring his property prior to conviction. This subsection makes it clear, however, that in the case of a transfer to a bona fide purchaser for value, the Attorney General may not proceed with disposition of the property. Such persons may obtain a return of their property by filing a petition for remission or mitigation of forfeiture.

18 U.S.C. 1963(d)

This provision is new to the law. It provides that where property found to be subject to forfeiture has been removed, concealed, transferred, or substantially depleted, the court may order that the defendant forfeit substitute assets. This section addresses one of the most serious impediments to significant forfeitures. Presently, a defendant may avoid the impact of forfeiture simply by transferring his assets to another, placing them beyond the jurisdiction of the court, or taking other actions to render such property unavailable at the time of conviction. Section 1963(d) addresses this problem. The criminal forfeiture provision of the Criminal Code Reform bill also included a substitute assets provision. See S. Rept. No. 97-307, page 948-949.

18 U.S.C. 1963(e)

This part of section 602 expands the current authority of the courts to enter restraining or protective orders with respect to property that may be subject to forfeiture. The current restraining order authority, set out at 18 U.S.C. 1963, is limited to the post-indictment period. However, defendants often become aware, prior to indictment, of a criminal investigation and will move to conceal or alienate their forfeitable assets at that time. To address this problem, section 1963(e) describes certain circumstances under which the government may obtain a pre-indictment restraining order. This section also articulates the circumstances in which an ex parte restraining order may be issued. Such an order is limited to a term of ten days, and may be issued only when it appears that the giving of notice will result in the transfer or removal of the property before an order could be issued.

18 U.S.C. 1963(f)

Proposed 18 U.S.C. 1963(f) governs matters arising during the period from the entry of the order of forfeiture until the time that the Attorney General directs disposition of the property. For the most part, these provisions are drawn from current law and practice, and have been formulated to provide necessary flexibility.

18 U.S.C. 1963(g)

Subsection (g) concerns matters regarding the disposition of property, and is drawn largely from current law. A new aspect of this provision is that it specifically authorizes the court to stay disposition of the forfeited property pending an appeal of the criminal case if a third party claiming an interest in the property demonstrates that such disposition 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) sets forth 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. This provision also improves on current law in that it articulates a standard for judicial review of the Attorney General's decision with respect to a petition for remission or mitigation of forfeiture, the mechanism whereby innocent third parties may obtain relief from a forefeiture of property in which they may have a legitimate interest.

18 U.S.C. 1963(i)

Under current 18 U.S.C. 1963(c), the procedures for most post-seizure matters are governed by the customs laws. In some respects, however, these customs laws provisions have been inadequate in addressing some of the complex issues that arise in RICO cases, where forfeited property may include complex interests in ongoing businesses. Subsection (i) therefore requires the issuance of regulations to govern certain post-seizure matters which may be drafted to address some of the unique problems arising in RICO forfeiture cases.

18 U.S.C. 1963(j)

This provision codifies the currently recognized limitations on the commencement of legal actions by third parties claiming an interest in property subject to forfeiture. See *United States* v. *Mandel*, 505 F. Supp. 189 (D. Md. 1981).

18 U.S.C. 1963(k)

This provision emphasizes the current jurisdiction of the court to enter orders under Part A without regard to the location of the property—a principle which distinguishes criminal forfeiture actions from *in rem* civil forfeiture actions.

18 U.S.C. 1963(l)

Subsection (l) of section 1963, as amended by this title, authorizes the court to order the taking of depositions to facilitate the identification and location of property that has been ordered forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture. The taking of such depositions will provide for a more orderly and fair consideration of these matters and will permit the development of a more complete record.

Part B

This part sets out various amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.).

Section 603 creates a new generally applicable criminal forfeiture statute for all felony violations of Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act. This statute is, in virtually all respects, identical to the RICO criminal forfeiture statute as amended by section 602 of this title, and will appear as a new section 413 of the Act, which is divided into the following subsections.

Section 413(a) provides for the sanction of criminal forfeiture upon a defendant's conviction for a felony drug offense. Property which is subject to criminal forfeiture under this provision includes the proceeds of the drug violation (now subject to civil forfeiture under 21 U.S.C. 881(a)(6)), property used or intended to be used to commit the violation (such property is largely subject to civil forfeiture under current 21 U.S.C. 8811, and the property already subject to criminal forfeiture under the Continuing Criminal Enterprise statute (21 U.S.C. 848).

Section 413(b), like the analogous provision of 18 U.S.C. 1963, as amended by section 802, emphasizes that the term "property", as used in section 413(a), is to be broadly construed.

Section 413(c)—see analysis of section 802 above that refers to new 18 U.S.C. 1963(c).

Section 413(d) see analysis of section 602 above that refers to the analogous substitute assets provision of new 18 U.S.C. 1963(d).

Section 413(e) provides for a permissive presumption that property of a defendant is subject to forfeiture if the government establishes that the defendant acquired the property at or within a reasonably related time after the commission of the offense and that he had no apparent legal sources of income to explain his acquisition of the property. This provision is much like the "new worth" method of proof commonly used in tax cases. Framed as a permissive and rebuttable inference rather than a mandatory presumption, this provision would appear to fully meet constitutional requirements. See *Ulster County Court* v. *Ulster*, 442 U.S. 140 (1979).

Section 413(f) see analysis of section 602 above that refers to the analogous protective order provision of new 18 U.S.C. 1963(e).

Section 413(g) recognizes that in drug cases forfeitable assets frequently take the form of cash, precious metals and gems, and other property that is easily moved or concealed. With respect to such property, a restraining or protective order may not be sufficient to assure the availability of the property for forfeiture. Therefore, this section provides for the issuance of a warrant of seizure if the government demonstrates that a protective or restraining order will not be sufficient.

Section 413(h) see analysis of section 602 above that refers to the analogous provision of new 18 U.S.C. 1963(f), governing certain matters arising in the period between the entry of the order of forfeiture and the disposition of the property.

Section 413(i) see analysis of section 602 above that refers to the analogous provision of new 18 U.S.C. 1963(g), which governs matters concerning the disposition of property ordered forfeited.

Section 413(j) see analysis of section 602 above that refers to the analogous provision of new 18 U.S.C. 1963(h), enumerating the authorities of the Attorney General.

Section 413(k) retains the current application of the customs laws to certain matters arising under forfeitures effected under title 21, United States Code. See 21 U.S.C. 881(d).

Section 413(l) see analysis of section 602 above that refers to new 18 U.S.C. 1963(j).

Section 413(m) see analysis of section 602 above that refers to new 18 U.S.C. 1963(k).

Section 413(n) see analysis of section 602 above that refers to new 18 U.S.C. 1963(l).

Section 604 incorporates in 21 U.S.C. 824(f) (relating to the forfeiture of controlled substances held by a dispenser or manufacturer whose registration has been revoked) the "taint" theory discussed above under sections 602 and 603.

Section 605 deletes the separate criminal forefeiture provisions of the Continuing Criminal Enterprise statute (21 U.S.C. 848). Criminal forfeiture arising out of a violation of this statute will be governed by the new criminal forfeiture statute set out in section 603 of this title.

Section 606 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 governs 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 real property which is used in a felony violation of title 21. An "innocent owner" exception like that now included in other provisions of section 881(a) is included.

The amendments to subsections (b), (c), (d), and (e) of section 881 are essentially technical and conforming amendments. In addition, two new subsections are added to 21 U.S.C. 881. The first codifies that "taint" theory now clearly applicable in civil forfeiture actions. The second provides for a stay of civil forfeiture proceedings where a criminal action including criminal forfeiture of the same property is commenced.

Section 607 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 new criminal forfeiture statute applies in cases of felony violations involving the import or export of controlled substances.

Section 608 is a conforming amendment to the table of contents of the Comprehensive Drug Abuse Prevention and Control Act.

Part C

Section 609 establishes, for a two-year trial period, a program under which twenty-five percent of the amounts realized from civil and criminal forfeitures under title 21, United States Code, are to be available to pay for discretionary rewards for information or other assistance that leads to such forfeitures. The amount of such rewards is limited to the lesser of $50,000 or twenty-five percent of the amount realized in a forfeiture case. During the two-year period, detailed audits of the expenditure of these funds are to be made semi-annually.

TITLE VII—OFFENDERS WITH MENTAL DISEASE OR DEFECT

I. Introduction

Title VII of the bill amends various provisions of title 18, United States Code, and of the Federal Rules of Criminal Procedure, relating to the procedure to be followed in Federal courts with respect to offenders who are or have been suffering from a mental disease or defect. Among the matters provided for by these amendments are the determination of mental competency to stand trial, the determination of the existence of insanity at the time of the offense, the limit the scope of a separate insanity defense, and the post-trial hospitalization of defendants suffering from a mental disease or defect.

II. Section-by-section analysis of title VII

Section 701 of the bill provides a comprehensive amendment of current chapter 313 of title 18, United States Code. Proposed section 4241 deals with the determination of mental competency to stand trial. Section 4242 relates to the determination of the existence of insanity at the time of an offense, and limits the separate insanity defense to a "mens rea" test of criminal responsibility. Section 4243 provides for the hospitalization of a person acquitted by reason of insanity. Section 4244 deals with the hospitalization of a convicted person who is suffering from a mental disease or defect. Section 4245 covers the hospitalization of an imprisoned person who suffers from a mental disease or defect. Section 4246 deals with the situation of such a person who is scheduled to be released. Section 4247 contains general provisions for chapter 313.

Section 4241, Determination of Mental Competency to Stand Trial, contains five subsections which deal exclusively with the determination of the mental competency of the defendant to stand trial or to enter a plea. Subsection (a) permits either the defendant or the government to move for a hearing to determine the defendant's mental competency, and requires the court to order a hearing if there is reasonable cause to believe that a mental disease or defect renders the defendant unable to understand the proceedings or to assist in his defense. Subsection (b) permits the court to order a psychiatric or psychological examination of the defendant prior to the hearing. Subsection (c) requires that the hearing be conducted pursuant to the provisions of section 4247 (i.e., the defendant shall be represented by counsel, afforded an opportunity to testify, etc.). Subsection (d) provides that a defendant found by a preponderance of the evidence to be mentally incompetent shall be hospitalized for treatment in a suitable facility for a reasonable period of time to determine whether there is a substantial probability that he will attain the capacity to permit the trial to proceed. If the defendant appears unlikely to improve sufficiently, he is to be treated in accordance with the provisions of section 4246. Subsection (e) provides for the discharge from the hospital of a defendant who has recovered sufficiently to stand trial. Subsection (f) specifies that a court finding of competency to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the crime charged, and shall not be admissible as evidence at trial. See S. Rept. No. 97-307, pages 1191-1197.

Section 4244, Determination of the Existence of Insanity at the Time of the Offense, specifies the extent to which a defendant's mental disease or defect constitutes a defense to prosecution, provides for an examination of a defendant who intends to rely on such a defense, and sets forth the types of verdict to be rendered in such cases.

Subsection (a) states that it is not a defense to prosecution under any federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged, and specifies that mental disease or defect does not otherwise constitute a defense. By limiting the separate, judicially-developed, insanity defense, this statutory approach to the issue of the criminal responsibility of a person suffering from a mental disease or defect focuses on two critical questions: did the defendant act with the state of mind required for the offense charged and, if he did so act but was suffering from a mental disease or defect, should he be imprisoned, hospitalized, or otherwise treated. See S. Rept. No. 97-307,

pages 95-108. See also, remarks of Senator Hatch upon introduction of S. 818, Cong. Rec. S2809-2828, March 26, 1981.

Subsection (b) provides for the psychiatric or psychological examination of a defendant who files a notice of intent to rely on the defense set forth in subsection (a). Subsection (c) specifies that in a case involving such a defense the trier of fact is to return a verdict of guilty, not guilty, or not guilty only by reason of insanity.

Section 4243, Hospitalization of a Person Acquitted by Reason of Insanity, 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. Subsection (a) requires that such a person be committed to a suitable facility until he is eligible for release pursuant to subsection (d). Subsection (b) requires that the person undergo a psychiatric or psychological study, while subsection (c) mandates a hearing on his present mental condition within forty days following the verdict. Subsection (d) provides that if, after the hearing, the person is found by clear and convincing evidence to be then 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 shall be committed to the custody of the Attorney General for treatment, preferably in a state facility. Subsection (e) provides for the absolute or conditional release of such a person pursuant to a medical certification and a court finding that such release will no longer create a substantial risk to the person or property of others. Subsection (f) permits revocation of a conditional release order if such a risk is created anew by the person's failure to comply with the conditions of release. See S. Rept. No. 97-307, pages 1200-1203. See also, remarks of Senator Hatch upon introduction of S. 1558, Cong. Rec. S9102-9105, July 31, 1981.

Section 4244, Hospitalization of a Convicted Person Suffering From Mental Disease or Defect, sets forth procedures new to Federal law, to be followed when there is reasonable cause to believe that a recently convicted defendant may be suffering from a mental disease or defect and in need of care or treatment in a suitable facility. Subsection (a) permits the court, shortly after a guilty verdict and before sentencing, on motion of the defendant or the government or on its own motion, to order a hearing on the defendant's present mental condition if there is reasonable cause to believe he is suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in suitable facility. Under subsection (b), the court may order psychiatric or psychological examination of the defendant. If, after a hearing provided for by subsection (c), the court determines by a preponderance of the evidence pursuant to subsection (d) that the standard set forth in subsection (a) has been met, the defendant is to be committed to the custody of the Attorney General for hospitalization in a suitable facility, in lieu of being imprisoned. Subsection (e) permits the discharge and final sentencing of a hospitalized defendant when the director of the facility certifies that he is no longer in need of custody for care and treatment. See S. Rept. 97-307, pages 1204-1206.

Section 4245, Hospitalization of an Imprisoned Person Suffering from Mental Disease or Defect, deals with the hospitalization of an imprisoned person who is suffering from a mental disease or defect for which he is in need of custody for care or treatment, if the person objects to being hospitalized. Unlike current federal law, subsection (a) provides that, when a defendant who is imprisoned objects to being transferred to a suitable facility for care and treatment of a mental disease or defect, the court shall, on the government's motion, order a hearing on the defendant's present mental condition if there is reasonable cause to believe that the defendant may be suffering from a mental disease or defect for the treatment of which he is in need of custody or care for treatment in a suitable facility. Subsections (b) and (c), respectively, provide for the psychiatric or psychological examination of the defendant, and for the conduct of the hearing. Subsection (d) provides that a defendant who is found to be suffering from a mental disease or defect and in need of custody for care and treatment shall be hospitalized in a suitable facility until he is no longer in need of such care or treatment, or until his prison sentence expires. Subsection (e) provides for the defendant's discharge from the hospital and return to prison upon the certification of the director of the facility that he is no longer in need of custody for care and treatment. See S. Rept. No 97-307, pages 1206-1208.

Section 4246, Hospitalization of a Person Due for Release but Suffering From Mental Disease or Defect, covers those circumstances where State authorities will not institute civil commitment proceedings against a hospitalized defendant whose federal sentence is about to expire, who is mentally incompetent to stand trial, or against whom all criminal charges have been dropped solely for reasons related to his mental condition, and who is presently mentally ill. Subsection (a) requires the court to order a hearing if the director of the facility in which the person is hospitalized certifies 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 State custody and care of the person are not available. Subsections (b) and (c), respectively, provide for the psychiatric or psychological examination of the person and for the conduct of the hearing. Subsection (d) provides that if the facts certified are found by the court by a preponderance of the evidence, the person is to be committed to the custody of the Attorney General for treatment, preferably in a State facility. Subsection (e) provides for the absolute or conditional release of such a person pursuant to a medical certification and a court finding that such release will no longer create a substantial risk to the person or property of others. Section (f) permits revocation of a conditional release order if such a risk is created anew by the person's failure to comply with the conditions of release. Subsection (g) deals with mentally ill persons who have been hospitalized and against whom all charges have been dismissed for reasons not related to their mental condition. If the director of the hospital certifies that the release of such a person would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General is required to release the person to appropriate State officials for the institution of State civil commitment proceedings. If the appropriate State will not assume responsibility, and so informs the Attorney General, the person must be released. See S. Rept. No. 97-307, pages 1209-1212.

Section 4247, General Provisions for Chapter, contains a definition of terms used in chapter 313, as well as other provisions generally applicable to sections 4241-4246. Subsection (a) defines the terms "rehabilitation program" and "suitable facility". Subsections (b) and (c), respectively, set forth requirements for court ordered psychiatric or psychological examinations and reports. Subsection (d) enumerates the rights a person has at a hearing to determine his mental condition. Subsection (e) pertains to reports by mental facilities, and contains a requirement that a hospitalized person be informed of the availability of rehabilitation programs. Subsection (f) permits the court to order and examine a videotape record of a defendant's testimony or interview which forms a basis of a periodic report of his mental condition. Subsection (g) concerns the admissibility in evidence of statements made by a defendant during the course of a psychiatric or psychological examination. Subsections (h) and (i), respectively, preserve the availability of the writ of habeas corpus, and permit a hospitalized person to move for a hearing to determine whether he should be released. Subsection (j) sets forth the authority and responsibility of the Attorney General under chapter 313. Subsection (k) provides that chapter 313 does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice. See S. Rept. No. 97-307, pages 1212-1213.

Section 702 of the bill amends Rule 12.2 of the Federal Rules of Criminal Procedure to conform with chapter 313 of title 18 as amended by section 701.

Section 703 of the bill amends section 3006A of title 18, United States Code, to conform with chapter 313 of title 18 as amended by section 701.

TITLE VIII—SURPLUS FEDERAL PROPERTY AMENDMENTS

I. Introduction

Title VIII of the bill is designed to make it easier for the federal government to transfer to the State and local governments surplus federal property for use by the transferee for the care or rehabilitation of criminal offenders. It is identical to S. 1422 as reported by the Committee on Governmental Affairs presently pending on the Senate Calendar (See S. Rept. No. 97-322). The provisions are also in accord with Recommendation 56 of the Attorney General's Task Force on Violent Crime, which cited the transfer of surplus property for this purpose as a "significant opportunity for Federal involvement in easing State and local correctional facility overcrowding." Attorney General's Task Force on Violent Crime, Final Report, p. 79 (1981).

II. Section-by-section analysis

Section 801 of the bill amends section 203 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 484) to permit the Administrator of the General Services Administration to transfer or convey to a State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, or any political subdivision or instrumentality thereof, surplus property determined by the Attorney General to be required for a correctional facility by the transferee or grantee. Because of the knowledge of the Bureau of Prisons as to the appropriateness of particular facilities for particular corrections programs, the Attorney General rather than the Administrator of GSA would approve the transfer. The transfers under the provision would be made without charge to the State of local government receiving the property. If the property ceases to be used for the authorized purpose, it will revert, at the option of the United States, to the United States.

Section 802 of the bill further amends section 203 of the Federal Property and Ad-

ministrative Services Act of 1949 to require that the head of the transferring agency under the amendment made by section 801 submit an annual report to the Congress showing the acquisition cost of personal property donated and of real property disposed of during the preceding fiscal year.

TITLE IX—MISCELLANEOUS CRIMINAL JUSTICE IMPROVEMENTS

I. Introduction

Title IX of the bill incorporates a number of additional improvements in the criminal justice system, including the creation of new offenses, the expansion of existing offenses, and the revision of procedural provisions of federal law.

II. Section-by-Section Analysis

Part A—Contract Murder

Section 901 would add two new sections, 1952A and 1952B, to title 18 of the United States Code to proscribe contract murders. Although designed primarily for use in cases of murder-for-hire carried out at the orders of organized crime figures, section 1952A would also reach other such calculated murders. Section 1952A follows the format of 18 U.S.C. 1952, interstate travel in aid of racketeering. Section 1952 presently covers murder if the perpetrator traveled in interstate commerce to commit the murder, or used a facility of interstate commerce to commit it, and the crime was in furtherance of an unlawful activity involving offenses relating to gambling, untaxed liquor, narcotics, prostitution, extortion, bribery, or arson.

Section 1952A would reach the travel in interstate or foreign commerce or the use of the mails or a facility in interstate or foreign commerce (such as a telephone if used for an interstate call) with the intent that a murder be committed in violation of State or Federal law. The murder must be planned or carried out as consideration for the receipt of something of pecuniary value or a promise or agreement to pay something of pecuniary value. Both the person who ordered the murder and the "hit-man" would be covered. If the victim is killed the punishment can extend to life imprisonment and a $50,000 fine but lesser punishments are provided if the planned murder did not take place or the attempt resulted only in an injury to the victim.

Section 1952B is designed to deal with contract murders and other violent crimes by organized crime figures which do not involve interstate travel or other interstate facilities or are committed not for money but rather as a part of membership in a criminal organization. This section proscribes murder, kidnaping, maiming, serious assaults and threats of violence committeed as consideration for payment or a promise to pay anything of pecuniary value from an "enterprise" engaged in "racketeering activity." "Racketeering activity" is defined as set forth in the RICO statute, section 1961, and "enterprise" is defined as an organization, group or entity whose activities affect interstate commerce. The proposed section also covers murders, kidnapings, maimings, serious assaults and threats of violence committed as a means of gaining entrance into or improving one's status in an enterprise engaged in racketeering activity. Attempts and conspiracy to commit these offenses are also covered. The person who ordered the offenses set forth in the section could also be punished as an aider and abettor under 18 U.S.C. 2.

While section 1952B proscribes murder, kidnaping, maiming, assault with a dangerous weapon, and assault resulting in serious bodily injury in violation of federal or State law, it is intended to apply to these crimes in a generic sense, whether or not a particular State has chosen those precise terms for such crimes. For example, section 120.10 of the Penal Code of New York provides that a person is guilty of assault in the first degree when "(1) with intent to cause serious physical injury to another person, he causes such injury of such person or to a third person by means of a deadly weapon or a dangerous instrument; or (2) with intent to disfigure another person seriously and permanently, or destroy, amputate, or disable permanently a member or organ of his body, he causes such injury to such or to a third person . . ." A person who committed such an offense in New York would violate the proposed new section if his actions were for payment of anything of pecuniary value from an organization engaged in racketeering activity or for advancement in such an organization.

Part B—Administrative Forfeiture Amendment

Section 902 amends the Tariff Act of 1930 (19 U.S.C. 1202 et seq.), which governs not only seizures and forfeitures under the customs laws, but also those under the narcotics laws (see 21 U.S.C. 881(d)), to address the increasing problem of unmanageable backlogs of civil forfeiture actions in areas such as South Florida. The Tariff Act currently provides for mechanism of administrative forfeiture as a means of quickly disposing of uncontested forfeitures. However, this mechanism is currently of little utility since it may be invoked only when the value of the seized property does not exceed $10,000, a dollar amount unchanged since the enactment of the Tariff Act. Presently, much of the property seized as the result of violations of the customs and narcotics laws has a value in excess of $10,000, and thus, even though the forfeiture of the property is uncontested, the property may be forfeited only after a judicial proceeding, a proceeding which, because of the backlog of civil cases in the federal courts, may not take place until more than a year after the property has been seized. Pending such judical proceedings, the United States must bear the expense of storing and maintaining the property. Furthermore, much of this property consists of "wasting" assets whose value will decline substantially during the delay.

To address these problems, section 902 amends 19 U.S.C. 1607 and 1610, to permit the administrative rather than judicial forfeiture of personal property valued at less than $100,000, where such forfeiture is uncontested. In light of this increase, section 902 also amends 19 U.S.C. 1608 to increase the amount of a bond that is to be filed if a party wishes contest a forfeiture of such property in a judicial proceeding from the current level of $250 to the greater of $250 or ten percent of the appraised value of the property.

Part C—Arson

Section 903 amends two subsections of section 844 of title 18, United States Code and is designed to resolve a problem that has impeded the use of that section in major arson cases. Section 844 deals with the criminal misuse of explosives. Section 844(i) presently proscribes the destruction of property used in or affecting interstate or foreign commerce by means of an explosive. Section 844(f) prohibits the destruction by means of an explosive of property of the federal government or of an organization receiving federal financial assistance.

Section 844(i) has been sucessfully used as a basis for prosecution in some arson cases where gasoline or another flammable liquid has been employed. An ignited mixture of air and gasoline vapor has been held to be an "explosive" within the definition applicable to 844(f) and 844(i). See, e.g., *United States* v. *Agrillo-Ladlad* and *United States* v. *Fleming*, Nos. 80-2822 and 80-2826 (7th Cir., Apr. 14, 1982) and cases therein cited. But the Ninth Circuit has refused to apply section 844(i) in this type of case. *United States* v. *Gere*, 662 F. 2d 1291 (9th Cir. 1981). Moreover, demonstrating that a particular "torching" of a building was carried out by means of such an explosive is often difficult and time consuming. Section 903 would overcome these problems by amending 18 U.S.C. 844(i) to cover damage to property used in or affecting commerce by means of fire as well as by an explosive, and by amending 18 U.S.C. 844(f) to cover destruction of federal property by fire or explosive.

Part D—Electronic Surveillance Amendments

Part D is identical to S. 1640, as passed by the Senate on March 25, 1982, and amends Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 et seq.), the provision of current law which governs electronic surveillance, to achieve two district purposes: first, to estabish uniform procedures for the use of surreptitious entries to install court-authorized electronic eavesdropping devices and second, to provide for emergency interceptions of wire or oral communications in life-endangering situations. See Senate Report 97-319, 97th Cong., 2d Sess. (1982) for an extensive discussion of the need for these provisions.

surreptitious entry

In *United States* v. *Dalia*, 441 U.S. 238 (1979), the Supreme Court held that neither the Fourth Amendment nor Title III required specific court authorization of a surreptitious entry necessary to install an interception device to effect a court ordered interception of communications. Nonetheless, the Court stated that the "preferable approach" would be for Government agents to make explicit to the court their expectation that an entry would be needed to carry out the surveillance, and noted with approval a Department of Justice policy, still in effect, which requires not only that an application for a Title III order indicate whether a surreptitious entry is expected, but also that specific authorization of such an entry be included in the court's order. The provisions of Part D essentially incorporate this long-standing policy of the Department of Justice.

life-endangering exception

Generally, Title III requires prior court authorization of an interception of communications. However, 18 U.S.C. 2518(7) permits an emergency interception without such prior authorization under two types of emergency situations when there is not time to obtain a court order: those involving either "conspiratorial activities threatening the national security" or "conspiratorial activities characteristic of organized crime." The absence of similar specific authority to intercept communications in emergency situations in which there is an imminent threat to human life has been of grave concern to law enforcement authorities. Part D would amend 18 U.S.C. 2518(7) to provide such authority.

As noted in the Senate Report on S. 1640, 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:

"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.

S. Rept. No. 97-319, p. 7. The FBI also provided a number of case studies illustrating the need for the emergency life-in-danger amendment which are set out at note 37 of the Report.

Section 904 amends 18 U.S.C. 2510 to include a definition of the term "surreptious entry." Surreptitious entry is defined to mean a "physical entry upon a private place or premises to install, repair, reposition, replace, or remove" an eavesdropping device, and includes both covert entries and entries effected by ruse or subterfuge.

Section 905 amends 18 U.S.C. 2518(1) to require that an application for an order authorizing the interception of communications specify whether a surreptitious entry will be required to carry out the order, and would thus alert the issuing judge to the fact that a surreptitious entry was anticipated.

Section 906 amends 18 U.S.C. 2518(4) to require that the court's order authorizing an interception state whether a surreptitious entry is authorized to effect the order and identify the agency authorized to make the entry.

Section 907 amends 18 U.S.C. 2518(7) to add to the bases for an interception of communications without a prior court order (currently limited to emergency situations involving conspiratorial activities threatening the national security or conspiratorial activities characteristic of organized crime) emergency situations involving an "immediate danger of death or serious physical injury to any person." As under the existing emergency interception provision, an interception based on such life-endangering circumstances would be permitted only if the grounds for obtaining a court ordered interception exist and an application for such an order is made within forty-eight hours. This amendment is in accord with the established principle that the existence of exigent circumstances requiring immediate action is justification for conducting a warrantless search. There is no reason why the same principle should not also apply in the area of interception of communications, particularly in view of the narrowly drawn basis for emergency authorization set forth in this amendment. Certainly, an immediate threat of danger to human life is an equally, if not a more compelling justification for emergency interception than the current statutory basis set out in 18 U.S.C. 2518(7).

This section also makes it clear that an emergency interception authorized under 18 U.S.C. 2518(7) may include a surreptitious entry.

Section 908 amends section 2519 of title 18, United States Code, currently provides that certain information concerning Title III interceptions be reported to the Administrative Office of the U.S. Courts. The amendment adds the requirement that information regarding surreptitious entries be included in these reports.

Section 909 merely corrects the paragraph references in section 2519(2) of title 18, United States Code, to reflect the addition of a new section 2519(1).

Part E—Juvenile Delinquency

Part E makes several amendments to the juvenile delinquency chapter of title 18, United States Code.

Section 910 lowers from eighteen to seventeen the age at which an act that would be considered a crime if committed by an adult is instead considered to be an act of juvenile deliquency.

Section 911 amends section 5032 of title 18 to provide that the provision relating to deferral of juvenile prosecutions to State authority does not apply to an offense that is a felony if there is a substantial federal interest in the case or the offense that warrants the exercise of federal jurisdiction. This amendment to current law was recommended by the Attorney General's Task Force on Violent Crime. That Task Force Report indicates, at page 83, that it believes that the federal government "should have the opportunity to prosecute those individuals, be they adults or juveniles, who violate federal law".

Section 911 also amends section 5032 to permit adult prosecution of anyone over fourteen who is charged with a crime of violence or an offense described in section 841, 952(a), 955, or 959 of title 21, United States Code, relating to drug trafficking. Under current law, a person may be charged as an adult only if he is over 16 and is charged with an offense punishable by ten years or more in prison, life imprisonment, or death.

Section 912 amends section 5038 of title 18 of the United States Code to permit a juvenile who is prosecuted as an adult. Under current law, the name and picture of a juvenile may not be released even if the courts have found that prosecuting him as an adult is in the interests of justice. The amendment is consistent with a recommendation of the Attorney General's Task Force.

Part F—Kidnaping of Federal Officers

Section 913 amends the kidnaping statute, 18 U.S.C. 1201, to cover the abduction of a federal officer listed in 18 U.S.C. 1114 if the crime is committed while the victim is engaged in his official duties or on account of his official duties. Presently only murder and assault on these persons are federal offenses and kidnaping would not be covered unless the victim happened to be transported in interstate commerce or the offense was committed in an area of special federal jurisdiction. The amendment also complements the amendments contained in Part G, which proscribes the murder, assault, or kidnaping of family members of federal law enforcement officers and high level federal officials if the offense is committed to impede or retaliate against the federal officer or employee because of his official duties.

Part G—Protection of Families of Federal Officials

Section 914 adds a new section 115 to title 18, United States Code, to make it a federal offense to commit or threaten to commit a murder, kidnaping or assault upon a close relative of a federal judge, federal law enforcement officer, or certain high-level federal officials if the purpose of the attack is to impede, interfere with, intimidate, or retaliate against the federal employee on account of his official duties. Since it would be an element of the new offense that the act was done because of the official duties of the employee, the section represents no real expansion of federal jurisdiction. The scope of the offense is linked to acts done with a purpose to obstruct or retaliate against federal officials because of their job-related responsibilities—acts for which a State or local jurisdiction might lack the necessary degree of interest to vindicate the crime and for which federal jurisdiction is thus appropriate.

The subjects of the new offense are family members—spouse, parent, brother, sister, and other relatives of the official who actually live in his household—of those government employees and officers most likely to be subjected to attacks by terrorists or other criminals in an attempt to interfere with vital functions of the government and the administration of justice, namely law enforcement officers, the President, Vice President, Members of Congress, Cabinet officers and federal judges including Supreme Court Justices. In part, this section complements Title IV of the bill, which protects Supreme Court Justices and Cabinet officers themselves by making attacks on their persons federal crimes.

Part H—Destruction of Motor Vehicles

Section 916 amends the definition of "motor vehicle" in 18 U.S.C. 31, the section that defines the term as it is applied in 18 U.S.C. 33 which proscribes the destruction of motor vehicles or the disabling of a driver of a motor vehicle. Presently "motor vehicle" means any device used for commercial purposes on the highways for the transportation of passengers or passengers and property. It does not include vehicles used to transport only cargo. Another statute which does cover the actual or attempted destruction of cargo moving in interstate commerce, 15 U.S.C. 1281, is restricted to the destruction of the cargo itself. Thus, there is no federal coverage of a sniper who shoots at a cargo truck since the truck carries only cargo which usually is not destroyed. The amendment would close this gap by expanding the definition of "motor vehicle" to include a device used for carrying "passengers and property, or property or cargo."

Part I—Reporting of Currency Transactions

Part I would amend various sections of chapter 21 of title 31 of the United States Code to strengthen the ability of law enforcement authorities to stem the illicit flow of currency involved in narcotics trafficking and money laundering schemes often associated with organized crime. The chapter presently provides for the filing of reports relating to certain large-scale domestic currency transactions, and to the importation or exportation of monetary instruments—generally cash or the equivalent—in large amounts.

Section 916(a) raises the civil penalty authorized in section 1056 of title 31 for a willful violation of the chapter by a financial institution or a participating officer or employee from $1,000 to $10,000.

Section 916(b) raises the criminal penalty for a willful violation of the chapter from its present misdemeanor level to a felony with an authorized punishment of five years' imprisonment and a $50,000 fine, or both.

Section 916(c) would amend section 1101, which presently requires a report to be filed by a person who transports monetary instruments of $5,000 or more into or out of the United States. First, it would raise the reporting requirement to those transporting $10,000 in recognition of the fact that legitimate tourists today occasionally carry more then $5,000. Second, it would add a reporting requirement for those who attempt to transport the larger amount. Presently there is no attempt provision. As a result, court decisions have held that as to transporting currency out of the country the statute is not violated until the person has actually departed the United States. At that point federal arrest authority is generally lacking.

Section 916(d) would amend section 1105 by allowing a customs officer to make a warrantless search of a vessel, vehicle, airplane or person entering or departing from the United States if he has resonable cause to believe the conveyance or person is trans-

porting monetary instruments in violation of the reporting requirements of section 1101. Warrantless border searches of persons and conveyances entering the United States have long been judicially sanctioned. This subsection extends this type of search to outgoing traffic. The only court which has squarely considered this question concluded that the similarity of incoming and outgoing border searches compelled a holding that a warrantless search on less than probable cause was proper. *United States* v. *Stanley*, 545 F.2d 661 (9th Cir. 1976), cert. denied, 436 U.S. 917 (1978).

Section 916(e) would authorize rewards for persons who provide information which leads to a fine, civil penalty, or a substantial forfeiture for a violation of the currency reporting laws.

Section 917 would add currency reporting violations to the definitions of "racketeering activity" listed at 18 U.S.C. 1961 (1), thereby making title 31 crimes predicate offenses for a RICO prosecution.

Part J—Pharmacy Robbery

Section 918 adds a new section 2118 to title 18, United States Code, to proscribe the taking of certain narcotics, amphetamines or barbiturates from a pharmacy or from a registered manufacturer, distributor, or dispenser of controlled substances by force, violence, or intimidation. See S. Rept. No. 97-307, pages 674-675.

Part K—Solicitation To Commit a Crime of Violence

Section 919 adds a new section 373 to title 18 of the United States Code, to proscribe the offense of solicitation to commit a crime of violence. This section is of principal utility in a situation where a person makes a serious effort to induce another to engage in activity constituting a crime of violence but is unsuccessful in doing so. The solicitor is clearly a dangerous person and his act merits criminal sanctions. Yet at present there is no federal law that prohibits solicitation generally, although solicitation offenses are common in modern state criminal codes and a solicitation offense was included in S. 1630, the proposed federal criminal code reform bill. See S. Rept. No. 97-307, pages 179-186.

Only solicitation to commit a crime of violence is here covered. "Crime of violence" is defined, in a new section 16 to be added to title 18, as a crime that has as an element the use or attempted use of physical force against another's person or property, or any felony that involves a substantial risk that physical force will be so used. Thus, although the new offense rests primarily on words of instigation to crime, what is involved is legitimately proscribale criminal activity, not advocacy of ideas which is protected by the First Amendment right of free speech.

Part L—Felony-Murder

Section 920 amends the felony-murder portion of the federal murder statute, 18 U.S.C. 1111. Presently premeditated murder is murder in the first degree. Under common law, a murder committed during a common law felony was held to be committed with a sufficient degree of malice to warrant punishments as first degree murder, but section 1111 only applies the felony murder doctrine to killings committed during an actual or attempted arson, rape, burglary, or robbery. The amendment would expand the list of underlying offenses by adding escape, murder—for example if the defendant acts in the heat of passion in an attempt to kill A but instead kills B—kidnaping, treason, espionage, and sabotage since these crimes also pose as great, if not more, danger to human life, as the four presently listed.

Part M—International Year Against Drug Abuse

Section 921(a) states that it is the sense of the Congress that the President is urged to promote a declaration by the United Nations of an International Year Against Drug Abuse. The statement of the sense of the Congress follows congressional findings that the problems of drug abuse continue to worsen in most parts of the world, that the number of drug abusers has risen and abuse has spread geographically, that the types and quantities of drugs abused has expanded, and that a declaration by the United Nations as an International Year Against Drug Abuse would be a catalyst for international action against the problem.

Section 921(b) requires that the secretary of the Senate transmit copies of the resolution to the President.

Part N—Distribution of Drugs Near Schools

Section 922 enacts a new section 405A of the Controlled Substances Act that provides in subsection (a) that, if a person is convicted of distributing a controlled substance in or on, or within one thousand feet of, a school or its premises, he will be punishable by imprisonment or a fine that is twice that provided in section 401(b) and by a special parole term that is twice that authorized for a first offense involving the same controlled substance and schedule.

Subsection (b) of section 405A provides that, if the offense is a second offense, the person is punishable by a term of imprisonment of not less than three years and not more than twenty years and at least three times the special parole term authorized for a second or subsequent offense under section 401(b).

Subsection (c) of section 405A makes the sentence under subsection (b) mandatory and makes the offender ineligible for parole until he has served the minimum specified sentence.

Subsections (b), (c), and (d) of section 922 of the bill contain conforming amendments.

Part O

Section 923 contains a provision to ensure that the bill conforms to the Budget Act requirements.

STATEMENT OF MAJOR PURPOSES

This legislative proposal is designed to improve the criminal justice system to better serve and protect the American people in three distinct areas of critical concern to this Administration, to law enforcement authorities, and to the public. The Administration has determined that legislative action is needed, first, to define and limit the insanity defense, a subject on which Congress has never acted. Second, we believe that the Congress must act to restrict the exclusionary rule, a rule by which highly relevant evidence of a defendant's guilt is suppressed even though it most frequently involves police conduct which, while reasonably undertaken in good faith, is ruled improper by a court long after the fact. The exclusionary rule often operates to divert a criminal trial from a search for the truth into a search for minor police error. Finally, the Congress should act to limit the duplicative and time consuming federal review, through the habeas corpus procedure, of State criminal convictions that have been upheld by State appellate courts. These endless reviews of typically frivolous contentions unnecessarily interject the federal judiciary into matters that are primarily the responsibility of the State courts and erode the principle of finality of criminal convictions, which is an essential element of a credible and effective criminal justice system.

Enactment of these reforms would be a significant step in restoring a rational balance to the criminal justice system. The present application of the insanity defense and the exclusionary rule in federal courts gives unjustifiable windfall benefits to certain defendants and does not adequately protect the public. The continual review of state convictions in federal courts has severely taxed judicial resources in instances where no federal action is needed to ensure that the rights of criminal defendants are protected.

Title I of the bill amends various provisions of title 18, United States Code, and of the Federal Rules of Criminal Procedure relating to the procedures to be followed in federal courts with respect to offenders who allegedly are or have been suffering from a mental disease or defect. The most significant aspect of this title is that it limits the insanity defense. To date, the Congress has never acted in the development or limitation of the insanity defense. Its development has been left to the courts. As a result, even today, the federal circuits do not apply a wholly uniform standard, although in recent years all the circuits have adopted, with some variations, the formulation proposed by the American Law Institute's Model Penal Code.

Under the formulation now prevailing, a "person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform to the requirements of the law." In our

view, this prevailing test contains two critical flaws. First, it introduces concepts of a defendant's motivation into the determination of guilt or innocence. Second, it permits the introduction at trial of massive amounts of conflicting and irrelevant testimony by psychiatric experts, thereby complicating the trial process and deflecting the attention of the jury from the critical issues.

Title I of the bill would effectively eliminate the separate insanity defense. A person could be found not guilty by reason of insanity only if, as a result of mental disease or defect, he lacked the state of mind (mens rea) required by statute as an element of the offense. Mental disease or defect would not otherwise constitute a defense. In a case where the defendant's sanity at the time of the offense was put in issue, the jury would be required to return a verdict of "guilty," "not guilty," or "not guilty only by reason of insanity." This last verdict, which would be added by Title I, could only be rendered when the defendant was found not to have the requisite mens rea.

This Administration has carefully considered the numerous other proposals that have been made for limiting or amending the insanity defense. We have concluded that this approach would abolish the insanity defense to the maximum extent permitted under the Constitution and would, in the vast majority of cases, make mental illness a factor to be considered only in sentencing, the one stage of a criminal proceeding where it is proper to consider mitigating circumstances. Limiting the insanity defense to those rare cases where the defendant lacked

the mens rea required as an element of the offense would assure to the maximum extent possible that defendants do not escape justice. Under this limitation, a mental disease or defect would, for example, be no defense in a murder trial if the defendant knew he was shooting at a human being and was trying to kill him, even if the defendant acted out of an irrational or insane belief. Mental disease or defect would constitute a defense only if the defendant, in the example, did not even know he had a gun in his hand or did not know he was shooting at a human being.

This is the one approach that would assure that defendants do not inappropriately escape justice, and that a criminal trial is not diverted into a confusing swearing contest between opposing psychiatrists. This approach has been endorsed in the past by numerous legal scholars, bar associations and psychiatrists. Under this approach, it is very likely that the defendant John Hinckley would not have been acquitted of the attempted assassination of the President since he did not seriously contest that he intended to kill him.

The Hinckley verdict has understandably focused public attention on the need for limiting the insanity defense. As it is presently applied, the defense is correctly seen not only as time consuming, confusing, and expensive, but also as a defense that is not available to less affluent defendants and favors those persons able to hire an impressive array of psychiatrists.

Limiting the insanity defense as in the proposed Title I of the bill would eliminate this unjustified disparity and protect the public to the maximum extent possible.

The bill also contains provisions for determining mental competency to stand trial, for hospitalization of a person who is convicted but is suffering from a mental disease or defect, for hospitalization of a person who develops a mental disease or defect while in prison, and for dealing with such a person due to be released from prison. Significantly, the bill also provides for the hospitalization of a person acquitted by reason of insanity. At present, outside the District of Columbia, there is no federal statute authorizing or compelling the commitment of an acquitted but presently dangerous and insane individual. When faced with such a situation, federal prosecutors today can do no more than call the matter to the attention of State or local authorities and urge those authorities to institute appropriate commitment proceedings. Of course, there is no requirement or assurance that this will occur, and the lack of such a commitment procedure in the federal system creates the very real potential that the public will not be adequately protected from a dangerously insane defendant who is acquitted at trial. The proposed bill fills this present void in the law.

Title II of the bill amends title 18 of the United States Code by adding a new section, 3505, to Chapter 223 to limit the application of the Fourth Amendment exclusionary rule in federal court proceedings.

The exclusionary rule is a judicially created rule under which evidence is barred from introduction at a proceeding such as a criminal trial if the evidence is determined to have been obtained as a result of a search or seizure that violated the first clause of the Fourth Amendment, which provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The rule is of comparatively recent vintage and was not even applied by the Supreme Court in the context of the Fourth Amendment until 1914, 123 years after the Fourth Amendment was adopted; it has only been held applicable to state criminal proceedings for the past twenty years.

When first imposed by the Supreme Court in 1914, the exclusionary rule was justified both as a means of deterring unlawful police misconduct and on a judicial integrity ground, which sought to prevent courts from being accomplices in willful constitutional violations. Over time, it has become clear that the deterrence rationale is the foremost reason behind the rule. Cases such as Stone v. Powell, 428 U.S. 465 (1976), Michigan v. DeFillippo, 443 U.S. 31 (1979), United States v. Peltier, 422 U.S. 531 (1975), and United States v. Calandra, 414 U.S. 338 (1974), have clearly established that today the rule will be invoked to protect Fourth Amendment rights only when to do so is deemed efficacious as a deterrent to unlawful conduct by law enforcement authorities.

Although the Court recognizes deterrence as the rule's paramount purpose, it has not limited the rule only to those situations in which a law enforcement officer's conduct is susceptible to being deterred. In fact, the heart of the present problem in application of the rule is that it has been expanded gradually by the courts and is still applied is some situations in which the rule cannot possibly serve its primary purpose of deterring police misconduct. This distortion of the rule's purpose has resulted in a substantial cost to our society as law enforcement officers and private citizens alike have lost faith in our criminal justice system. In considering those costs the Supreme Court has stated that the rule "deflects the truthfinding process and often frees the guilty," Stone v. Powell, 428 U.S. 465, 490 (1976).

The proposal in Title II would restrict the application of the rule to those cases in which it would in fact act as a deterrent to unlawful police conduct, thus restoring the rule to its proper role. Under the proposal, the rule would not be invoked where evidence was obtained pursuant to a search or seizure undertaken by law enforcement officers in the reasonable and good faith belief that their acts were lawful. The proposal would enhance the operation of the federal criminal justice system by allowing courts greater access to all reliable evidence relevant in determining the guilt or innocence of the defendant, and would promote renewed respect for that system as a search for he truth in the minds of our citizens.

For example, citizens and law enforcement officers alike cannot help but have diminished respect for system that allows the suppression of evidence seized by law enforcement officers during searches conducted pursuant to duly authorized warrants obtained in good faith but later found to contain some minor defect by an appellate court, the situation in Spinelli v. United States, 393 U.S. 410 (1969).

A more frequent problem with application of the rule arises when police in the field are confronted with a question as to whether they can make a warrantless search or arrest. Although arrests and seizures may sometimes be made without a warrant, the specific rules governing police conduct are to be found in hundreds of appellate court decisions that are often confusing or even flatly contradictory. The police must make an immediate legal analysis, often while confronting a known criminal. These situations often present such difficult factual situations coupled with a high degree of danger to the officer that the rule can in no way act as a deterrent.

The rule was applied in precisely this type of case by the Supreme Court in Robbins v. California, 453 U.S. 420 (1981). In Robbins, the Court excluded evidence of a substantial quantity of marihuana found in a car trunk in a decision based largely on two previous cases, United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979), neither of which had been decided at the time of the search in Robbins in 1975. Then, less than one year later the Court overruled Robbins in United States v.

Ross, No. 80-2209, 50 Law Week 4580 (June 1, 1982). Ross dealt with the same type of automobile search as in Robbins and the Court held that evidence seized during such a search was admissible. In the view of the Administration, these cases illustrate why it is totally unrealistic to think that the exclusionary rule can motivate even the most conscientious law enforcement officer to apply flawlessly the teaching of a body of law that the courts are still developing and debating.

It is the type of situation exemplified by Spinelli and Robbins, where the conduct of the officers could not be deterred, that would be covered by our proposal. The often highly probative evidence found during a search undertaken by the officers in reasonable good faith would be admitted and the attention of the court in a criminal case would remain focused on the question of the defendant's guilt or innocence, not diverted to a consideration of possible police error in applying the ever evolving law of search and seizure. Our proposal would still allow consideration of police conduct but the issue would be whether the actions of the law enforcement officers were undertaken in a reasonable and good faith belief that they were lawful. Such good faith is clearly shown when an officer makes an arrest in reliance on a statute that is later found to be unconstitutional or relies on a duly authorized search warrant, a judicial mandate to search which he has a sworn duty to carry out. Hence, the proposed bill specifically provides that a

showing that evidence was obtained pursuant to and in the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief.

The Department is satisfied that the Congress may, and indeed should, act to limit the exclusionary rule. In fact, the dissent of the Chief Justice in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 422-424 (1971), invited Congressional action. Since our proposal is grounded primarily on the cases decided over the past ten years in which the Supreme Court has emphasized the deterrence of unlawful conduct as the sole or primary purpose of the rule, the Department has concluded that such a modification would be held to be constitutionally permissible. In addition, the Supreme Court in United States v. Peltier has stated that "the 'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law ..." 422 U.S. 531, 537-38. Thus, we believe that our proposal is fully consistent with the principle of judicial integrity as well as with that of deterrence. In fact, the proposal is very similar to that already adopted by the Fifth Circuit en banc in United States v. Williams, 622 F. 2d 830 (1980), cert. denied, 449 U.S. 1127 (1981) in a decision based on a thorough analysis of relevant Supreme Court cases, and it basically follows the recommendation of the Attorney General's Task Force

on Violent Crime which conducted hearings on the issue around the country and received the opinions of distinguished citizens and jurists of all points of view.

Title III of the proposal sets forth certain amendments to 28 U.S.C. 2244, 2253, 2254 and 2255 and Rule 22 of the Federal Rules of Appellate Procedure to reform habeas corpus procedures. The Administration is firmly committed to the enforcement and protection of federal rights including the federal rights of criminal defendants in state proceedings, and recognizes that, in appropriate cases, access to the remedy of a writ of habeas corpus may be necessary to secure these rights. In present practice, however, federal habeas corpus procedures no longer serve this laudable, but limited, purpose. Instead, they too often provide seemingly endless opportunities for attacks on criminal conviction, attacks which are all too frequently based on frivolous or previous litigated issues. This formerly extraordinary federal remedy of collateral attack on criminal judgement and sentence has now become commonplace, a phenomenon that consumes unjustifiably large amounts of prosecutorial and judicial resources, undermines the important principle of finality of judgment, and distorts the proper role of the federal courts in reviewing state criminal proceedings.

This last problem -- the easy accessability, under current practice, of the federal writ of habeas corpus as a means of challenging state criminal convictions -- is one of particular concern to the Administration. We believe there is no justification in the present day for the availability of

federal rights, review of State judgments by the lower federal courts through habeas corpus is at most justifiable as a backstop or fail-safe mechanism to guard against the rare instances in which State courts may have acted in defiance or disregard of federal law. Moreover, federal habeas corpus procedures should reflect a scrupulous regard for the integrity of State procedures and an appropriate recognition of the State courts as trustworthy expositors of federal law.

Judged against these standards, present habeas corpus procedures have been widely recognized to be seriously deficient and in need of legislative reform. As the leading treatise on Federal procedure has noted:

> The most controversial and friction-producing issue in the relation between the federal courts and the States is federal habeas corpus for State prisoners. Commentators are critical of its present scope, federal judges are unhappy at the burden of thousands of mostly frivolous petitions, State courts resent having their decisions reexamined by a single federal district judge, and the Supreme Court in recent terms has shown a strong inclination to limit its availability. Meanwhile, prisoners thrive on it as a form of occupational therapy and for a few it serves as a means of redressing constitutional violations.

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4261, at 588 (1978).

The amendments set out in Title III of the bill are designed to limit unjustified review of State convictions through the habeas corpus procedure. In addition, they address problems that arise from excessive and poorly designed procedures which can, by the burdens they create, defeat the objectives of criminal justice.

In putting forward our proposals, we recognize the salutary measures the Supreme Court has taken in recent years to establish a more appropriate scope of review of State judgments in such areas as guilty pleas, fourth amendment exclusionary rule claims, and procedural defaults. See McMann v. Richardson, 397 U.S. 759 (1970); Stone v. Powell, 428 U.S. 465 (1976); Wainwright v. Sykes, 433 U.S. 72 (1977). We believe, however, that further reforms are necessary and should be accomplished through legislation. This reflects, in part, our general view that the creation of legal remedies, and the delineation of the scope of such remedies, are most appropriately legislative functions. It also reflects the limitations under which the courts operate in instituting such reforms -- the constraints imposed by precedent and the language of existing statutes and the need to proceed in piecemeal fashion, reacting to the facts of particular cases. We are strengthened in our conviction concerning the need for legislative action by the recent

existing statutes. We are strengthened in our conviction concerning the need for legislative action by the recent statement of the Chief Justice in his 1981 Year End Report on the Judiciary urging Congress to consider limiting federal collateral review of state court criminal convictions.

While our proposals rest primarily on considerations of federalism and appropriate recognition of the dignity and independent stature of the state courts, we believe that they will also tend to reduce the level of resources required of the states and the federal courts under the current system, and will accord more appropriate weight to the interest in finality in criminal adjudication. The latter considerations are also pertinent to applications for collateral relief by federal prisoners pursuant to 28 U.S.C. §2255. Accordingly, we are also advancing certain proposals in connection with § 2255 motions by federal prisoners.

The specific changes proposed by these habeas corpus amendments are as follows:

-- The amendments would ordinarily bar consideration by a federal habeas corpus court of a claim that has not been properly raised in state proceedings where the state has provided an opportunity to raise the claim that is consistent with the requirements of federal law.

-- The amendments would establish a one-year limitation period, normally commencing at the time when State remedies are exhausted, for application for federal habeas corpus, and a corresponding limitation for §2255 motions.

-- The amendments would vest the authority to issue certificates of probable cause for appeal in habeas corpus proceedings exclusively in the courts of appeals and would impose a similar requirement in relation to appeals by federal prisoners in §2255 proceedings.

-- The amendments would clarify that applications for writs of habeas corpus can be denied on the merits without requiring exhaustion of State remedies.

-- The amendments would require deference to State court determinations of factual and legal matters that have been fully and fairly adjudicated in State proceedings.

We believe that these reforms would establish a more appropriate scope and function for federal collateral remedies without jeopardizing the legitimate protection of federal rights.