PART B - Diversion Control Amendments

The Comprehensive Drug Abuse Prevention and Control Act of 1970 (CSA) (P.L. 91-513) has been in effect for nearly twelve years, during which time it has proven to be a relatively effective piece of legislation. Through the enforcement of its provisions, the Drug Enforcement Administration has actively pursued the immobilization of major drug traffickers and has removed from the illicit market significant quantities of both illicit and diverted licit controlled substances. However, over this period several weaknesses have surfaced which adversely affect the Federal Government's ability to deal effectively with the menace of drug abuse in the United States. Some of these weaknesses have developed due to the changing character of the illicit drug trade since the CSA was enacted. Others are the result of omissions or unclear language in the legislation. The proposed Diversion Control Amendments included in Title VII of the Comprehensive Crime Control Act of 1983 address the problem of diversion of legally produced controlled substances into the illicit market. It also includes provisions to reduce the regulatory burden on the controlled drug industry.

The problem of abuse of drugs diverted from legitimate channels is a major one that is not generally well recognized. In its September 10, 1970 "Report on the Comprehensive Drug Abuse Prevention and Control Act of 1970," the Committee on Interstate and Foreign Commerce noted that, as of late 1969, almost 50 percent of legitimately produced amphetamines and barbiturates were being diverted into illicit channels. It was the intent of the CSA to provide for a "closed" system of drug distribution for legitimate handlers of controlled drugs in order to reduce this level of diversion.

Despite the provisions of the Act, it was reported in the 1978 GAO Report entitled, "Retail Diversion of Legal Drugs--A Major Problem With No Easy Solution," that diversion and abuse of legal drugs may be involved in as many as 7 out of 10 drug-related injuries and deaths. During the period 1980-1982, between 60-70 percent of all emergency room controlled substance mentions involved drugs that are legitimate in origin (source: Drug Abuse Warning Network). A more direct measure of diversion is the documented diversion by convicted violators. The first 21 practitioners convicted under Operation Script, a pilot program directed against registrant violators, were responsible for documented diversion of approximately 20.6 million dosage units of controlled substances. Operation Script was the forerunner of DEA's ongoing Targeted Registrant Investigation Program (TRIP). At least one of those convicted was responsible for diverting between 4 and 5 million dosage units a year. These convicted defendants constitute only a portion of the defendants under Operation Script, who in turn make up only a small portion of the total number of registrants involved in diversion. In FY 1982, DEA initiated 320 cases involving willful diversion by registrants. An example of the success of these actions is the investigation of the so-called "store clinics" operating in the Detroit area. We estimate that these "clinics" distributed between 6 and 7 million dosage units of Preludin, Desoxyn, Dilaudid, and Talwin, all highly abused drugs, over a two-year period. Twenty-nine indictments were returned in this case on two physicians, seven pharmacists, and six corporations for a variety of drug charges including illegal distribution, conspiracy and continuing criminal enterprise. Similar success has been achieved in cases against the "stress clinics" which act as "prescription mills" for the diversion of methaqualone. Clearly, diversion by registrants appears to be much greater than had previously been estimated. These figures

involve only willful diversion and do not include theft, fraud, or misprescribing which add to the problem.

The incentives for diverting legally produced controlled substances are many and varied. Certainly, the enormous profits involved make trafficking of diverted drugs most attractive. A single dosage unit of Dilaudid, a synthetic narcotic which can be purchased by a pharmacy or doctor for approximately 17¢, can be sold on the streets for up to $60.00.

Contributing to the demand for and the price of diverted drugs is the fact that heroin availability in many parts of the United States has been reduced from 1971 levels and continues to remain at a considerable reduced level. The demand for a wide variety of diverted drugs to supplement poor quality or non-existent heroin continues to be a factor affecting the diversion problem. However, it is clear that a large poly-drug abusing population has developed and will continue to have a preference for multiple drug use particularly among school age children. In some cases, legally produced narcotics have replaced narcotics as the drug of choice.

The responsibility for enforcing the provisions of the Controlled Substances Act, as they pertain to legally produced controlled substances, lies with DEA's Office of Diversion Control. Created to deal specifically with this problem, this office uses a wide range of tools to combat diversion. It conducts periodic investigations of manufacturers and distributors; criminal investigations of violative registrants; maintains the "closed system" through the registration process; sets production limits on Schedule I and II substances; places drugs in the appropriate schedule of the CSA; authorizes and monitors imports and exports of controlled substances; participates in international drug control bodies; and conducts a variety of other activities to control

diversion. The system of diversion controls in the United States is recognized and admired worldwide.

Despite the successes of our diversion programs, a major problem with combating the diversion problem continues to be the source of the diversion. Under the provisions of the Act, DEA has been successful in reducing diversion at the manufacturer/distributor level to a relatively small portion of the total drugs diverted each year. This success has been a direct result of the authority to regulate this level of the "closed" distribution chain. Registration to manufacture and distribute controlled substances is issued only when clearly consistent with public interest. Authority to enforce the Act through administrative, civil, and criminal statutes is clear at this level, and mechanisms exist to control diversion. This same level authority does not extend to the practitioner level. It is at the practitioner level that 80-90 percent of all diversion occurs. Registration of practitioners is predicated on authorization of the state in which they practice. Grounds for denial or revocation are extremely limited.

This difference in the level of authority between Federal and state governments concerning registration requirements established their respective roles in the area of drug diversion. Since the inception of the Act, the Federal effort has been directed primarily at the upper level of the distribution chain, the manufacturers and distributors. The states were left to monitor and enforce compliance at the practitioner level. However, the level of diversion at the practitioner level demonstrates that the states have not been able to maintain effective controls against diversion. As reported in the "Comprehensive Final Report on State Regulatory Agencies and Professional Associations," legislative deficiencies and organizational and resource problems, have all rendered many states ineffectual. As a

result, the Federal Government has had to increase its support of the states in combating practitioner diversion. This support has taken many forms and includes both enforcement and non-enforcement efforts and a provision to expand this effort is included in the proposed amendments.

A major part of the Diversion Control Amendments address the issue of diversion at the practitioner level where it is estimated that 80-90 percent of diversion from legitimate channels occurs. However, we have not strengthened our ability to combat the diversion problem by placing undue burdens on the drug industry. Whenever possible, these amendments move to reduce the burden on the vast majority of registrants who abide by both the letter and the spirit of the law. Some of the proposed amendments were developed as the result of comments received from industry and the public and through the regulatory review process.

I would like to take the opportunity to address the major areas that the Diversion Control Amendments address.

1. Expansion of State Assistance Efforts

In the GAO Report, "Retail Diversion of Legal Drugs," it was recommended that Congress enhance the Drug Enforcement Administration's role by authorizing it to either:

-- exercise direct regulatory authority over retail level practitioners, or
-- implement grant programs for assisting states in controlling diversion.

Due to the complexity of the problem, the varied degree of state level capabilities and the need for prompt and effective action at the practitioner level, a combination of both avenues is most appropriate. The Federal effort will continue at the highest level of practitioner diversion, where

highly complex, multi-state operations clearly warrant Federal action. However, it is clear that the bulk of the enforcement responsibility will be at the state and local level where these registrant divertors have a significant impact on the abuse of drugs in their locale. To increase the ability of the state and local authorities to deal with this currently overwhelming problem, we have proposed a new state assistance effort aimed against the diversion of legally produced drugs.

We have proposed an amendment to Section 503 to provide new grant authority for the expansion of assistance to states for curtailing practitioner diversion. The assistance would be aimed at those areas which have been identified by DEA's "Comprehensive Final Report on State Regulatory Agencies and Professional Associations," and subsequent GAO reports, as the major problem areas inhibiting effective state action in curtailing practitioner diversion. These problems include legislative deficiencies, organizational and resource problems, and inadequate training. Grants would be established for a specified term with appropriate matching funds provided by the state. Each grant will be for a specific effort aimed at the diversion problem.

Through the expansion of its ability to assist the states' efforts, DEA would identify and provide the necessary resources to correct many of these deficiencies. In many cases, the first step in the process would be to establish an Evaluation Task Force to evaluate current state capabilities and to identify specific needs. Based on determined needs, funding would then be provided for such projects as the preparation of improved state legislation regarding controlled substance handlers; revisions in state statutes concerning the authority, duties and responsibilities of state regulatory boards; establishing improved systems of controlled substance licensing; and initiation of programs to establish Administrative Law Judge provisions to adjudicate actions against registrants.

The expansion of the state assistance authority of DEA is a significant step in reducing the diversion of legitimately produced controlled substances. The Grant-In-Aid-Program, combined with increased support by DEA in the areas of training, intelligence support, legal assistance and cooperative information exchange, will be part of a comprehensive program aimed at combating practitioner diversion at the state and local level.

2. Strengthening of Registration Requirements

Current statutory authority to deny, revoke, or suspend the DEA registration of a practitioner is limited to three criteria. Action can be taken upon a finding that a registrant has:

(1) materially falsified an application,

(2) been convicted of a drug-related felony, and

(3) had their state license suspended, revoked or denied.

The first criterion has proven virtually useless. The third criterion is very limited because of the difficulty states have in taking such action. This leaves the conviction of a drug-related felony as the only practical avenue for action. Unfortunately, many practitioners who are a clear and present threat to the health and safety of the community will never be brought to trial in the overloaded judicial system. These registrants will continue to divert into the illicit traffic while the legal system slowly grinds on.

Amendment of Section 303 expands the standards for practitioner registration beyond the current sole requirement of the authorization of the jurisdiction in which he/she practices. Additional standards pertaining to consistency with the public interest are added. They include the recommendation of the appropriate state licensing or disciplinary authority, prior conviction record with respect to controlled substances, and compliance with applicable

Federal, state and local laws relating to controlled substances. This amendment does not provide for a detailed Federal review of all practitioners, but provides the opportunity for action in the most egregious cases. It also provides for the full protection of the individual's rights through administrative procedures that provide the right to a full hearing and judicial appeals.

3. Extended Registration Period

The amendment to Section 302 extends the registration period from 1 year to 3 years for practitioners. The practitioner level represents almost 98 percent of all DEA registrants. This move will reduce the paperwork required of these registrants and will provide substantial cost benefits to the Government. These benefits will be used to provide improved service. An additional amendment, necessary to maintain an effective registration system, amends Section 307 by requiring registrants to report changes of address.

4. Scheduling Procedures

The provision for an emergency scheduling procedure, to be utilized in the event of an imminent danger to the public safety, is added to Section 201. This provision allows DEA to control a drug for one year on an emergency basis, during which time final determination will be made based on routine scheduling procedures under Section 201. Controls would be limited to those activities necessary to assure the protection of the public from drugs of abuse that appear in the illicit traffic too rapidly to be effectively handled under the lengthy routine control procedure. The Department of Health and Human Services is provided a 30-day period during which they may stop the implementation of control.

5. Miscellaneous Regulatory Provisions

A variety of other provisions involve the clarification of record keeping requirements, simplification and expansion of the authority to exempt controlled drug preparations without abuse potential from the application of the regulatory provisions of the Act, facilitate the importation of small quantities of controlled substances used exclusively for scientific, analytic or research purposes, and several other actions to ease the burden on the controlled drug industry without increasing the danger to public safety.

This has only been a brief description of the key proposed amendments. We are available at any time to meet with the Committee staff to discuss each proposed amendment in detail and answer any questions. As I have stated, I believe that this is a balanced package that will decrease the burden on the law abiding registrant, who is clearly in the majority, while at the same time enhancing our ability to successfully attack the drug diversion problem.

We are currently embarking on the largest, most comprehensive effort ever levied against drug trafficking and abuse. It is my firm belief, which is supported by death and injury data, that no such effort would be complete without a major program directed at the diversion of legally produced drugs into the illicit market.

TITLE VIII - JUSTICE ASSISTANCE ACT

An integral part of the President's comprehensive crime program is the proposal to provide assistance to state and local law enforcement in order to enlarge their capacity to attack the problems of violent crime. The primary responsibility and the direct burden for enforcement of criminal laws and programs of crime prevention fall on state and local governments, which increased their expenditures for criminal justice by 146 percent during the 1970's. State and local governments account for 87 percent of the total expenditures for criminal justice. Title VIII is a counterbalance to strengthened Federal law enforcement by providing local law enforcement with additional resources focused on violent crime, repeat offenders, victim/witness assistance, and crime prevention.

The proposed Justice Assistance Act is based on agreements reached in discussions involving members of the Senate and House Judiciary Committees, representatives of the Department of Justice, and the White House. It closely parallels the financial assistance provisions of legislation passed by the Senate and House during the 97th Congress, following extensive public hearings. It embraces the concept of a highly-targeted program of financial assistance to state and local criminal justice, operating within a new, streamlined, and efficient organizational structure. The proposal incorporates the lessons learned from past experience with law enforcement assistance programs and

focuses the available resources on a very limited number of high priority objectives.

The state and local financial assistance portion of current law (the Omnibus Crime Control and Safe Streets Act of 1968, as amended), has been phased out. No funds for that activity, the former Law Enforcement Assistance Administration, have been appropriated since Fiscal Year 1980. The prior history of LEAA, however, provides us with some important lessons. It shows, for example, that after the expenditure of $8 billion over 12 years, money alone was not the answer to the problem of crime. It demonstrated that a program whose priorities were unclear and constantly shifting resulted in minimal payoff. And the history indicates that overly detailed statutory and regulatory specification produces mountains of red tape but little progress in the battle against crime.

We have also learned, however, that the concept of Federal seed money for carefully designed programs does work, and that certain carefully designed projects can have a significant impact on criminal justice.

Title VIII reflects an appreciation of these lessons and embodies the program concepts agreed upon last year in the discussions between members of the Senate, the House, and representatives of the Administration. It strips away the complicated and expensive application and administrative red tape

required under the earlier program and consolidates the management of the program in a single unit of the Department of Justice. Moreover, it continues the presently authorized justice research and statistical programs and insures coordination and interaction between the products of research and the programs implemented under the financial assistance provisions of the proposal.

The proposal would establish within the Department an Office of Justice Assistance (OJA), headed by an Assistant Attorney General. Within this office would be three separate units--the Bureau of Justice Statistics (BJS), the National Institute of Justice (NIJ), and a new Bureau of Justice Programs (BJP)--each headed by a director appointed by the Attorney General. The directors would be responsible for the day-to-day management of their units and would have grantmaking authority, subject to the delegation, coordination, and policy guidance of the Assistant Attorney General.

The organizational structure established under current law (JSIA) was intended to administer programs for which $800 million were authorized and was expected to be engaged in virtually every aspect of the state and local criminal justice systems. The targeted program proposed by Title VIII, on the other hand, will operate at a fraction of that amount and does not require the elaborate administrative structure provided in current law. Moreover, the unified and consolidated administrative structure

under the direction of an Assistant Attorney General gives new emphasis to Federal participation and cooperation with state and local criminal justice. The Assistant Attorney General will be the focal point of the Department's interrelationship with state and local governments and will serve as the spokesperson for the Department on state/local criminal justice issues and as liaison with the academic communities on justice research and statistics.

Both the National Institute of Justice and the Bureau of Justice Statistics would continue to carry out the justice research and statistical programs authorized in the current statute. The Bureau of Justice Programs would administer the new technical and financial assistance program. All would be directly involved in strengthening the capacity of state and local criminal justice to address the problem of crime.

Advising the Assistant Attorney General would be a Justice Assistance Advisory Board appointed by the President. This Board, replacing the two separate boards currently advising the NIJ and BJS, will consider the full range of criminal justice issues and policies, rather than the compartmentalized and narrower view of only research or only justice statistics.

Under the proposal, the BJP would have the responsibility to provide technical assistance, training, and funds to state and local criminal justice and nonprofit organizations. This assistance would be provided through a combination of block and discretionary grant funds.

The block grant funding will provide each state with an allocation based on its relative population and a proportional share of the funds are to be passed through to local governments. The Federal funds would be matched 50/50 and individual projects would be limited to no more than three years of Federal assistance. Moreover, the use of the Funds is limited to specific types of projects which have a demonstrated track record of success.

We envision a simplified application procedure for block grant funds under which the cities and counties would submit abbreviated applications to the State. Essentially, these applications would indicate which of the authorized programs the locality intends to carry out, data to demonstrate the level of need for assistance, the amount of funds required, and the level of local funds available to match the Federal dollars. The state office, in turn, would compile the local applications along with those from state criminal justice agencies, rank them according to indices of need, and submit the package along with the various certifications required under the Act as a single application for the state's allocation of funds.

The discretionary funds would focus on training and technical assistance, multi-jurisdictional and national programs, and demonstration projects to test new anti-crime ideas.

In summary, the assistance provisions of the proposal would reduce from four to one the number of Presidentially appointed officials, replace two advisory bodies with a single Board; consolidate the research, statistical and financial assistance efforts into a single organization headed by an Assistant Attorney General; eliminate the bureaucratic administrative requirements currently imposed on state and local governments, and provide funds and technical assistance to local law enforcement for activities directly related to violent crime, repeat offenders, victim/witness assistance, and crime prevention.

Also included in Title VIII is a provision which would establish a program of emergency law enforcement assistance. Part L would authorize the Attorney General to approve or disapprove applications from state governors for the designation of a "law enforcement emergency jurisdiction", when an uncommon situation develops in which state and local resources are inadequate to provide for the protection of the lives and property of citizens or for the enforcement of criminal laws. When such an emergency exists, assistance in the form of equipment, training, intelligence information, and technical

expertise can be provided by Federal law enforcement agencies. In addition, the Office of Justice Assistance would be authorized to provide funds to the emergency jurisdiction. We anticipate that this special aid would be made available in a very limited number of situations, such as the child-murder investigations in Atlanta, the destruction of police communications by Hurricane Frederick, and the Mount St. Helen volcanic eruption.

Two additional matters addressed in Title VIII pertain to the Public Safety Officers' Benefits program and the Prison Industries certification authority.

The Public Safety Officers' Benefits Act of 1976 (PSOB) authorizes the payment of a $50,000 benefit to the survivors of law enforcement officers and firefighters who die as the result of an injury sustained in the line of duty. Excluded from benefits under the Act, however, are deaths resulting from the voluntary intoxication or intentional misconduct of the officer. Our experience in administering the program over the past six years has produced evidence of some difficulty in applying these exceptions in full accord with the legislative history of the Act. Consequently, Title VIII includes a definition of the term "intoxication". Under the proposal, no benefit would be paid when the deceased officer's blood alcohol level is between .10% and .20%, unless there is convincing

evidence that the officer was not acting in an intoxicated manner immediately prior to his death. No payment is permitted if the blood alcohol level is .20% or greater.

The addition of language to exclude PSOB benefits in instances of "gross negligence" is a formalization of the legislative intent expressed by the original sponsors of the bill and which was believed to have been adequately addressed by the prohibition against payment if the officer's death was caused by "intentional misconduct". However, our experience and litigation on the "gross negligence" issue demonstrates that the more specific language of the Administration proposal is required. (See Harold v. U.S. F. 2d 547 (Ct. Cl. 1980).)

The amendment to the Prison Industry Enhancement authority is designed to increase from 7 to 20 the number of projects eligible for exemption from Federal restrictions on the sale and transportation of prisoner-made goods. The amendment also makes several technical changes to present law to permit prisons seeking exemption to obtain it more easily.

The original Prison Industry Enhancement legislation was enacted in 1979 as part of the Justice System Improvement Act and the 7 projects it authorized have been designated. The early evaluations of the program indicate that the designated projects have been successful in teaching inmates marketable job skills, reducing the need for their families to receive public

assistance, and decreasing the net cost of operating correctional facilities. A modest expansion of the program to 20 projects will permit willing and able prisons to participate in the program and allow the Department to better evaluate which prison industry projects best accomplish the program's goals.

One technical amendent to the current law would exempt goods produced by designated projects from a Federal law which permits a state to keep prison-made goods in another state from crossing its borders. The final amendment would require states to provide compensation to injured inmates, but not necessarily under the state's workers' compensation law, as the current legislation requires. This change is necessary because many states cannot offer workers' compensation to inmates under their own laws.

TITLE IX -- Surplus Property Amendment

The last decade has seen dramatic increases in the nation's prison population. Between 1973 and 1983 the prison population has grown from 204,211 to over 400,000, an increase of 98 percent in one decade. By comparison, during the same period, the total U.S. population has increased by only 11 percent.

The rapid rise in prison population has overcrowded correctional facilities and created a number of serious problems. Overcrowding results in increased prison violence. Other negative effects of overcrowding are idleness and a reduction in the number of correctional programs available to inmates.

More than half of the State correctional systems are under court orders stemming from overcrowding. Judges are sometimes reluctant to sentence offenders to overcrowded institutions. The lack of adequate prison space, in effect, hampers the operation of the criminal justice system at all levels.

Many States have responded to overcrowding by double-bunking and using tents and trailers. While this approach provides a temporary solution, it is neither satisfactory, safe nor humane.

The construction of new facilities to meet this need is extremely expensive. It can cost anywhere from $30,000 to $90,000 per bed to construct a prison facility. And, it can take anywhere from five to seven years to obtain funds and then construct and complete a facility. An immediate, short-term, low cost solution is desperately needed.

One solution to this problem is amendment of the Federal Property and Administrative Services Act of 1949 to provide Federal surplus property to State and local governments for correctional use at no cost. Currently, the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 484) permits transfer of surplus federal property to States and localities for public benefit use, not specifically including correctional facilities. We support legislation that would amend the law to permit, specifically, transfer of federal real and related personal property to States for correctional use, taking benefits accrued to the United States into account in fixing the sale or lease price. We support the inclusion of proposed correctional use properties as eligible for transfer. In order to encourage and facilitate these types of transfers and to meet the current pressing need for more correctional facilities, we propose that these transfers be permitted without monetary consideration to the United States.

The Attorney General's Task Force on Violent Crime recommended in its first report that the Attorney General work with the appropriate governmental authorities to make available, as needed and where feasible, abandoned military bases for use by States and localities as correctional facilities on an interim and emergency basis only. The report also asks the Attorney General to work with the appropriate government authorities to make available, as needed and where feasible, federal property for use by States and localities as sites for correctional facilities.

As a direct result of the findings of the Task Force on Violent Crime, the Attorney General directed the Bureau of Prisons to form a clearinghouse for correctional facilities. The clearinghouse, as it now operates, can provide information to concerned parties and serve as liaison with GSA and the Department of Defense regarding potential correctional facilities, such as former military bases. We view the clearinghouse function as an information pipeline that is necessary, but independent of the surplus and disposal actions, which should be performed by GSA. Four States have acquired surplus property for correctional use, but under existing law they must either lease or purchase the property at fair market value. This is a financial burden that many can hardly afford to bear. A more workable solution is needed.

At present, State and local governments must pay for surplus Federal property they intend to use for correctional purposes. By amending the Federal Property and Administrative Services Act of 1949 to permit conveyance or lease, at no cost, of appropriate surplus Federal properties to State and local governments for correctional use, we can provide to State and local governments immediate additional capacity while relieving State and local budgets of the fiscal burden of constructing new facilities.

TITLE X - REINSTITUTION OF CAPITAL PUNISHMENT

The purpose of Title X of the Administration's bill is to provide constitutional procedures for the imposition of capital punishment. Various provisions of the United States Code now authorize the imposition of the sentence of death for crimes of homicide, treason, and espionage. However, in all but one instance, these sentences are unenforceable because they fail to incorporate a set of legislated guidelines to guide the sentencer's discretion in coming to a determination whether the sentence of death is merited in a particular case.[1/] This requirement was first articulated by the Supreme Court in its decision in Furman v. Georgia, 408 U.S. 238 (1972). In a series of decisions following Furman, the Court has given further guidance on the constitutional requisites of a statute authorizing the imposition of capital punishment. Notable in this series of cases was a group of landmark death penalty decisions in which the Court held that the death penalty was a constitutionally permitted sanction if imposed under certain procedures and criteria which guarded against the unfettered discretion condemned in Furman, but which retained sufficient flexibility to

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1/ Only the death penalty provisions of the aircraft piracy statute, 49 U.S.C. 1473(c), which were enacted after Furman v. Georgia, 408 U.S. 238 (1972), appear to comport with the death penalty decisions of the Supreme Court over the last decade.

allow the consideration of aggravating and mitigating factors in each case.[2/]

In the decade since the Furman decision, two-thirds of the States have enacted laws to restore the death penalty as an available sanction for the most serious crimes when committed under particularly reprehensible circumstances. During this same period, the Congress has on several occasions considered legislation to provide constitutional procedures that would permit the restoration of the death penalty to the federal criminal justice system, but with the exception of a death penalty provision included in anti-aircraft hijacking legislation in 1974, no such statute has been passed by the Congress.

As the decisions of the Supreme Court over the past ten years have made clear, the death penalty is a constitutionally permitted sanction for the most grave offenses, committed under aggravating circumstances, provided it is imposed under procedures that guard against arbitrariness and disproportionality. Nonetheless, enactment of legislation to permit reinstitution of the death penalty at the federal level has been a controversial issue, because of strongly felt, but disparate, views on the propriety of restoring the availability of the death penalty as an element of the federal criminal justice system.

[2/] Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976).

We are aware that there are men of ability, goodwill, and conscience who believe that it is never justified for society to deprive an individual of life, however grave and despicable may have been his crimes and however much a threat his actions may pose to others in the community or to the survival of the community itself. But while recognizing these views, this Administration does not subscribe to them. As both the President and the Attorney General have repeatedly indicated in public statements, we support the imposition of the death penalty under carefully circumscribed conditions for the most serious crimes -- a position also held by a majority of the American public.3/

In our view, the death penalty is warranted for two principal reasons. First, while studies attempting to assess the deterrent effect of the penalty have reached conflicting results, we believe that common sense supports the conclusion that the death penalty can operate as a deterrent for certain crimes involving premeditation and calculation, and that it will thus save the lives of persons who would otherwise become the permanent and irretrievable victims of crime. Second, society does have a right -- and the Supreme court has confirmed that right -- to exact a just and proportionate punishment on those who deliberately flout the most basic requirements of its laws; and there are some offenses which are so harmful and so reprehensible

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3/ See S. Rep. No. 97-143, 97th Cong., 1st Sess. 19 (1981).

that no other penalty, not even life imprisonment without the possibility of parole, would represent an adequate response to the defendant's conduct.

In the 97th Congress, the Senate Judiciary Committee devoted considerable effort to the development of legislation that would establish constitutional procedures for the imposition of the death penalty on the federal level. The bill reported by the Committee, S. 114, improved on bills introduced in earlier Congresses and incorporated provisions to comport with the Supreme Court's capital punishment decisions over the past decade. The provisions of Title X of the Administration's bill are based, with only minor modifications, on this legislation approved by the Judiciary Committee in the last Congress. Also, they differ in only minor respects from S. 538, death penalty legislation now pending consideration by the Committee.4/

The primary focus of the provisions of Title X is on the establishment of constitutional procedures for the imposition of the death penalty. For the most part, the scope of offenses for which capital punishment may be considered as a sanction remain the same as under current law. One significant change, however, is an amendment that would permit consideration of the death penalty for an attempted assassination of the President which resulted in bodily injury to the President or which otherwise

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4/ The Department's report on S. 538 will soon be transmitted to the Committee.

came dangerously close to causing the death of the President.5/ This provision was incorporated in S. 114 by the Judiciary Committee during the last Congress.6/ In three other respects, however, the bill restricts the availability of the death penalty under current statutes. First, in accordance with the Supreme Court's decision in Coker v. Georgia, 433 U.S. 584 (1977), the death penalty has been deleted for the offense of rape. Second, the availability of the death penalty for peacetime espionage has been limited to cases involving strategic weapons or major elements of national defense. Third, through the mechanism of mandatory threshold aggravating factors, the availability of the death sentence for homicide is limited to instances in which the defendant either intentionally killed the victim or while engaged in the commission of a felony, intentionally participated in an act which resulted in the death of an innocent victim and which the defendant knew or reasonably should have known would result in such a death.

5/ The bill would also authorize the death penalty for murder of a foreign official, official guest, or internationally protected person and for homicide committed in the course of a kidnapping -- offenses which do not now provide for the death penalty because they were enacted or amended in a period following Furman, when the constitutional requisites of a death penalty statute were unsettled.

6/ A memorandum prepared by the Department's Office of Legal Counsel on the constitutionality of such a provision was submitted to the Judiciary Committee during its consideration of S. 114 in the last Congress and is reproduced in the published hearings of the Committee. See, Capital Punishment, Hearings before the Committee on the Judiciary, United States Senate on S. 114, 97th Cong., 1st Sess. 54-65 (April 10, 27 and May 1, 1981).

The procedural provisions of Title X may be summarized as follows. Under these provisions, the issue of the propriety of the death penalty in a particular case is the subject of a separate sentencing hearing held after the entry of a guilty plea or the return of a guilty verdict. The death penalty may be imposed only pursuant to such a hearing.

The first procedural requirement is that the government file, a reasonable time before trial, a notice that it will, in the event of conviction, seek the death penalty and a description of the aggravating factors it will seek to prove as the basis for the penalty. Generally, the sentencing hearing is to be held before a jury, either the jury that determined guilt, or where the defendant was convicted on a plea of guilty or pursuant to a trial without a jury, before a jury specially impaneled for the purpose of the sentencing hearing.

The focus of the hearing is on the consideration of evidence of aggravating and mitigating factors bearing on whether the death penalty is justified under the circumstances of the case. Title X sets out specific mitigating factors which may be considered, but, consistent with the Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), the jury may consider other, unenumerated mitigating factors as well. Two sets of specific aggravating factors are set out; one set is applicable to offenses of treason and espionage and the other applies to homicides and the attempted assassination offense. With respect to aggravating factors, the jury may also consider ones not

specifically enumerated. However, a finding of an aggravating factor or factors other than those specifically listed in the bill cannot alone support imposition of the death penalty.

At the sentencing hearing, the government bears the burden of proving any aggravating factors beyond a reasonable doubt. With respect to mitigating factors, the burden of proof is on the defendant, but his proof need meet only a preponderance standard. The jury is required to return special findings concerning any aggravating or mitigating factors it determines to exist, and such findings must be supported by a unanimous vote. If no aggravating factor is found to exist, or if, in the case of a homicide offense, one of the mandatory threshold aggravating factors is not found, the court must sentence the defendant to a sentence other than death.

Should the jury return findings of aggravating factors (in the case of homicide offenses, aggravating factors in addition to those which serve as a threshold limitation), it then must proceed to determine whether these factors outweigh any mitigating factors found, or if there were no mitigating factors established, whether the aggravating factors alone are sufficient to justify imposition of the death sentence. Based on this consideration, a finding of whether the sentence is merited must be returned. Where the determination is made by a jury, it is to be by unanimous vote. The court is bound by the unanimous decision of the jury, an approach upheld by the Supreme Court in Gregg, supra.

Like S. 114 as approved by the Judiciary Committee in the last Congress, our proposal requires an instruction to the jury before whom the sentencing hearing is held that it not consider the race, color, national origin, creed, or sex of the defendant in determining whether the sentence of death is justified. Each juror is to certify that none of these factors entered into his decision.

Title X also includes a provision, not incorporated in S. 114 but which appears in the death penalty bill now before the Committee, S. 538, which permits, in capital cases where it is determined that the death penalty is not justified, the imposition of a life sentence without possibility of parole.

Also addressed in Title X are the appropriate procedures and standards for appellate review of a death sentence. Appeal of the sentence is to be filed in the same manner as an appeal of a conviction. Consolidation of the appeal of sentence with the appeal of conviction is specifically sanctioned, and review in capital cases is to be given priority over all other appeals. In its review, the appellate court must consider the entire record of the case, the procedures employed in the sentencing hearing, and the findings as to particular aggravating and mitigating factors. Affirmance of the death sentence is required if the appellate court finds that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factors and that the information presented supports the findings with respect to aggravating and mitigating factors upon which the

sentence was based. In all other cases, the appellate court must remand the case for reconsideration under the sentencing provisions of this Title.

The provisions of Title X of the Administration's bill combine, in our view, to establish procedures for determining whether the sentence of death is justified in a particular case that comport fully with the constitutional teachings of the Supreme Court over the last decade. We believe that in the carefully delineated circumstances to which Title X would apply, the opportunity for imposition of the death penalty should be restored. A criminal justice system limited to lesser sanctions is lacking in adequate deterrence and fails to meet society's need to exact a just and proportionate punishment for the most grave and reprehensible of crimes.

TITLE XI - Labor Racketeering Amendments; and

TITLE XII - Foreign Currency Transaction Reporting Amendments

As these Titles of the bill are before the Committee on Labor and Human Resources and the Committee on Banking, Housing and Urban Affairs respectively a statement of their provisions is not included herein.

TITLE XIII - Federal Tort Claims Act Amendments

Title XIII would make the United States the exclusive defendant for all torts committed by federal employees within the scope employment and would, for the first time, make the United States liable for torts arising under the Constitution of the United States. The title would provide for the substitution of the United States for defendant employees acting within the scope of their employment in all suits alleging common law or constitutional torts. Title XIII constitutes a significant, equitable and badly needed reform of the federal tort law.

The current state of federal tort law, at least in the area of the constitutional tort, is unsatisfactory and counterproductive from the perspective of every participant. Since the Supreme Court announced that a cause of action was available against individual federal officers in 1971, federal employees have been the subject of an increasing number of suits filed personally against them at every level of government. 1/ They are being sued for doing no more than carrying out the duties which Congress and the President have ordered them to perform. In a society where virtually every other identifiable group is protected by some form of indemnity, insurance or rule of law, this exposure to personal financial ruin is shocking and unconscionable. In reflecting upon this, one United States District Judge has beeen moved to comment, "The effect of this development upon the willingness of individuals to serve their country is obvious." 2/ If, as opponents to this legislation maintain, deterrence is the object of such personal suits, that which is deterred is competent government. Effective action in all areas is

chilled. Resources and talent are diverted. Careers are shortened, recruitment discouraged, endless nonproductive litigation encouraged. 3/

Despite the ability to sue federal employees, the claimant, who may have a meritorious claim of governmental misconduct in violation of his constitutional rights, in practical terms has virtually has no remedy. As a result of the sound doctrine of sovereign immunity, the United States cannot be sued for a constitutional tort because it has not consented to be sued. 4/ As a result, a plaintiff frequently faces enormous problems in attempting to even achieve service of process and jurisdiction over individual defendants and may only look to the individual assets of those persons should he obtain a judgment. Our records indicate that of the thousands of lawsuits that have been filed, only sixteen have resulted in a judgment and, of those, we believe that only six have ultimately been paid. 5/ Despite the fact that there is no hope of meaningful monetary recovery, suits continue to be filed at an alarming rate. It appears that they are often prompted by reasons other than money damages such as personal revenge or harassment upon a public official or as a means of collateral attack upon an otherwise legitimate criminal or civil enforcement effort. The proportion of recoveries to the number of law suits filed also demonstrates that federal public servants do not violate the rights of their fellow citizens with any significant frequency. Thus the current threat of personal lawsuits under which they must now operate is unfair and unjustified. The severe disruption that these lawsuits cause in the lives of federal employees cannot be overemphasized.

The American citizen and taxpayer is not being well served by the current state of the law. The system for redress is not functioning and conscientious federal employees are traumatized by the threat or reality of suit, sometimes into inaction. In addition, the present scheme engenders protracted and expensive litigation which costs the taxpayers more money than it should and contributes to the serious and increasing problem of backlogs and delays in the courts. Because the constitutional tort or Bivens case concerns the personal finances of the individual defendants it can only be settled in the rarest of cases. In addition, multiple defendants are sued in almost seventy-five percent of the cases. As a result, conflicts of interest sometimes arise and the Department of Justice must hire private counsel to represent each of the groups whose factual positions collide. It is anticipated that the cost of hiring private attorneys in those cases will exceed $1,300,000.00 for fiscal years 1982, 1983 and 1984.

Previous testimony before Congress by several United States Attorneys also indicated that a great deal of extra attorney time is required for each matter in order to deal with the personal concerns and trauma of the individual defendants. Those same witnesses also elaborated on the very difficult ethical, client relations and resource problems caused by the current state of the law. 6/ The decisions that must be made by both clients and Department of Justice attorneys who represent them in these cases are often excrutiating. They must be made despite the fact that most of the lawsuits are wholly without merit and will be eventually disposed of on motion.

Many of the cases will proceed to resolution at a snail's pace at large monetary and emotional expense to all parties. Thus, from the perspective of any objective observer, the current scheme of civil tort liability, particularly in the area of federal constitutional rights, is a failure.

Were Title XIII enacted, federal public servants would no longer be subjected to the specter of personal financial ruin and inordinate diversion from their duties. At the same time, their conduct would just as surely be amenable to the scrutiny of the courts through an action brought against the United States where the reasonableness of the actions of the employee could be challenged. The citizen would gain his day in court and a defendant, the United States, amenable in every case to personal jurisdiction and service of process, a defendant who would be in a position to settle cases and who could pay any judgments awarded to the plaintiff. Cases would proceed much more expeditiously to trial and resolution with the cost to all parties drastically reduced.

Opponents to legislation of this nature have historically relied upon an argument best summarized as one of accountability. Although the number of adherents to this point of view seems to be declining, the argument is that the threat of suit deters public servants from doing wrong. The short answer to this is that it prevents the public servant from doing anything, including what is right. As one witness before Congress has stated, "The deterrence we have is that of deterring federal employees from doing their duty." 7/ The increasing number of federal officials who are aware of the state of the law cannot help but face a difficult decision with

trepidation because of what should be extraneous consideration for his or her personal welfare. The law enforcement officer, the welfare case worker, the probation officer, the meat inspector, the contract officer, the veterinarian, the revenue agent, the congressional staffer, the personnel manager, the job foreman, and even the forest ranger are at least given pause and perhaps prevented from carrying out the very mission that Congress has set for them. 8/

In addition, this accountability argument places too much emphasis upon money damages as the only meaningful remedy and ignores the array of other sanctions available ranging from agency punishment including termination, to a finding that the actions were beyond the scope of employment and therefore not defensible by the United States, to injury to professional reputation, to criminal prosecution.

Perhaps the best rebuttal to the deterrence argument, however, is the fact that its acceptance means that the American people and government continue to stumble along with the current inadequate system. In other words, in order now to be sure of having the narrow, yet very unlikely, legal possibility of punishing the very few through civil damages, we have placed in jeopardy and confusion the functioning of all civil servants and <u>have not</u> correspondingly provided the plaintiff with a remedy that he or she can expect to be realized. The current "remedy" of deterrence is thus grossly disproportionate to the problem.

Title XIII preserves the defense of qualified immunity on behalf of the United States with respect to constitutional torts.

It is important to point out that, while labelled as an immunity, it is really an affirmative defense that simply gives the United States the opportunity to defend the conduct of its employees as having been reasonable. The Supreme Court, in the case of Harlow Fitzgerald, 102 S.Ct. 2727 (1982), recently defined the test of qualified immunity to be one solely of objective reasonableness. Under traditional tort law analysis, it is the failure to act as a reasonable man in violating a duty owed to an injured person which triggers liability. In the private sector, an employer can assert the reasonableness of the conduct of an employee when the employer is sued for a tort committed by the employee. Retention of the qualified immunity defense would simply echo that legal principle. Elimination of the qualified immunity defense would be a declaration by the Congress that considerations of reasonableness are irrelevant to the conduct of government agents. Taxpayers would pay damages in cases when courts determined with hindsight that technical violations had occurred even though the conduct of the employee was properly motivated and eminently reasonable. Agencies and agents would hesitate to act for fear of damages claims which would reflect adversely upon them because they would be prevented from defending their conduct as reasonable in court. In other words, the government would be placed in a situation of strict liability were the defense to be eliminated, a disadvantage to the United States clearly contrary to existing provisions of the Federal Tort Claims Act and to reason and sound policy. 9/ Additionally, elimination of the defense would seriously detract from the ability of the courts to fully ventilate and get to the truth of alleged mis-

conduct. That is because the issue of the reasonableness of the conduct would have been declared to be irrelevant to liability; and thus so would many of the pertinent facts be rendered irrelevant. Accordingly, the Department strongly urges that the defense continue to be retained.

Enactment of Title XIII would, for the first time, permit plaintiffs to have recourse in a meaningful defendant because the United States would be waiving sovereign immunity for constitutional torts. This is a major reform and benefit that cannot be overstressed. At the same time, the cloud of personal, financial liability would be removed from federal officials who could get on with the business of proper government. Perhaps most importantly, the courts would be enabled to deal with the serious questions that arise in constitutional cases of this nature in an expeditious and meaninful way and award genuine relief to deserving plaintiffs.

FOOTNOTES

1/ Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

2/ Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1979), Judge Gesell concurring.

3/ See, Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, Ninety Seventh Congress, on H.R. 24, October 13, 1981; May 19 and 20, 1982.

See also, Hearings before the Subcommittee on Agency Administration, Committee on the Judiciary, United States Senate, Ninety Seventh Congress, on S. 1775, November 13 and 16, 1981; March 31, 1982.

4/ See, Duarte v. U.S., 532 F.2d 850 (2d Cir. 1976); Norton v. U.S., 581 F.2d 390 (4th Cir. 1978); Ames v. U.S., 600 F.2d 183 (8th Cir. 1979); Jaffee v. U.S., 592 F.2d 712 (3rd Cir. 1979); Baker v. F & F Investment Co., 489 F.2d 829 (7th Cir. 1973).

5/ Askew v. Bloemker, S-CIV-73-79 (S.D. Ill., Sept. 29, 1978). DEA agent was held personally liable for violating the Fourth Amendment rights of three plaintiffs by conducting a search without probable cause or a warrant; the jury awarded damages of $22,000; plaintiffs agreed not to enforce the judgment against the uninsured federal agent but rather to proceed against defendant state employees who were insured.

Seguin v. Hightower, No. C76-182-V (W.D. Wash., Oct. 24, 1978). Customs agent held personally liable to the owner of an impounded car used in a smuggling scheme because the agent delayed four and one half months in initiating forfeiture action; the court awarded the plaintiff $7,300 for rental value of the car plus consequential damages.

Jihad v. Carlson, CA No. 5-71-805 (E.D. Mich., Oct. 18, 1976). Prison guard held personally liable for $992 to inmate for violating his right to religious freedom in placing him in segregation for refusing to shave his beard; the judgment was reversed on appeal.

Weiss v. Lehman, CA No. 375-36 (C.D. Idaho, July 14, 1978). Forest service ranger held personally liable for $1,000 for violating plaintiff's Fifth Amendment rights by destroying property owned by plaintiff which had been apparently abandoned; the Ninth Circuit Court of Appeals affirmed the judgment. A Petition for Writ of Certiori was filed in the Supreme Court. The Court granted the petition and remanded the case for reconsideration (No. 80-2159, Oct. 5, 1981) in light or Parratt v. Taylor, 49 USLW 4509, May 18, 1981. The Ninth Circuit Court of Appeals then reversed and entered judgment for the defendant.

Halperin v. Kissinger, 424 F.Supp. 838 (D. D.C. 1976) and 434 F.Supp. 1193 (D. D.C. 1977). Former President Richard Nixon, H.R. Haldeman and John Mitchell held personally liable in damages for violating plaintiff's Fourth Amendment rights in authorizing wiretaps.

Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977). Chiefs of U.S. Capitol and D.C. Police held personally liable for arrests at Capitol Building during anti-war demonstration in class action with 1,200 plaintiffs; a total judgment of approximately 2 1/2 million dollars plus interest was entered against all defendants and subsequently paid through Congressional action.

Tatum v. Morton, 562 F.2d 1279 (D.C. Cir. 1977). Inspector of D.C. Police held personally liable for $500 for disrupting 29 demonstrators at the White House.

Schoneberger v. Hinchcliffe, C.A. No. 76-234 (D. Vermont, Sept. 22, 1980). FBI agent personally held liable for $150 for retaining a firearm (for too long a period) seized during a raid for illegal aliens.

Saxner v. Benson, C.A. No. 75-47-C (S.C. Indiana 1981). Three members of a Federal Corrections Institution Disciplinary Committee held personally liable for $3,000 apiece for violating an inmate's procedural due process rights.

Hobson v. Jerry Wilson, et al., D. D.C. Civil Action No. 76-1326. A total of $711,000 was awarded seven former antiwar activists against fourteen present or retired officers of the FBI or the Washington, D.C. police department. The suit charged violation of constitutional rights during undercover surveillance activities in the 1960s and 70s. The verdict was complex, awarding different amounts for and against different parties.

Epps. v. United States, et al., D. Md. CA No. 0-78-2373. A judgment of $200,000 was awarded against a Field Branch Chief of the IRS for allegedly vandalizing the property of the plaintiff while her business was in the possession of the IRS. The judgment was subsequently vacated on post trial motions.

Nees v. Bishop, et al., D. Col. 524 F.Supp. 1310 (1981). $1,000 was awarded to a plaintiff who alleged that the losing defendant had deprived him of his right to counsel by allegedly advising state custodial authorities that he need not see a state public defender since he had been incarcerated on a federal charge.

Clymer, Jr. v. Grzegorek, et al. E.D. Va., CA No. 80-1009-12 (1982). Damages of $1,000 were awarded against a former federal correctional institution warden in favor of a prisoner who claimed overcrowding and understaffing led to violence and an assault upon him.

Whitney v. Skinner, E.D. Wash. C-78-139 (1982). A judgment of $9,000 was awarded to a Federal employee who alleged thata here rights were violated by her supervisor's action that "intimidated her into falling".

Rodgers v. Hyatt, 83-1 U.S.T.C. ¶ 9139 (10th Cir. 1983). The Tenth Circuit Court of Appeals affirmed a jury verdict of $1,000 against an IRS official for disclosure of tax return information notwithstanding the fact that the information had been fully disclosed in a prior court proceeding.

Doran v. Houle, D. Mont. 79-14-GF (1982). A group of veterinarians were awarded $272,000 against a Federal veterinary inspector on the allegation that he wrongfully denied them licenses necessary for innoculation of sheep. The jury trial lasted ten days and was the subject of extensive media attention. The adverse decision has had a devastating impact on the individual federal defendant and upon the Veterinary Service. It is presently on appeal before the Ninth Circuit.

6/ See, testimony of Stanley S. Harris and Royce C. Lamberth before this Subcommittee on May 19, 982 and the testimony of Jerome F. O'Neill, John S. Martin, Jr., and William B. Cummings, on November 13, 1981 before the Subcommittee on Agency Administration of the Committee on the Judiciary, United States Senate.

7/ Testimony of Jerome F. O'Neill, supra.

8/ In an article entitled "Suing Our Servants" appearing in the 1980 edition of The Supreme Court Law Review published by the University of Chicago, (page 281) Peter H. Schuck, Associate Professor of Law, Yale Law School, makes a convincing case for the proposition that the most frequent targets of such suits are the everyday public servants who operate at the level which deals directly with the public. It is important to understand that our support for proposals of this nature is not primarily based upon a desire for relief of high level officials.

9/ See, letter of April 11, 1983 from Deputy Attorney General Edward C. Schmults to the Honorable Sam Hall concerning the qualified immunity defense.

10/ "The head of an agency or his designee may, to the extent he or his designee deems appropriate, hold harmless or provide liability insurance for any person described in subsection ( ) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission while acting within the scope of such person's office of employment."

Title XIV - Miscellaneous Violent Crime Amendments

Title XIV in divided into subparts A - M and is designed to strengthen a number of provision dealing with violent crime. It also creates a limited number of new offense involving violent crime to fill gaps in existing law.

Part A - Murder-for-Hire and Violent Crimes in Aid of Racketeering

Section 1401 adds a new section 16 to title 18 to define the term "crime of violence." The term is used in several new or revised sections as a result of other provision in this title such as section 1402 proscribing violent crimes committed for money or other consideration, and section 1403, prohibiting solicitation to commit a crime of violence. The definition of the term "crime of violence" is taken from the Senate version of the Criminal Code Reform Bill (S. 1630, 97th Cong.) and predecessor bills. The term means an offense that has an element the use, attempted use, or threatened use of force, or any other offense that is a felony and that involves a substantial risk that physical force may be used against the person or property of another.

Section 1402 proscribes murder and other violent crimes for hire. It is similar to a provision contained in S. 2572 as passed by the Senate in the 97th Congress and would add two new sections, 1952A and 1952B, to title 18 of the United States Code. Although designed primarily for use in cases of murder-for-hire carried out as 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 1952A would reach 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 our 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 involved 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 committed as consideration for payment or a promise to pay anything of pecuniary value from an "enterprise" engaged in "racketeering activities." "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