S. HRG. 98-503

COMPREHENSIVE CRIME CONTROL ACT OF 1983

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAW

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 829

TO AMEND THE FEDERAL CRIMINAL CODE REGARDING: (1) BAIL; (2) SENTENCING; (3) THE EXCLUSIONARY RULE; (4) FORFEITURE; (5) THE INSANITY DEFENSE; (6) HABEAS CORPUS; (7) DRUG-RELATED OFFENSES; (8) JUSTICE ASSISTANCE; (9) CAPITAL PUNISHMENT; (10) SURPLUS FEDERAL PROPERTY USED IN CORRECTIONS; (11) CURRENCY AND OTHER CRIMINAL OFFENSES

MAY 4, 11, 18, 19, AND 23, 1983

Serial No. J-98-37

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

25-694 O WASHINGTON : 1984

COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, JR., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ROBERT DOLE, Kansas
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania

JOSEPH R. BIDEN, JR., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DECONCINI, Arizona
PATRICK J. LEAHY, Vermont
MAX BAUCUS, Montana
HOWELL HEFLIN, Alabama

VINTON DEVANE LIDE, *Chief Counsel and Staff Director*
DEBORAH K. OWEN, *General Counsel*
SHIRLEY J. FANNING, *Chief Clerk*
MARK H. GITENSTEIN, *Minority Chief Counsel*

SUBCOMMITTEE ON CRIMINAL LAW

PAUL LAXALT, Nevada, *Chairman*

STROM THURMOND, South Carolina
ARLEN SPECTER, Pennsylvania
ROBERT DOLE, Kansas

JOSEPH R. BIDEN, JR., Delaware
MAX BAUCUS, Montana

JOHN F. NASH, Jr. *Chief Counsel and Staff Director*
WILLIAM MILLER, *General Counsel*
BEVERLY MCKITTRICK, *Majority Counsel*
FREDERICK NELSON, *Counsel*

CONTENTS

STATEMENTS OF MEMBERS

CHRONOLOGICAL LIST OF WITNESSES

WEDNESDAY, MAY 4, 1983

WEDNESDAY, MAY 11, 1983

WEDNESDAY, MAY 18, 1983

THURSDAY, MAY 19, 1983

JOINT HEARING—SUBCOMMITTEES ON JUVENILE JUSTICE AND CRIMINAL LAW

APPENDIX

Part 1.—Extradition

Part 2.—Exclusionary Rule

Part 3.—Capital Punishment

PART 4.—HABEAS CORPUS

PART 5.—S. 829

PART 6.—ADDITIONAL CORRESPONDENCE

---

[1] See "Federal Law Revision." Hearings before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 97th Cong., 1st. and 2d sessions. Serial No. 132, Parts 1, 2, and 3.

[2] See "The Habeas Corpus Reform Act of 1982." Hearings before the Committee on the Judiciary, U.S. Senate, 97th Cong., 2d sess. Serial No. J-97-108.

[3] See "Reform of the Federal Criminal Laws." Hearings before the Committee on the Judiciary, U.S. Senate, 97th Cong., 1st sess. Part XVI, Serial No. J-97-60.

[4] See "Capital Punishment." Hearings before the Committee on the Judiciary, U.S. Senate, 97th Cong., 1st sess. Serial No. J-97-13.

[5] See "Reform of the Federal Insanity Defense." Hearings before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 97th Cong., 1st. sess.

[6] See Extradition Hearings before House Judiciary Committee, May 5, 1983.

[7] See "Federal Tort Claims." Hearings before the Subcommittee on Administrative Law and Governmental Relations of the Judiciary, House of Representatives, 98th Cong., 1st sess. Serial No. 11.

COMPREHENSIVE CRIME CONTROL ACT OF 1983

WEDNESDAY, MAY 4, 1983

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the full committee) presiding.

Present: Senators Laxalt, Biden, Kennedy, and Specter.

Staff present: John F. Nash, Jr., chief counsel and staff director; Beverly McKittrick, majority counsel; William Miller, general counsel; and Susan Fanning, chief clerk.

OPENING STATEMENT OF HON. PAUL LAXALT, A U.S. SENATOR FROM THE STATE OF NEVADA, CHAIRMAN, SUBCOMMITTEE ON CRIMINAL LAW

Senator LAXALT. The subcommittee will be in order.

This is the first of a series of hearings which the Subcommittee on Criminal Law will hold on S. 829, the Comprehensive Crime Control Act of 1983. My good friend and chairman of the Committee on the Judiciary will chair this first day.

This bill, sent to Congress by President Reagan, is a package of well-reasoned proposals that do not simply add to the list of Federal statutes and Federal crimes but that make much needed improvements in the Federal criminal justice system.

Crime—violent crime, drug-related crime, and organized crime—is a major threat to American society. S. 829 is a comprehensive, well-considered response to this threat. Most of the parts of the package have been the subject of hearings and votes in the Senate in recent years. The purpose of these hearings is to bring the record on these measures up to date and to provide a record for the new proposals in the bill. The hearings will provide an opportunity for all of the major parties interested in Federal criminal justice reform to discuss the legislation and to point out its merits and its weaknesses.

I want to thank the Attorney General and the other distinguished witnesses from the Department of Justice and from the Treasury Department for leading off these hearings. The Department of Justice put this bill together in its present form, and the subcommittee looks forward to benefiting from the expertise of these various gentlemen in our deliberations.

At this point, I would like to turn the gavel over to my distinguished chairman, Senator Thurmond.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY [1]

The CHAIRMAN [presiding]. Thank you very much, Mr. Chairman.

I am pleased to welcome the Attorney General of the United States to appear before the Subcommittee on Criminal Law, Senate Committee on the Judiciary to launch consideration of a massive package of criminal law amendments proposed by the administration entitled "The Comprehensive Crime Control Act of 1983."

I will be very pleased to cooperate with the able chairman of this subcommittee in this matter. Since he has to leave for a conference, I believe, with the President, I will chair this session for him.

Mr. Attorney General, we are very pleased to have you with us this morning. No one knows more than you the toll violent crime, illegal drugs, and organized crime takes on this society. Various polls and surveys over the past few years show that one-third of all households in the United States are touched by crime each year; one in five Americans is a victim of a crime each year. The latest available FBI crime clock figures show someone is killed every 23 minutes, a woman is raped every 6 minutes, and a person robbed every 55 seconds. A burglary takes place every 8 seconds. One of the FBI major index crimes is committed every 2 seconds. While the FBI recently reported that serious crime dropped by 4 percent in 1982, such a drop hardly alters the crime clock rates and leaves us far behind in dealing with a 21 percent rise in serious crime since 1977 and a walloping 254 percent since 1962.

I do wish to commend you, though, Mr. Attorney General, for the great work that you have done, and we are so pleased that this crime rate has been reduced, and I think probably you are more responsible than any one individual.

Having reviewed the problem, we must recognize that in our Federal system the State and local authorities are primarily responsible for protecting our communities from crime. As limited as the Federal role may be in this regard, however, the Congress and administration have the responsibility to make the Federal effort as effective as possible and to set an example of excellence for others.

The Comprehensive Crime Control Act of 1983 constitutes a major legislative contribution toward meeting this responsibility. The proposal includes among other things:

Reform of the bail laws to permit pretrial detention of dangerous defendants.

A constitutional procedure for imposition of the death penalty in Federal cases involving treason, espionage, murder, and an attempt to kill the President.

Improvements to the sentencing system by abolishing parole and most good time credit; standardizing sentences through guidelines; permitting Government appeal of lenient sentences below the guidelines; and allowing a life sentence without parole in the most serious offenses.

---

[1] The opening remarks of Senator Thurmond and text of S. 829 given before the U.S. Senate can be found on p. S 3076 in the March 19, 1983 Congressional Record.

Modification of the judicially created exclusionary rule that now keeps evidence out of the criminal trial on the ground that it was illegally seized.

Providing more emphasis on protecting and meeting the needs of the victims and witnesses of crime.

Improving the drug penalty structure of Federal law.

Improving the operation of the criminal forfeiture laws applicable to organized crime and drug offenders.

Modifying the current insanity defense and related procedures to more effectively enhance the safety of the community.

Modifying Federal procedures for review of State criminal convictions to afford greater finality and deference to State court decisions.

I am looking forward to working with this administration and the Department of Justice to enact the best legislation possible.

[The opening statements of Senators Kennedy and Biden follow:]

OPENING STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Mr. Chairman, I welcome these hearings on comprehensive anticrime legislation. We face a serious problem of crime in America, and there is an urgent need for effective leadership by the Federal Government.

There is widespread agreement on the need for basic reforms in the Federal laws on bail and sentencing. Sentencing is a scandal that permits the courts to play judicial roulette in determining whether defendants convicted of violent crimes go free or go to jail. Almost every day, the press reports the abuses caused by the unfettered discretion of judges in criminal sentencing. Excessively harsh sentences and incredible examples of leniency proliferate side by side, and undermine public confidence in our system of justice.

Our outdated bail laws fail to protect the safety of the community and permit violent offenders to return to the streets to commit new crimes while awaiting trial. We also suffer from outdated provisions on organized crime, narcotics crime, and violent juvenile crime.

We have worked long and hard on these issues and we know what the needed reforms are. In the area of sentencing, we must provide certainty of sentencing, guidelines to limit judicial discretion, abolition of parole, and appellate review of sentences. In this Congress, I have introduced sentencing reform legislation which is virtually identical to the measure which passed the Senate last year by a vote of 95–1.

With respect to bail, judges must be permitted by law to consider the dangerousness of a defendant in determining whether and under what conditions to permit release on bail.

Other needed reforms are also clear. Criminal forfeiture statutes must be strengthened to enhance the ability of prosecutors to confiscate the assets of criminal organizations and the proceeds of illegal drug trafficking. And violent juveniles must be held accountable for their crimes. They should be fingerprinted and photographed, and tried and sentenced as adults, but incarcerated separately from adult criminals. These needed reforms are neither too complicated to legislate nor too difficult to implement.

And we can adopt and carry out all these measures without jeopardizing the basic constitutional rights of any citizen or the civil liberties of our people.

Finally, we must make assistance to State and local governments a higher priority. Local police, and prosecutors, and courts are our front line against crime and adequate Federal support for their efforts must be an essential component of any responsible effort we make.

A few years ago, Congress was in the vanguard of proposals like these for wise reform. In fact, many of them originated in the bipartisan hearings on crime held in this committee in the 1970's. But in recent years, we have fallen behind the States in updating our criminal laws. Many of the reforms we sought in Congress have been introduced, evaluated, refined and adopted in the States, while we have failed to act. While criminals rush to invent new offenses such as computer fraud and

move crime into the twenty-first century, Congress has yet to bring the Federal criminal laws into the twentieth century.

There are no easy answers to this problem. There are no Kemp-Roth tax cuts, no budget cut quick fixes, no law and order panaceas that will help in fighting crime.

But we have made some worthwhile bipartisan advances in this committee, and I look forward to even greater progress in the weeks to come.

OPENING STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Mr. Chairman, I am particularly pleased to welcome the Attorney General here today because this hearing is the first step toward enactment of a package of crime legislation in this Congress.

The Senate Judiciary Committee has worked for over a decade to develop a comprehensive crime bill which would make the reforms essential to a fair and effective Federal criminal justice system. Unfortunately, partisan concerns and the unwillingness of some Members of the Senate, the House and representatives of the administration, to compromise prevented enactment of substantial reform legislation.

Last Congress a criminal law reform package met with a degree of success many thought impossible. Everyone in this room knows how far the crime package progressed: The Senate passed the Violent Crime and Drug Enforcement Improvements Act of 1982, (S. 2572). Although we sent the bill to the House very late in the session the members of the House Judiciary Committee demonstrated a willingness to devote long hours to reach agreement on substantial portions of the bill. In addition to the final package, many compromises were reached in bail and sentencing reform. In fact, insufficient time at the end of the session may have been the major factor which prevented final agreement in bail and sentencing. Although the President vetoed the final package he expressed strong support for a substantial portions of its contents. In fact, the administration-proposed bill before us today, the Comprehensive Crime Control Act of 1983 (S. 829) clearly demonstrates the administration's support of the Senate-passed bill by incorporating many of its provisions, including bail reform, sentencing reform, forfeiture reform, and numerous amendments to current law directed at violent crime.

I believe Chairman Thurmond will agree with me that successful Senate and House passage of comprehensive anti-crime legislation last Congress taught us some very important lessons.

First, under Chairman Thurmond's leadership, the members of the Judiciary Committee and ultimately the Senate recognized the need to compromise and develope comprehensive legislation with bipartisan support. To achieve that goal some Senators agreed to process important anti-crime bills as separate legislation because they recognize that one controversial provision could slow or halt progress on the entire package.

Second, we found substantial agreements in our negotiations with Members of the House by deleting from the package those provisions which would be so controversial that they would jeopardize House passage.

The lessons of last Congress clearly showed the way to enactment into law of comprehensive anti-crime package this Congress: Members of both parties must work toward that goal by demonstrating a willingness to compromise and agreeing to process controversial legislation as separate bills rather than in a package. Also, Senate passage of a comprehensive bill must occur early in this session to provide sufficient time to reach agreement with our colleagues in the House.

The administration crime bill makes a significant first step in this process by incorporating many provisions of the bipartisan bill of last Congress. However, some provisions in the bill, which did not pass last Congress appear to be more of a legislation wish list than an assessment of what is likely to be passed by both the House and Senate this Congress. Regardless of our individual views we all know what those provisions are because both the Senate and House have been through seemingly endless debate, numerous amendments, threatened filibusters and other delay tactics, in some instances over more than one Congress.

We are very close to finally enacting comprehensive anti-crime legislation into law. We must learn from our experience and begin with the bill which passed the Senate last Congress 95 to 1. Proponents of any additions to that bill bear the burden of proving that a new provision will not prove controversial and prevent enactment of the entire package into law in this Congress.

Chairman Thurmond, I am eager to once again work with you, the Criminal Law Subcommittee chairman, Senator Laxalt and with all of my colleagues on both sides of the aisle.

The CHAIRMAN. Mr. Attorney General, we are very pleased to have you with us, and we will be honored now to have you proceed with your testimony.

STATEMENT OF HON. WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, U.S. DEPARTMENT OF JUSTICE

Mr. SMITH. Thank you very much, Mr. Chairman.

I am very happy to be here today to testify on behalf of the Comprehensive Crime Control Act of 1983.

Our bill is just that—comprehensive, in the sense that it concerns problems throughout the criminal justice system. The most serious of these problems, however, are those raised by the involvement of organized crime in drug trafficking. Before commenting on the legislation before you, I would like to take a few moments to review these problems and our response to them.

Organized crime has expanded its operations to include drug trafficking. Indeed, most drug trafficking today is organized crime.

Large-scale drug dealers must organize their operations. They obtain the illicit substances, or the rights to the substances, overseas. Within our borders, the drug dealers have set up elaborate enterprises for cutting the pure imported drugs and distributing them over a wide geographical area.

And the operation does not stop there. Drug money is laundered through businesses set up as "fronts" for drug dealers. The profits are then plowed back into the drug business, as with any major enterprise. Increasingly, some of the profits are actually invested in legitimate businesses—including real estate in Florida, restaurants in California, and other businesses across the Nation.

And the tremendous multibillion dollar profits from drug trafficking are used to finance the other illegal activities of organized crime—gambling, pornography, prostitution, extortion, loansharking, fraud, weapons trafficking, and public corruption.

Through its drug profits, organized crime spawns a great deal of the crime in this Nation. In addition, illicit drugs themselves spawn a great proportion of crime. One recent study demonstrated that over an 11-year period some 243 addicts committed about one-half million crimes—an average of 2,000 crimes each or a crime every other day—to support their habits. Half of all jail and prison inmates regularly used drugs before committing their offenses. According to a recent Rand study, addicted offenders in California committed nearly nine times as many property crimes each year as nonaddicted offenders.

Although much remains to be done, this administration has already launched a new and promising assault upon organized crime and drug trafficking. A year ago last January, the FBI was brought into the drug fight for the first time—to complement the excellent work of the DEA. Thereby, we gained not only the FBI's resources, but also its years of experience in fighting organized crime. Prior to January 1982, the FBI had no specific drug investigations underway. As of April 25 of this year, the FBI had more than 1,300—and about 30 percent of these were joint investigations with the DEA.

We have in fact scored dramatic successes against organized crime. We have indicted and convicted numerous high-level members of syndicate families—in some cities, the top structure of organized crime families regarded as untouchable a few years ago. In the last 2 years, we have convicted more than 1,200 persons in organized crime cases—including more than 350 members and associates of La Cosa Nostra. In addition, more than 300 La Cosa Nostra members and associates are currently awaiting trial.

To build on these successes, the President announced last fall perhaps the most significant assault on organized crime and drug trafficking ever planned. Critical in this effort are the 12 new regional task forces designed to mount a coordinated attack by all of the involved Federal agencies against organized drug trafficking. These task forces are operational—they have cases under investigation. We expect each of the task forces will be fully staffed by the end of the summer.

By creating these task forces—and bringing the FBI into the battle against drug trafficking last January—we will have approximately doubled our drug enforcement resources in one year. Unlike prior Federal drug efforts that focused on the street level, our new task forces will concentrate on destroying the top levels of organized drug trafficking.

In addition, just last month the White House announced the creation of a new drug interdiction group headed by Vice President George Bush. This group will be looking outward from our borders in an effort to stop the movement of illicit drugs into this country. This new group will harness the power of the U.S. Customs, the Coast Guard and the military to deploy a first line of domestic defense against illicit substances shipped towards the United States. Meanwhile, within our borders, the Organized Crime Task Forces will fight drug trafficking.

Although we have made a good beginning in this new effort against the most serious form of crime in America, it is essential to the fight against organized crime that the Congress enact the significant criminal law reforms that the President has proposed. Organized crime is sophisticated and will take advantage of any weakness in the law—and weaknesses in each of these areas have been clearly identified through difficult and costly experience.

Appearing before you shortly will be Associate Attorney General Rudolph Giuliani, Assistant Treasury Secretary John Walker, and Assistant Attorney General Lowell Jensen, who will cover the major aspects of the bill in more detail. Right now I would like briefly to note several areas where we believe reform is badly needed.

We propose reform of the Federal bail system by authorizing the pretrial detention of defendants shown to be dangerous to the community and by reversing the current presumption in favor of bail pending appeal. This has been the law in the District of Columbia, and it would restore the discretion vested in Federal judges prior to the Bail Reform Act of 1966. The courts should be specifically authorized to inquire into the source of bail, and they should refuse to accept money or property that will not reasonably ensure a defendant's appearance at trial.

We propose sentencing reform in order to reduce the considerable disparity in the sentencing process and also to restore truth in sentencing. Specifically, we propose abolishing the Parole Commission and establishing a system of uniform, determinate sentencing; authorizing Government appeal of sentences; and restructuring the entire range of criminal fines and prison terms.

Determinate sentencing improves the ability of the courts to impose a just, visible punishment that reflects a measured balance of society's interests. This bill includes provision for a new level of mandatory sentencing for violent crime, and it would serve to enhance the deterrent effect of imprisonment where imposed in proper cases in the area of "white collar" crime such as fraud, antitrust, and tax cases in particular.

We propose making criminal forfeiture available in all major drug trafficking cases. We must strengthen procedures for "freezing" forfeitable assets pending judicial action, expand the classes of property subject to forfeiture, and facilitate the administrative forfeiture of conveyances and other property in uncontested cases. We must provide specific authority for the forfeiture of the proceeds of an "enterprise" acquired or maintained in violation of the RICO statute.

We also propose modification of the exclusionary rule, which has substantially hampered our law enforcement efforts. The suppression of evidence has freed the clearly guilty, diminished public respect for the law, distorted the truth finding process, chilled legitimate police conduct, and put a tremendous strain on the courts. A recent National Institute of Justice report found that when felony drug arrests were not prosecuted in California, 30 percent of the time it was for search and seizure reasons. It also found that "[t]o a substantial degree, individuals released because of search and seizure problems were those with serious criminal records who appeared to continue to be involved in crime after their release."

It is time to bar the use of the exclusionary rule when a law enforcement officer has acted in good faith, reasonably believing his action to have been legal. This modification of the exclusionary rule—which is already the law in the fifth and eleventh circuits—would by itself do a great deal to restore public confidence in our criminal justice system.

Another reform concerns the insanity defense. It is used in only a small percentage of criminal cases—and it is used successfully in an even smaller percentage. Nevertheless, the public attention received by those cases has fully exposed glaring flaws in that defense. It is for this reason that the administration proposed reform of the insanity defense to limit its use to those who are unable to appreciate the nature or wrongfulness of their acts. Under our original proposal, the burden would rest on the defendant to establish insanity by clear and convincing evidence.

Already, our original proposal—plus public concern about the abuse of the insanity defense—has moved many knowledgeable persons to rethink the issue. Committees of the American Bar Association are considering—and the American Psychiatric Association has adopted—worthy proposals for reform. Those proposals would eliminate the second—or "control"—prong of the two-part ALI-Model Penal Code test. In other words, they would limit the insan-

ity defense to those situations in which, as the result of mental disease or defect, a defendant could not appreciate the wrongfulness of his conduct. Combined with requiring the defendant to prove by clear and convincing evidence that he did not appreciate the wrongfulness of his conduct, this approach would represent a substantial improvement over present law. By supporting such an approach, we hope to fashion a modification of the insanity defense that will enlist a broad base of support—and insure speedy reform in the Congress.

As several members of the Supreme Court—and other concerned citizens—have pointed out, one of the greatest problems facing our legal system is the overload of cases in the courts. Too much business insures that the cases most in need of prompt judicial attention may not receive it. As one observer noted, due process of law risks becoming overdue process of law.

To ease at least some of the burdens on the courts, we also propose a revision of the Federal habeas corpus laws. Our reform would impose a statute of limitations and provide that issues fully litigated in State courts would not be subject to relitigation in Federal courts. The purpose of this reform is to restore a degree of finality to criminal convictions, but an incidental effect would be the reduction of substantial burden on the Federal courts. State prisoners filed more than 8,000 habeas cases in Federal court just last year. The only thing to commend the vast majority of those cases, to quote Judge Learned Hand, "is the hardihood in supposing they could possibly succeed."

The legislation before you now includes all of these proposals plus more than 20 others. This comprehensive criminal law reform bill collects in one place all of the most necessary changes—including, for example, a constitutionally sound Federal death penalty. It also includes provisions concerning the Tort Claims Act, the Justice Assistance Act, drug enforcement penalties, and surplus Federal property.

In drafting this bill, we were ever mindful of the need to safeguard individual liberty. But we also recognized that the most basic individual liberty is freedom from violence, and that liberty can be secured only by effective and vigorous enforcement of the criminal laws. As Judge Hand recognized 50 years ago: "Our dangers do not lie in too little tenderness to the accused. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."

That concludes my opening statement. Rudy Giuliani, John Walker, and Lowell Jensen are here to discuss the legislation in more detail and to answer any questions you may have.

Thank you very much.

The CHAIRMAN. Thank you, Mr. Attorney General.

I understand that you have another appointment and cannot remain longer. So we will just reserve questions for the other witnesses.

We appreciate your appearance.

Mr. SMITH. Thank you very much.

Senator KENNEDY. Could I just have one question?

Would the Senator yield?

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Mr. Attorney General, just one question on, really, it deals with the strategy.

I think that we have worked out, over a long period of time, on this committee, a bipartisan effort which has coalesced around the areas in which there can be substantial agreement. I must say that the proposal made by the administration includes a variety of different elements which are extremely controversial both, I think, within this committee, and certainly on the floor of the Senate.

I am just wondering, without getting into the details of the particular provisions—I know you have to run—what is your own strategy? The Democrats have put in their program, the Republicans have put in their program, and there is substantial agreement on a number of areas that can have a real impact. Why are we not trying to take the elements of both programs on which we agree and move that rapidly through the Senate, and see what can be done in the House.

I must say as somebody who has been here over 20 years, I have seen the enormous diversity on law enforcement in the early years, and then the coming together during the period of the late seventies. I think we are right back in the situation where we have added too much in terms of this legislation.

Maybe you just believe as a matter of principle that the controversial issues have to be so included. But as a practical matter, I think that there is a very little likelihood that they are going to be enacted into law. There is a real chance of jeopardizing the whole crime package, which I believe the President is committed to, I know you are, and many members are.

I would just be interested if you did have 2 minutes to comment on what your own view and strategy is, because there are strong views not only in this House, but as you understand, in the House of Representatives, on a variety of these amendments. Yet there is very substantial agreement on the vast majority of the package, whether it is sentencing, whether it is the bail reform, whether it is violent juvenile offenders, provisions dealing with drug traffickers, and a variety of other provisions which both the Republicans and Democrats have worked on.

Would we not be wiser to take those areas where we have substantial agreement, and move those as a package, and deal with the controversial issues, such as the death penalty on a separate tract.

Are we at a point where we want to isolate those individuals who oppose the controversial items and, make them appear like they are against doing something on crime, or are we just trying to get this passed?

Mr. SMITH. Well, Senator, we feel, as you know, that all of the proposals in that package are very badly needed. It is true, and certainly true in the Senate here, that a bill was passed last year by a vote of 95 to 1. It never got out of the House.

Senator KENNEDY. We have other assurances from the chairman of the House Committee on that issue.

Mr. SMITH. The Senate certainly has done a good deal with respect to making some of the changes that we think are needed. The Congress as a whole has done very little, and we think that it is

important that all of these proposals be seriously considered and acted on.

Now, it may very well be, as you say, that there are differences of opinion. I am sure there are, with respect to a certain number of these proposals. But it does seem to me that at least the floor of each House ought to have the opportunity to vote on each of those proposals as a package, or otherwise.

Now, the strategy of how it is put together, of course, is really the responsibility of this committee and the Senate.

Senator KENNEDY. Well, it is also yours, hopefully, as well. You are influenced and guided by the committee here, and by the administration.

Mr. SMITH. It is ours, Senator Kennedy, and we think we have done that by putting together this package, and submitting it to both the Senate and the House. We would like to see all of those proposals considered, because we think every one of them is important.

Senator KENNEDY. Do you think adding a death penalty to this particular package assists in moving this whole package through, in terms of the Senate of the United States, given what a number of the Members of the Senate have said?

Clearly, you know, there is always the possibility of cloture, filibusters, and all the rest of it. But as someone who has been involved in the process, and who is opposed to the death penalty, I certainly have indicated I would never filibuster, but I think there are others who would. There has been a serious effort on a number of the consensus areas which I have just mentioned here.

If we could have a chance to vote on those, and move those through, and get the House of Representatives to do likewise, we will have accomplished something, but it is inconceivable to me that you expect that with your package, you are really doing a great deal more than posturing, quite frankly.

I have a lot of respect for you and the Department, but it just seems to me that the better part of wisdom is to try to find the areas where there is agreement, and there are many, and they are extremely important, and they can make some important difference in trying to deal with crime, and get those passed, and I would dare say that you could take 8 of 10 or the principal items in there and pass them through the Senate this afternoon.

But I just raise this as a question of strategy, because I am very interested in the issue, as are the people in my State, and all across the country, and I am not too sure that we are not doing their interests a disservice by not moving the controversial issues separately from the consensus package.

But perhaps later down the road, when push comes to shove, we can come back to you and talk to you about a strategy, because I think we are going to be there.

I thank the Chair.

Mr. SMITH. We certainly hope that all of these proposals do get to the floor and are voted on by both Houses. We think they are all important.

Now, how they get there, of course, is another matter.

Senator BIDEN. Mr. Attorney General, could I ask one question?

The CHAIRMAN. Senator Biden.

Senator BIDEN. I apologize for being late, General.

I want to echo the statements that Senator Kennedy just made, and clarify one thing.

The Senate and the House did pass a very significant bill last year, the most significant anticrime legislation that has come through Congress in the last 15 years. Now I understand the administration did not like it. The President vetoed it, not Congress. We passed the bill and it did not have sentencing or bail reform in it.

We did get a commitment, with Herculean efforts, and with your Department aiding us, from the chairman of the House Judiciary Committee, to report a sentencing bill and a bail bill this Congress.

The number three man on this committee, Senator Laxalt, has agreed to report out a sentencing bill by June 1, so that we can quickly send a bill to the House.

I want to emphasize that we did pass a significant piece of legislation through both Houses last year and put it on the President's desk. I do not think anyone who has been here even 3 days can believe that we are going to be able to pass in its entirety either the crime package that Senator Kennedy and I introduced on the Democratic side (S. 830), or this package (S. 829).

And I really think that if we are going to play politics, and say that we are going to get every element of the package and vote each up or down, and make it an election issue, I can assure you that—not because I will do anything about it but because of the nature of the beast—we will get nothing done here.

We have a golden opportunity to keep the House to its word on sentencing, and a golden opportunity on bail, two of the four most important aspects of any legislation that has been proposed here, and 85 percent of everything else that is in here, I think it can pass.

I hope we can work with you, General, on trying to come up with a bipartisan package that was engineered, like the one engineered by the chairman of this committee last year.

Mr. SMITH. Well, we certainly agree with most of the provisions of the bill that you are referring to. We do not think that it was anywhere nearly as extensive as it should have been, or as this package is, or as what I hope the Congress will do this session.

As you know, that veto was for completely independent reason, not having to do with the merits of any of the proposed, crime changes.

Senator BIDEN. Thank you.

The CHAIRMAN. I might say, General, that it is my intention, if we can, to get this package before the full committee, and pass as much of it as we can. If the committee votes out certain sections, well that will be the privilege of the committee. I certainly appreciate the spirit of cooperation of Senator Kennedy and Senator Biden with respect to many of these provisions.

Senator KENNEDY. I must say that the Chair has been, since we started, extraordinarily cooperative and responsive. There have been a number of different areas that I know that he and I and other members have differed on, but he has been persistent in trying to see that we are able to get passed what can make a difference on this issue.

I would just hope that we could could continue in that spirit.

Senator BIDEN. There is no way that we can pass anything without expending political capital. Senator Kennedy has expended political capital from the folks to the left who are unhappy with the idea that he would not filibuster the death penalty and many other provisions.

Senator Thurmond expended a great deal of political capital by agreeing to the fact that he would not allow certain provisions to come up in the package we had last time. The only way that we can legislate around here is to have people who are willing to legislate and expend political capital. Both of these men have demonstrated that, although they come from opposite perspectives, and I hope that the administration can demonstrate that same kind of willingness to expend some political capital, and get something passed.

Mr. SMITH. Well, we very much appreciate the actions taken by the Senate in the last Congress. We certainly want to do everything that we can do to cooperate and work with this committee and all of those involved in connection with the current package, because what we are talking about is a very important public interest issue. I think we all have responsibility, and we certainly all want to cooperate to the fullest extent. I can certainly say on behalf of the administration that we intend to do just that.

Senator BIDEN. We are happy to cooperate.

The CHAIRMAN. I might say, Mr. Attorney General, that I favor the package. I think it is an excellent package.

I would be very pleased to see it passed just as it was submitted to us, and I think we can take it up in the committee, but I cannot assure you that every provision in the package will be approved. That will be up to the committee. We will just have to vote on each provision in the committee, but we will do the best we can.

Thank you very much for your appearance.

Mr. SMITH. Thank you.

The CHAIRMAN. Our next witnesses are the Associate Attorney General, Rudolph Giuliani, the Department of Justice; Assistant Attorney General Lowell Jensen, the Department of Justice; and John Walker, the Department of the Treasury.

You know we approved your nomination in the District of New York?

STATEMENT OF RUDOLPH GIULIANI, ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY LOWELL JENSEN, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE; AND JOHN M. WALKER, JR., ASSISTANT SECRETARY (ENFORCEMENT AND OPERATIONS) DEPARTMENT OF THE TREASURY

Mr. GIULIANI. Yes, I did, Mr. Chairman. Thank you very much. Mr. Chairman, members of the subcommittee——

The CHAIRMAN. The Department of Justice, I believe, has a very full statement on this matter. I think we might place that in the record and have the witnesses summarize significant joints as they see fit.

Senator KENNEDY. Mr. Chairman, could I include an opening statement, at an appropriate place?

The CHAIRMAN. Without objection, the opening statement——

Senator KENNEDY. And I have just one or two questions, both on the bail and sentencing. Some differences in where we were last year, but I would like to just submit those, if I could, for the record.

The CHAIRMAN. Without objection, the opening statement of Senator Kennedy, and the opening statement of Senator Biden will follow my opening statement, if that is agreeable.

You gentlemen may proceed.

Mr. GIULIANI. Mr. Chairman, members of the subcommittee, I appreciate this opportunity to testify regarding the President's Comprehensive Crime Control Act of 1983.

We have submitted for the record a lengthy written statement, so what I would do, Mr. Chairman, is briefly summarize some of the provisions of the bill.

Assistant Attorney General Jensen will summarize others, and Assistant Secretary of the Treasury, John Walker, several sections. I will cover bail reform, insanity defense reform, Federal intervention in State proceedings, surplus property amendments, and sentencing reform.

Mr. Jensen will cover—we both will cover sentencing reform—the exclusionary rule, justice assistance, drug enforcement amendments, and capital punishment; and Mr. Walker will cover forfeiture and the Federal Tort Claims Act.

Mr. Chairman, in our view, the first title of the administration's crime bill is certainly one of the most significant, that is, bail reform.

Unfortunately, the shortcomings of current law are most evident when we are dealing with the most serious criminal offenders, habitual or violent offenders, and the leaders of the drug trafficking syndicates.

In Miami, for example, although the average money bond for drug defendants is $75,000, 17 percent of these defendants never appear for trial. For them, money bonds are nothing more than a cost of doing business, and a means of escaping prosecution. For many nondrug defendants, bail is a means of securing release from custody so that they can continue preying upon the public.

In a Michigan case, late last year, a particularly violent bank robber, George Gibbs, was released from Federal custody on $25,000 bail, and 4 days later was arrested for holding up a second bank and shooting a local police officer in the process of attempting his getaway.

In short, Federal bail laws do not adequately protect the public from violent criminals and dope traffickers. We recommend that the courts be required to consider danger to the community, as well as risk of flight in making bail decisions.

It is difficult for many laymen to believe that Federal bail laws now look only to the flight issue. Presently, Federal judges making release decisions as to demonstrably dangerous defendants face a dilemma. They may release the defendants despite the danger that he poses to public safety, or they can attempt to find some reason, such as risk of flight, to justify a high money bail which the defendant cannot meet.

In short, judges too often find it necessary to choose between protecting public safety, which may require intellectually dishonest findings, or applying the law as presently written, and releasing such defendants, recognizing the danger that they pose to the community.

Although the provision in our bail reform proposal authorizing consideration of a defendant's dangerousness in setting release conditions, and a limited category of cases as the basis of denying release altogether, is probably the most important concept in the bail reform title, there are other provisions that are equally significant. The bail title, for example, clearly authorizes courts to inquire into the source of property that will be used to post bond, and to reject property derived from criminal activity. The bail title would also make penalties for bail jumping commensurate with those applicable to the underlying criminal offense with which the defendant is charged, in requiring that such bail-jumping penalty run consecutively with other prison terms imposed.

The bill also shifts the current presumption favoring release on bail following conviction and pending appeal, so that the defendant is required to show, in order to secure postconviction release, that he will not flee, or pose a danger to the community, and that his appeal raises a substantial question of fact or law likely to result in reversal of his conviction.

To me, this is one of the most absurd provisions in the Federal law. After a person now, under current Federal law, is convicted of a crime, the presumption operates in favor of that person being released. That, in essence, is having exhausted the rights, not of the accused, or those who might possibly be presumed innocent, but rather elevating the rights of the convicted over the rights of the public and society.

It was an absolutely absurd extension of the bail laws, and practically it results in most Federal defendants, after conviction, being released on bail, and not being incarcerated for a year, a year and a half, and many of our defendants, many of our fugitive defendants, are in that category, those who have already been convicted of crimes.

The second aspect of this that is very important is that, with all the changes that have been made in drug enforcement as outlined by the Attorney General, the increase in the number of FBI agents now doing drug investigations, that were not doing drug investigations a year ago, and 18 months ago, an increase of about 600 or 700 agents, the task force increases, which will be an additional 1,000 agents, doing drug cases, there is no reason to believe that, without a change in our bail laws, the result of their efforts will not be just a commensurate increase in the number of fugitives—drug fugitives.

At last count we had a little under 2,000 drug agents and over 3,000 drug fugitives. There is no reason to believe that when we have 4,000 or 5,000 drug agents, we would not have 7,000 or 8,000 drug fugitives, unless the bail laws are changed in the way in which this committee has already considered it and we are proposing.

Another important part of the President's crime bill is title V, to reform the insanity defense now applicable in the Federal criminal

justice system. Although the insanity defense is used in comparatively few Federal cases, the defense raises fundamental issues of criminal responsibility which the Congress should address, and, also, in assessing how often the defense is used, one must also look to any number of cases where a plea results or a disposition results in which the defendant, instead of being convicted, is placed in a mental institution or is civilly committed.

And, in fact, under State systems that happens quite frequently. As a result of the *Hinckley* case, there has been a careful review of the insanity defense, and a consensus has emerged for narrowing of the defense, particularly the volitional arm of the defense, as it is now used in Federal courts, which focuses upon the ability of the defendant to control his conduct.

As the American Psychiatric Association noted in December of last year, the line between an irresistible impulse and an impulse not resisted is probably no shorter than that between twilight and dusk.

Since the experts themselves recognized a virtual impossibility of determining whether the defendant can or cannot control his conduct, we propose to limit the insanity defense to the so-called cognitive arm, that is, a defendant would be deemed not guilty by reason of insanity only if, as a result of mental disease or defect, he was unable to appreciate the nature and quality of the wrongfulness of his acts.

Otherwise, mental disease or defect would not constitute a defense. Furthermore, opinion evidence by psychiatrists on the ultimate question of whether the defendant had the mental state or condition constituting either an element of the crime or a defense would be prohibited, and the defendant would have the burden of proving his insanity by clear and convincing evidence.

We believe this reform would bring insanity issues back into the realm where psychiatric witnesses can provide reliable evidence. The question for the jury would be whether the defendant knew what he was doing or that what he was doing was wrong.

Although we frankly believe that even further narrowing of the insanity defense would be desirable, to look only to the issue of mens rea, the approach set out in the President's crime bill would represent a major improvement over existing law, and it is an approach that we believe can command overwhelming support in the Congress.

I note that, on this issue, the administration last year had proposed returning just to the mens rea approach. In other words, restricting the insanity defense, just to situations where a person could establish, or the Government could not establish, that the person knew what he was doing or intended the consequences of his act.

As a result, really, of consultations with the chairman, with other members of this committee, and our assessment of what is realistic, as opposed to what we would absolutely prefer, we have modified our position to one which we think is a more realistic one, and one that was supported by this—by a number of members of this committee last year, and is now essentially supported by the American Bar Association and the American Psychiatric Association.

I offer that as an example of how we are more than willing to compromise, if we can achieve improvements over current law, even if we cannot get exactly or precisely what it is that we would prefer in the first instance.

One of the provisions of the President's crime bill that would be of greatest benefit to State and local law enforcement authorities is title VI, which would limit Federal judicial interference in State court adjudications pursuant to the Federal habeas corpus statutes.

The abuse of Federal collateral remedies has been a a growing concern in recent years among State and Federal officials responsible for the prosecution of crime. The concern has been equally great among State and Federal judges.

Indeed, a majority of the Justices of the Supreme Court have strongly criticized the current operation of Federal habeas corpus, and have called for basic reforms.

Under the present system, there can never be an end to the litigation of a criminal case, since habeas corpus is available without limitation of time, and with no limit on repetitive filings by the same prisoner.

Criminal justice resources of the State and Federal governments are squandered in litigating the redundant and frivolous petitions of State and Federal prisoners. The possibility of structuring State processes through delay and repetitive applications for Federal habeas corpus has virtually nullified State capital punishment laws.

Title VI incorporates a variety of reforms responding to these abuses. It would establish a 1-year time limit on habeas corpus applications, normally running from the end of the State criminal process. This would provide a means for controlling the abuses of repetitive filing, and the filing of petitions years, or even decades, after the normal conclusion of a criminal case.

Title VI would also establish a general rule barring claims which were not raised before the State court where the State has provided an opportunity to raise such claims that would satisfy the requirements of Federal laws. Under this rule, a claim could be raised on a habeas corpus if an attorney's failure to raise it, in State proceedings, amounted to constitutionally ineffective assistance of counsel. But minor oversights and errors by counsel, which even the ablest attorneys will sometimes make, would not be grounds for reopening a criminal case in Federal court after the State process is completed.

A further reform of title VI is according deference in habeas corpus proceedings to the result of full and fair State adjudications. The requirement of a full and fair adjudication would generally be satisfied if the State determination of a petitioner's claim was reasonable, and was arrived at by procedures consistent with due process.

The current rules, by contrast, mandate redetermination of all claims, regardless of how often, and how adequately they have been considered by the State courts. The effect of the reform should be a relatively quick and easy decision in habeas petitions of most claims that have previously been decided by the State courts.

Finally, title VI would make comparable reforms in the collateral remedies for Federal prisoners, and affect various technical improvements in habeas corpus procedures.

The Federal surplus property amendments in title IX of the bill would be of great assistance in turning over Federal property to State and local jurisdictions for use as correctional facilities, something that we have done, to the extent that we can, laboring under the burdens of the present law, and have actually been very effective in assisting many of the States, or at least some of the States, the ones that have participated so far, and quickly, at least dealing with the overcrowding in State prison facilities.

In the past decade, the State prison population has almost doubled, from 204,000 in 1973 to over 400,000 today. Because prison construction is so expensive, ranging from $30,000 to $90,000 per bed, State governments are severely strained. More than half of our State correctional systems are under Federal court orders stemming from overcrowding.

In an effort to assist the States in dealing with this problem, the Attorney General has established a clearinghouse to facilitate the identification and transfer to States of surplus Federal properties suitable for prison use. Four States have acquired property under this program.

Under current law, however, States must either lease or purchase the property at its fair market value. This is a financial burden which many States cannot bear.

Under title IX of the President's crime bill, surplus Federal property could be donated to the States at no cost.

As there are surplus properties available which could, at minimal cost, be converted to prison use, enactment of this proposal would provide urgently needed relief to States, and reduce the problem of prison overcrowding.

The final provision that I would like to touch on, and then turn it over to Assistant Attorney General Lowell Jensen to offer further comments on, is the sentencing reform proposals in the bill.

Criminal sentences are imposed at the end of a process that is designed to assure fairness to defendants and to the public. Ideally, sentences represent society's statement of the relative seriousness of the defendant's criminal conduct, and will deter criminal conduct by others.

Unfortunately, despite everyone's best efforts, sentences ultimately fail to achieve these goals. This is true in large measure because the system fails not only to provide appropriate sentences in many individual cases, but even fails to provide a mechanism capable of consistently achieving such results.

Current Federal law provides a Federal judge who is sentencing someone, who has no special competence in knowing what sentence will reflect society's values, discretion to impose a sentence pursuant to numerous sentencing options, with almost no guidance as to how to choose among those options.

Federal penal statutes specify only the maximum sentence that may be imposed for a particular offense, and this only indicates the congressional view of the appropriate sentence for the most serious case under that statute. Federal law also provides various sentencing alternatives, such as probation and restitution, and various spe-

cialized sentencing statutes, such as those available for youthful offenders, or drug addicts.

But Federal law gives absolutely no guidance as to when or how these statutes should be used. As a result, judges are left to impose sentences according to their own notions of the purposes for sentencing. They are not required to state their reasons for choosing a particular sentence, and many, in fact most, do not. Sentences are reviewable only for illegality, or for constitutional violation.

A sentence that is substantially out of proportion to those in similar cases is not otherwise subject to challenge. It is unreviewable.

Current imprisonment statutes were enacted at a time when the criminal justice system utilized a medical model. A defendant sentenced to prison was sentenced to a term substantially longer than the judge thought would be needed to rehabilitate or cure the defendant.

Parole authorities would periodically review the defendant's case, to determine whether he had been rehabilitated, and could be released. This theory ignores the fact that there are other purposes of prison sentences, such as just punishment and deterrence for which definite sentences must be imposed.

In addition, the theory has proved to be unsound because behavioral scientists have concluded, in recent years, that there is no reliable means of inducing rehabilitation, and no way to tell from a prisoner's behavior in prison, or before a parole board, whether or when he has become rehabilitated. Decisions as to rehabilitation have resulted in numerous tragedies all throughout this country.

Consequently, the basic reasons for an indeterminate sentence, and thus, for the existence of parole boards has disappeared. The Federal Parole Commission today acknowledges that it cannot tell when a prisoner has become rehabilitated. It now sets release dates for most prisoners under its own guidelines soon after they begin their prison term, and based entirely on information known at the time of sentencing. The release date may be substantially different from the prison term, and may be set to achieve entirely different goals from those of the sentencing judge. It does not, however, reflect in any way an assessment of the person's behavior in prison, or of the quality or level of the person's rehabilitation.

It is, in essence, a resentencing of the person who has been sentenced by the judge already, and often in a way that conflicts with what the judge did in the first place.

The almost inevitable result of the problems of current law is considerable sentencing disparity. This disparity has been documented in numerous studies, including a recent study for the Department of Justice, in which 208 Federal judges agreed, in only 3 of 16 hypothetical cases, on whether to sentence a defendant to prison at all. The study found that 21 percent of the variation in sentences was due to the tendencies of some judges to sentence more harshly, or more leniently than others, and that even more variation was due to differences in the weight in which individual judges gave particular offenses or offender characteristics.

In the last decade a concensus has developed among those of different political views that the current Federal sentencing system is riddled with serious shortcomings. More recently, substantial support has developed for an approach along the lines of title II in this

proposed bill, a system that couples sentencing guidelines, and provides for determinate sentences. This title is substantially identical to the legislation approved several times by the Senate Judiciary Committee, and passed by the Senate most recently in S. 2572, in the last Congress.

The provisions are also similar to the Minnesota system, the only operating State system that is substantially similar to the proposal contained in title II, which the National Academy of Sciences has recently reported to be the most successful sentencing reform system.

If I may, Mr. Chairman, I would turn it over now to Assistant Attorney General Jensen, who will discuss the sentencing proposal, or continue the discussion of the sentencing proposal, and move on to some of the other provisions.

The CHAIRMAN. Mr. Jensen, we would be glad to hear from you.

STATEMENT OF LOWELL JENSEN

Mr. JENSEN. Thank you, Mr. Chairman and members of the subcommittee.

I would like to follow up on the discussion of the sentencing in title II, to describe a little bit just exactly what title II would suggest in terms of revision of Federal sentencing laws.

It would, for the first time, give legislative recognition to the purposes of sentencing, including just punishment, deterrence, protection of the public, and rehabilitation. A judge would impose sentence after considering these purposes, and sentencing guidelines, promulgated by a commission in the judicial branch that would recommend an appropriate kind of range of sentence for each combination of offense and offender characteristics. The judge would impose sentence in accordance with the guidelines, unless he found that a factor that should affect the sentence was not adequately considered in the guidelines.

If the judge imposed sentence outside the guidelines, he would have to state specific reasons for doing so. A sentence above the guidelines would be subject to appellate review at the request of the defendant, and a sentence below the guidelines would be subject to review at the request of the Government, acting on behalf of the public.

A prison term imposed by the judge would represent the actual time to be served, less a small amount of credit for compliance with prison rules. The Parole Commission would be abolished, and prison sentences imposed by judges would no longer be artificially inflated, because of the parole system.

If the sentencing judge thought that a defendant would need street supervision following his prison term, he could impose a term of supervised release to follow the prison term.

Title II provides numerous advantages over current law. The most important is that it provides a sentencing mechanism that will assure fair sentences, and the appearance of fairness. Sentencing guidelines will assure that defendants will receive sentences that are fair, as compared to sentences for all other offenders. Determinate sentencing will assure that everyone will know at the

time of sentencing exactly what the sentence is, and why it was imposed.

Finally, appellate review of sentences will assure the development of a balanced body of case law concerning the appropriateness of both unusually high and unusually low sentences.

Let me turn to one of the other titles, a major portion of the legislation we are discussing, and that has to do with the exclusionary rule.

In title III of the bill we set out a proposed modification of the fourth amendment exclusionary rule, to restrain it to its proper rule, which is precisely that of deterring unlawful police conduct.

Our proposal is identical to that submitted by the administration and introduced by Chairman Thurmond as S. 2231 in the 97th Congress. Our proposal is, simply, that the exclusionary rule would not be applied in cases in which the law enforcement officers who conducted the search acted in a reasonable good faith belief that their actions were lawful.

When first imposed by the Supreme Court in 1914, the exclusionary rule was justified both as a means of deterring unlawful police conduct 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.

There are any number of cases that set this out. They start with the cases that dealt with the retroactivity of the rule itself. And all those cases have now clearly established that the rule will be invoked to protect fourth amendment rights, only when to do so would effectively deter unlawful conduct by police or 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 the law enforcement officer's conduct is susceptible to being deterred. For example, courts continue to suppress evidence seized by law enforcement officers during searches conducted pursuant to duly authorized warrants which have been obtained in completely good faith but later found defective by an appellate court.

When a warrant is obtained in good faith from one court but is subsequently ruled defective by another court, there is a disagreement between judges—there is no police misconduct involved. The police have simply carried out their duties. They have gone to the court and presented their evidence, completely with full disclosure. The court has made a decision that probable cause exists for a warrant.

In those circumstances, there is no police misconduct, whatsoever, and the exclusionary rule, when it is applied in those cases, simply fails to comport with its rationale.

Moreover, when the officers carry out the orders of the court, once a warrant is issued, suppression of evidence in such an instance does not serve the purpose of the exclusionary rule.

In fact, it only serves to damage both a community's perception of justice and the morale of law enforcement officers who have followed the rules only to have the evidence suppressed on the prem-

ise that they have violated the Constitution. Proper police conduct is thereby falsely labeled as illegal.

The deterrent purpose of the exclusionary rule also is not served when courts apply the rule to situations where the appellate court cases are not at all clear, where the law is thoroughly confused, or even in situations where the cases are in flat contradiction. Police often are confronted with the question of whether to conduct a warrantless search in the field when the circumstances they are facing are not covered by existing case law.

For example, we could consider the facts in two recent cases decided by the Supreme Court, *Robbins'* v. *California,* and *New York* v. *Belton.* Both of these cases were decided by the Court on the same day in the 1981 term. In both cases, police officers lawfully stopped a car, smelled burnt marihuana, discovered marihuana in the passenger compartment of the car, and lawfully arrested the occupants. Thereafter, in *Robbins* the officer found two packages wrapped in green opaque paper in the recessed rear compartment of the car, opened them without a warrant, and found 30 pounds of marihuana. In *Belton,* the officer found a jacket in the passenger compartment, unzipped the packet without a warrant, and found a quantity of cocaine.

In decisions based largely on cases that had not even been decided at the time of the two searches were actually conducted, the Court split as follows in now considering the cases that have come from New York and California: three Justices of the Supreme Court decided that both searches were legal; three Justices decided that both were illegal; and three Justices decided the ultimate decision that *Robbins* was illegal and *Belton* was legal.

The interesting result of that is that both New York and California were found to be wrong. They were both reversed. So the Supreme Court, on the basis of the decision, simply decided that the cases as they come up through the State courts have been decided once again by the judicial disagreement to be a different state of law.

Moreover, the Court did not give the police any real guidance to understand the law of warrantless searches of automobiles, and less than a year later the issue was again before the Court in the *United States* v. *Ross.*

In that case, the Court reconsidered the holding of *Robbins,* and it was repudiated. So what we have was, after we had gone through this, we now have a state of law that was known but we had gone through a process where *Robbins'* and *Belton's* cases had been affected by a state of law which was unknown.

It was probably small consolation for the police involved in the search in *Robbins* to know that their view of the law in this area was ultimately upheld by the Supreme Court in another case since the defendant in *Robbins* went free because the evidence was excluded. To say the suppression of reliable, trustworthy evidence in this type of case helps to deter police misconduct is absurd, and the acquittal of the defendant is a totally unjustified windfall.

Our proposal in title III setting forth a reasonable, good faith exception to the exclusionary rule recognizes that conduct undertaken in reasonable good faith is not succeptible of being deterred. It is based on the en banc opinion of the Fifth Circuit in *United*

States v. *Williams,* which adopted a reasonable good faith exception in that circuit after an exhaustive opinion which considered all relevant Supreme Court cases. Such legislation was recommended by the Attorney General's Task Force on Violent Crime after hearing the recommendations of legal scholars on many different points of view. We are confident it is constitutional.

Moreover, a legislative modification of the rule is long overdue, having first been suggested 12 years ago by the Chief Justice in his dissent in the famous *Bivens* case.

Let me turn to another portion of the legislation, that which deals with the reinstitution of capital punishment.

The establishment of constitutional procedures for the imposition of capital punishment is the purpose of title X of the administration's crime bill. For more than a decade, Federal statutes authorizing the death penalty for offenses of homicide, espionage, and treason have been unenforceable because they fail to provide, as required under the Supreme Court's landmark decision in *Furman* v. *Georgia,* a set of legislated guidelines to narrow the sentencer's discretion in determining whether the death penalty is justified in a particular case. In a series of decisions after *Furman,* the Court has further refined the constitutional requisites of a statute authorizing imposition of the death sentence. At the same time, however, the Court has stressed that if procedural requirements designed to protect against arbitrainess and disproportionality are met, capital punishment is a legitimate, constitutional sanction for the most grave offenses.

In the 10 years 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 committed under particularly reprehensible circumstances, but the Congress has failed to enact similar legislation to reinstitute capital punishment at the Federal level. Of course, legislation to provide constitutional procedures for imposition of the death penalty has been considered by the Congress on several occasions.

In the last Congress, the Judiciary Committee held exhaustive hearings on capital punishment and devoted considerable effort to the development of a death penalty statute that would comport with the decisions of the Supreme Court. The product of this effort, S. 114, is the basis for the death penalty provisions of our bill.

Appearing before the Judiciary Committee during its hearings on S. 114 was one of my first tasks as an Assistant Attorney General. As I stated in my testimony at that time, the death penalty is not a pleasant subject for either a legislator or an official charged with enforcement of our criminal laws to contemplate. But the fact that the death penalty is an unpleasant and controversial issue is no justification for continuing to avoid enactment of procedures to permit its restoration, for, under certain circumstances, it is a warranted sanction for a limited number of Federal offenses—offenses which involve the brutal taking of innocent lives or which threaten the very security of our Nation.

In our view, the death penalty is warranted for two principal reasons. First, while studies attempting to assess the deterrent effect of capital punishment have reached conflicting results, we believe common sense supports the conclusion that the death pen-

alty can operate as a deterrent for certain crimes involving premeditation and calculation, and thus it will 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 that no other penalty, not even life imprisonment without the possibility of parole, would represent an adequate response to the defendant's conduct.

As the Supreme Court has stressed in its death penalty decisions, the severity of the sanction requires that it be imposed only in very limited circumstances and pursuant to stringent procedural safeguards. The death penalty provisions of our bill meet these requirements: the death penalty may be imposed only pursuant to a separate sentencing hearing and the Government must give advance notice to the defendant of its intent to seek the death penalty; aggravating and mitigating factors bearing on the justifiability of the death penalty in a particular case are specifically enumerated, but the defendant may raise any additional issue in mitigation; the Government's burden of proof with respect to aggravating factors is more stringent than that which is placed on the defendant in his proof of mitigating circumstances; special findings and jury unanimity are required at all stages, special jury instructions are mandated to guard against the influence of prejudice; and the standards and procedures for appeal of a death sentence are specified.

In our view, these procedures for determining whether the sentence of death is justified in a particular case fully comport with the constitutional teachings of the Supreme Court over the last decade. We believe that in the carefully delineated circumstances to which the death penalty provisions of our bill would apply, the opportunity for imposition of capital punishment 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.

Turning to another portion of the legislation, title VII. This deals with an area of amendments to drug laws. There has been a great deal of discussion, activity, the Attorney General alluded to the importance of this area, and there are a number of issues that are appropriate here. They deal across the whole range of sentencing, Assistant Secretary Walker will deal with forfeiture, another very important area.

This particular area in title VII deals with providing a more rationale penalty structure for the major drug trafficking offenses. 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, except for marihuana, and with that as an exception, the severity of current drug penalties is determined exclusively by the nature of the controlled substance involved. While it is appropriate that the relative dangerousness of

a particular drug should have a bearing on the penalty for its importation or distribution, another important factor is the amount of the drug involved. This bill takes that factor into account by providing more severe penalties for offenses involving larger quantities of certain drugs than for offenses involving lesser quantities.

The second problem addressed by this title is the current fine levels for major drug offenses. Drug trafficking is incredibly, enormously absurdly 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, 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; schedule I deals with narcotic drugs, opiates, and cocaine, and they are subject to greater penalties than offenses involving schedule II nonnarcotic substances. This penalty structure is at odds with the fact that title II controlled substances include such extremely dangerous drugs as PCP, LSD, methamphetamines, methaqualone, and Federal prosecutions involving these drugs typically involve huge amounts of illicit income and sophisticated organizations.

Title VII would correct these penalty problems in the areas of both drug trafficking and importation/exportation offenses.

Title VII also contains numerous amendments in the area of diversion control aimed at enhancing our diversion control capabilities but, where appropriate, relaxing certain restrictions. For example, the bill amends the Controlled Substance Act to establish a new emergency authority to place an uncontrolled substance under temporary controls which provide for registration, recordkeeping, and criminal penalties of up to five years. This would permit DEA to deal with rapidly developing situations in which a new or uncontrolled drug suddenly becomes a public danger.

Title VII also amends the registration procedures of current law. For example, the bill would greatly alter the standards required for the registration of practitioners by enabling DEA to consider recommendations of the State licensing board, special limitations, and applicants, prior conviction record and other related matters.

The diversion control amendments also provide special grant authority and authorize resources for the expansion of DEA's State assistance program to help State and local governments suppress the diversion of controlled substances. DEA's program to assist States in establishing diversion investigation units has proven successful; however, because of lack of explicit authority and necessary resources, States have been hindered in establishing such programs. The new authority will respond to this problem.

We turn finally to a portion of the legislation, title VIII, which deals with the Justice Assistance Act. This is an integral part of our comprehensive crime program, and it is a proposal to provide assistance to State and local law enforcement.

Although there is much to be done to strengthen Federal law enforcement, and this is the major focus of the administration's bill, the primary responsibility for enforcement of the criminal laws and for crime prevention in this country and the financial burden that goes with that responsibility, falls on State and local governments. Providing local law enforcement with additional resources, particularly with respect to the areas of violent crime, repeat offenders, victim and witness assistance, and crime prevention, is the purpose of the Justice Assistance Act. This title of our bill is the product of discussions with members of the House and Senate Judiciary Committees, and closely parallels similar provisions approved by the House and Senate in the last Congress.

The current law's program for providing financial assistance to State and local law enforcement—LEAA—has been phased out. The history of LEAA, however, provides some important lessons. It shows, for example, that expenditures of money—$8 billion over 12 years—is not the answer to the crime problem and that a program whose priorities are unclear and constantly shifting results in a minimal payoff. On the other hand, we have also learned that Federal seed money for carefully selected programs does work and that certain of these projects can have a significant impact on our criminal justice system.

Our proposed Justice Assistance Act reflects an appreciation of these issues. It focuses Federal financial assistance on a selected group of particularly important criminal justice issues where the application of additional funds will be most productive. It strips away layers of bureaucratic redtape 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 between the products of research and the projects implemented under the financial assistance provisions.

The proposal would establish within the Department of Justice an Office of Justice Assistance, headed by an Assistant Attorney General. Advising the Assistant Attorney General would be a single advisory board, replacing two current advisory groups. Within the Office of Justice Assistance would be three separate units—the existing Bureau of Justice Statistics and the National Institute of Justice, and a new Bureau of Justice Programs, which would administer the proposed technical and financial assistance programs.

Financial assistance to local law enforcement 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 share of the funds are to be passed on to local governments. There is a matching requirement for the Federal funds, and Federal assistance for individual projects would be limited to no more than 3 years.

Moreover, the use of the funds is limited to specific types of projects which have a demonstrated track record of success. The other component of the financial assistance package, discretionary funds, would focus on training and technical assistance, multijurisdictional and national programs, and demonstration projects to test new anticrime ideas.

25-694 O - 84 - 3

Also included in title VII is a provision which would permit emergency law enforcement assistance. Under this provision, the Attorney General could, pursuant to a request from a State Governor, designate a "law enforcement emergency jurisdiction," when an uncommon situation, such as the massive child murder investigations in Atlanta, develops and local resources are not adequate to meet the emergency. In these cases, emergency assistance in the form of equipment, training, intelligence information, and technical expertise, as well as emergency funds, can be provided by Federal authorities.

Finally, this portion of the administration's crime bill sets forth certain amendments to improve the current public safety officers' benefit program and the prison industries certification authority.

As Mr. Giuliani indicated previously, I would now like to, Mr. Chairman, turn this over to Assistant Secretary Walker for a description and discussion of some of the other areas of the title.

Senator BIDEN. Mr. Chairman, may I ask a question?

The CHAIRMAN. Senator Biden.

Senator BIDEN. Our plate is being filled with so much information here. There are a number of questions I have, and I am sure others have. Would it be possible for us to take 15 minutes here to ask questions of those who have already spoken, before we go on to the next witness?

Is that a good idea?

The CHAIRMAN. Would you like to do that?

Senator SPECTER. I would, too, Senator.

The CHAIRMAN. All right, we will take 10 minutes apiece and ask questions, and then we will go on to Mr. Walker.

Mr. Giuliani, the bail provisions in last year's bill contained a rebuttal presumption that no condition of release would insure appearance at trial, or safety of the community with respect to a defendant charged with a serious narcotic offense, or the use of a firearm to commit a felony. This presumption is not included in S. 829 bail procedures.

Would you elaborate on the reasons for not including this provision in the administration's proposal?

Mr. GIULIANI. I am told that the reasons were that it is probably not necessary, since a prosecutor would be able to make those arguments to a judge, and so long as the judge has discretion and the ability to deny bail in situations involving drug dealers, that is sufficient, and also there was some concern that there might be an issue of unequal treatment raised if it were done in certain categories of cases or in another.

Personally, that is certainly something that I think this committee should consider restoring in an amendment.

Senator BIDEN. It is obvious that you are leaving the Justice Department.

Mr. GIULIANI. That is right. [Laughter.]

The CHAIRMAN. Mr. Giuliani, with respect to the sentencing provisions, you note that Minnesota has adopted a sentencing system similar to the one proposed in this bill.

Could you tell us how well it is working?

Mr. GIULIANI. Well, Mr. Chairman, I am told, and the only study done is a very quick and preliminary study done by the National

Academy of Sciences, that they believe that it is working very, very well, and that it has not led to—one of the criticisms is that when you go to determinative sentencing, all of a sudden the sentences become astronomically much higher than they were before, and in fact, that has not been the case in Minnesota. The sentences have become more uniform, but not outrageously higher or lower, and what we are seeking, as you know, in the sentencing reform, is not some major change in sentences given for a particular crime, but more uniformity in the way Federal judges sentence throughout.

So I do not say that this is a definitive study. I believe they only studied it for a period of 7 or 8 months. But to the extent that there are any conclusions that can be drawn, they are all very positive.

The CHAIRMAN. Mr. Giuliani, S. 829, as well as previous sentencing bills, provides for a system of guidelines to be used by the court in setting a sentence, with appellate review of a lenient sentence below the appropriate guideline by the Government. Everyone seems to agree that the defendant sbould be able to appeal his sentence above the appropriate guidelines, while at least some oppose Government appeal.

How important is it to the operation of this system that the Government be permitted to appeal the sentence?

Mr. GIULIANI. Mr. Chairman, I believe it is probably the single most important provision in the sentencing reform, Government appeal and defendant appeal of sentences, because it is the only way that over a period of time we are going to develop a body of law and a group of opinions that instruct a judge on how to exercise discretion.

Sentencing commissions can set guidelines, and as you know, Mr. Chairman, it will fit some cases, and they are not going to be able to anticipate every case.

The real value to the judicial system would be if a Federal judge, at the time of sentence, when he had a question about how much he should weigh one factor or another, had a body of law that he could go to and read and apply, as he does in deciding every other question. And therefore, I think that appellate review of sentences, both the Government appeal and the defendant appeal, is really crucial to obtaining the kind of rough uniformity that we all want.

The CHAIRMAN. Mr. Giuliani, if the sentencing system proposed by this bill is adopted, do you expect a drastic increase in prison population, and if so, why?

By the way, I note the presence here of Mr. Norman Carlson, the Director of the Bureau of Prisons. I imagine he would be interested in that, too.

Mr. GIULIANI. Well, I will tell Norm that I predict that there will be an increase, not so much in the number of people going to prison, but possibly to some extent on the length of time they spend in prison. I would not categorize it as a drastic increase. There has been an increase over the last 2 years in the number of people going to prison, and in our budget we have been predicting an increase, based upon increased enforcement, and also the possibility that this bill will become law.

But I do not think it will be a drastic increase, and it would be more in the nature of people would be spending more time in

prison, as opposed to necessarily more people would be going to prison.

The CHAIRMAN. There probably would be some deterrent effect if this package is passed, would there not?

In other words, people would see that they have to serve their sentence, and they may be more careful about committing crime, but if they do commit it, then they will have a longer time to serve.

In short, is that it?

Mr. GIULIANI. That is absolutely correct, Mr. Chairman.

The CHAIRMAN. Now, Mr. Jensen, could I ask you a question on the exclusionary rule?

The administration proposal would eliminate the application of the exclusionary rule to evidence seized by a police officer acting with an erroneous but reasonable good faith belief that his conduct was not in violation of the fourth amendment.

Why does the administration believe this approach is superior to simply abolishing the exclusionary rule, and providing appropriate civil and disciplinary sanctions to deter unlawful police conduct?

Mr. JENSEN. Senator Thurmond, as I indicated before, the proposal that we have in the bill comes directly from the recommendation of the Attorney General's Task Force on Violent Crime. They considered all those issues as to the most appropriate response. It was their recommendation that this is the way in which we should seek legislation.

Let me add that there is some perception that this is the realistic way to approach the possibility of a legislative modification of the exclusionary rule. In addition to that, it is premised on the notion that there is already a case, *United States* v. *Williams,* which I cited, which supports, in very direct fashion, the constitutionality of that kind of a legislative notion, and therefore gives it very direct constitutional support.

In its final analysis we were also satisfied that the basis that I spoke to in terms of the application of the exclusionary rule would in fact be eliminated by a reasonable good faith statement of the rule.

The CHAIRMAN. Mr. Jensen, S. 829, as well as my bill on capital punishment, provides a death penalty for an attempt to kill the President. So we will have it in this record, would you comment briefly on the constitutionality of such a provision?

Mr. JENSEN. Yes, sir. The constitutionality issue deals with the question of whether or not a death penalty would be constitutionally permissible in a situation where there was no actual death of a victim. That has been raised in several U.S. Supreme Court cases. It has never been completely resolved, or specifically resolved.

If you look at the whole history of the death penalty, there has always been a death penalty in the Federal law, for any number of cases where there have been no underlying homicide. Espionage and treason come to mind. That is also in the bill, and we are satisfied that that is a constitutional application.

We specifically looked at the issue of any attempted assassination, as to whether or not it would be, in the opinion of the Department of Justice, that would meet constitutional muster, and we are satisfied that it would meet constitutional muster, Mr. Chairman.

The CHAIRMAN. I think my 10 minutes is about up now.

Senator Biden.

Senator BIDEN. Thank you very much.

Mr. Giuliani, you have not been releasing any reports to the GAO lately, have you? [Laughter.]

Mr. GIULIANI. No, Senator.

Senator BIDEN. Good. There is one coming out. I wish you were going to be here when it is released.

Mr. Giuliani, I wish you luck in your new position as U.S. attorney for the Southern District of New York. Actually, you have been there before, have you not?

Mr. GIULIANI. Yes, sir.

Senator BIDEN. Going back home. You have got your hands full.

I might say, I think you are going to be missed—your outbursts against me will not be missed, but you will be missed.

I am a little concerned about the questions relating to the task forces, because I viewed you as one of the linchpins in seeing that it worked. I realize that any good program can overcome the loss of good people, but I do want to discuss for the record what will happen in your going, and I understand your assistant is also going to be going, but I will get to that in a minute.

If I may, with regard to the exclusionary rule. Am I to understand that under the proposed exception, evidence would not be excluded if a law enforcement official was unaware of the current fourth amendment law that applied to a particular situation?

Mr. JENSEN. Excuse me, Senator, that is really not correct. I think that is an important point, is that it has been asserted, on some occasions, that this would place a premium on police ignorance, and that is a very difficult problem, and one which we would not want to see in the legislative structure, or legal structure at all. It does not do that.

The good faith test is both a subjective and an objective test. It requires a subjective belief on the part of the officer that it is unlawful, but if the officer is operating the situation where he is simply unaware of the rules that apply to the search, then it does not meet the objective standards of the good faith exception. So it has to be a reasonable good faith belief.

It is not reasonable if it does not meet an objective test. Then it would not fall within the exception.

Senator BIDEN. It is not reasonable if he does not understand the fourth amendment.

Mr. JENSEN. No, no. The test of whether or not it is reasonable is an objective test. It does not depend on his objective feeling, whatsoever. It is a test the court imposes on the search itself. The officer explains the search, what he did, what his subjective belief was, and it is tested then by the law.

If the law is clear that his conduct was in violation of the existing standards, then that is a bad search, regardless of his state of awareness.

If on the other hand you are in a situation where there is no law for him to follow, then it is objectively valid that his subjective belief could be acted upon, then reasonable good faith would permit the search to be all right.

Senator BIDEN. Well, as a practical matter, the subjective belief really is not going to impact at all upon the court's judgment, be-

cause the court applies what they believe to be an objective standard as to what is necessary to constitute protection, does it not?

Mr. JENSEN. That is what we do in any number of situations, where courts look to what is the objective state of the law. We do that in all kinds of areas of the law. This simply says that there is no reason why we should not do it in the fourth amendment also, and if we find a situation where the officer has in fact acted in such a way that it comports with the fourth amendment in an objective fashion, there is no reason to suppress the evidence.

Senator BIDEN. Without pursuing that in the little time that I have, let me ask you about the *Gates* case now. It is before the Supreme Court, and involves a good faith exception to the exclusionary rule.

In view of the potential constitutional issues raised by statutorily modifying that rule, would it not be wise to postpone legislative action until the Court judgment?

After all, the Court may in fact rule in a way that solves the problem.

Mr. JENSEN. It is potentially possible in the *Gates* decision that the Court would so rule. However, it is not necessary—it is not a necessary decision that will either have a decision by the Court that there will be a good faith exception, or that there will not be.

The *Gates* case involves a search by search warrant. It involves a case that in effect I alluded to as to the kind of problem situation where the officers went to a magistrate, they presented all the evidence they had, they made a complete disclosure to the Court, and a search warrant was issued. Pursuant to that search warrant they then went and completed a successful search.

A later Court decision said, well, we do not agree with the first judge. We think that there was not any probable cause. So if you look at the case, it is on appeal, on a number of levels. One is whether or not the decision of probable cause is correct. You could have a decision by the Court that only deals with probable cause.

Senator BIDEN. I agree with that. I acknowledge that there is a prospect that the Court will not solve the issue in its ruling in *Gates*, but there is also a possibility that it will. It seems to me that when we can avoid raising constitutional questions that the courts themselves may resolve, it might be wiser to wait. We are not talking about an indefinite wait here, we are talking about knowing the result this year.

Would you object to that?

Mr. JENSEN. No, I would not have any objection if the Court were to rule in *Illinois* v. *Gates,* in a fashion that would comport with what we are suggesting, certainly.

Senator BIDEN. No, I mean would you object to us waiting.

Mr. JENSEN. No, I think the time factor actually comes about in such a fashion that we are asking consideration of this bill, we have done that all the way through, as a part of the crime package. We think that it is appropriate for a statement by the legislature, and in due course it may very well be that the *Gates* decision is rendered while that consideration is on.

I think that in the normal course one would expect the *Gates* decision will be within another month or so, so that I think we will have a time factor that overlaps.

Senator BIDEN. In the habeas corpus provisions, the phrase, "full and fair adjudication" is not defined in the bill. Proponents of the bill have indicated the phrase is meant to be interpretted in terms of reasonableness.

How do you think the phrase should be defined, and do you think it should be defined in the statute itself?

Mr. GIULIANI. Well, cases have defined it already to the extent that courts deal with determining whether there has been a complete hearing in the State proceeding. It is intended, the purpose of it is intended to not relitigate in the Federal court something that has been fully and effectively dealt with in the State courts.

I would have no objection to a definition. I do not really believe one is necessary, and it is something that is going to have to be worked out by courts in interpreting the statute afterward. But I certainly would have no objection to either our trying to develop a proposed further definition of that, or if the committee——

Senator BIDEN. What about the situation where a Federal judge found the State adjudication to be reasonable in a technical legal sense, yet believed that the State decision was substantively incorrect? What happens in a case like that?

Mr. GIULIANI. Where he believes that there has been a full and fair?

Senator BIDEN. Where he believes there has been a full adjudication, and that the adjudication was reasonable in a technical legal sense, but he believes that the State decision was in fact incorrect.

Mr. GIULIANI. I see. Senator, I think that would really depend on the kind of question that was involved. In one case, if it was a full hearing, but it was not in the view of this particular judge complete enough, or a perfect hearing, that should not be grounds for reopening a criminal proceeding, because this particular Federal judge would have preferred to have seen more witnesses or more evidence, although it was a fair and reasonable proceeding.

However, if he disagrees as to the conclusion that a constitutional right was violated, then that is something that he would have to consider, and he would grant, not so much another hearing, but whatever additional fact finding was necessary to come to a conclusion about it. It would really depend on the nature of the question that was involved.

In some cases I can see it leading to not reopening the State proceedings, and in others, it might be necessary to reopen it.

Senator BIDEN. In the interest of time, Mr. Chairman, I have several more questions on habeas corpus and the exclusionary rule, which I would like to submit in writing, if I could.

The CHAIRMAN. Without objection.

[The following was received for the record:]

Response of the Department of Justice to
Questions Proposed by Senator Biden
Concerning Title VI of S. 829
(Habeas Corpus Reform)

The questions proposed by Senator Biden on Title VI of S. 829 are in four parts. The first three parts are concerned respectively with the proposed standard of review in habeas corpus proceedings, the standard governing excuse of procedural defaults, and the proposed time limitation rules. The fourth part has no title, but appears to be concerned primarily with the work involved in handling habeas corpus cases.

I. REVIEW OF LEGAL CLAIMS OF STATE PRISONERS

Part I poses three questions relating to the proposed standard of review (the "full and fair" standard) in Title VI of S. 829. The first question is as follows:

> Won't federal courts still have to look into state court proceedings to determine if the claim was "fully and fairly adjudicated"? In other words, would not this bill merely change the standard of review without actually affecting the level of federal intervention?

Response: Assuming satisfaction of the other requirements for seeking habeas corpus set out in Title VI, examination of the state proceeding would be required to the extent necessary to determine compliance with the standard of "full and fair" adjudication of the petitioner's claims. In comparison with the current review standards, however, the inquiry would be easier, less intrusive and disparaging, and less likely to result in protracted proceedings or the invalidation of a state conviction.

In practical terms, the present rules produce results that border on the absurd, requiring reversal of judgments many years after the normal conclusion of state proceedings on grounds that the habeas court may regard as no more than reasonable differences of opinion concerning close or unsettled questions in the interpretation or application of federal law on which the federal courts themselves may well disagree. In addition to enhancing the finality of state criminal judgments and avoiding the burden on the state of re-trying the petitioner which may result when a writ is presently granted in such a case, the proposed reform is likely to make it possible to decide cases more easily and with less extensive litigation, whether or not the petitioner would ultimately obtain relief under the current rules. A good illustration was provided by the Chief Justice of Iowa in his testimony on the proposals:

> Explore with me for a moment the anatomy of a 1975 Iowa murder trial, State v. Moore. Moore, who assaulted and injured a jailer at a recess, in the course of trial badgered a witness, used vulgar language, and persisted in profane and disrespectful statements to the court. After calling another recess and subsequently warning him, trial court ultimately had Moore removed from the courtroom during twenty-five minutes of an expert's testimony. In a 1979 decision, the Iowa Supreme Court ruled Moore had waived his sixth amendment right to confront the adverse

> witness and upheld his conviction. Our opinion quoted the relevant portion of the transcript and applied as controlling the Supreme Court's standards laid down in Illinois v. Allen. In 1980 a federal trial judge, ruling on Moore's application for writ of habeas corpus, set out the same portion of the transcript, found Illinois v. Allen to be controlling, but issued the writ. In 1981, following the State's appeal, the Eighth Circuit, again quoting the then-familiar portion of the transcript and for the third time applying Illinois v. Allen standards, agreed with the Iowa Supreme Court and reversed the federal district court.
>
> Thus Moore was permitted to collaterally attack his conviction in two federal courts even though the identical issue was fairly and fully considered and decided in his state court direct appeal. This process injected over two years of uncertainty into his case after his state appeal was concluded, cost Iowa substantial resources to defend the judgment it had secured in one state court and retained in another, and risked tensions between state and federal courts in Iowa.
>
> No one suggests federal oversight of state decisions involving federal constitutional rights should be eliminated. Adoption of [the reform proposals], however, would avoid many unfortunate and wasteful proceedings. For example, proposed new subsection (d) to section 2254 of title 28 provides ... [for deference to full and fair state adjudications] .... Such a provision, promptly applied by the federal district judge in the Iowa case just discussed, would have terminated the Moore litigation in the federal courts. 1/

Further economies would result from the creation of a uniform standard applicable to both factual and non-factual issues. The current rules can require difficult, if not arbitrary, decisions as to whether a particular state court determination is purely one of fact or reflects an application of law to fact. This occurs because the rule governing re-adjudication of factual questions (deference allowed if a number of poorly defined conditions are met) differs from that governing re-adjudication of mixed questions of law and fact (re-adjudication uniformly mandated). Since the "full and fair" standard would apply the same criterion of "reasonableness" to review of both factual and non-factual determinations, such hairsplitting distinctions would no longer be required. 2/

1/ The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 232-34 (1982) [hereafter cited as "Hearing"].

2/ See 128 Cong. Rec. S11856 (daily ed. Sept. 21, 1982) (statement of Senator Thurmond concerning S. 2838) [hereafter cited as "Sponsor's Statement"].

Finally, it should be noted that the reform offers other types of benefits, in addition to the improvements that can be expected in litigational economy and finality of judgments. These include fostering state responsibility in the enforcement of federal rights and according more appropriate recognition to the dignity and independent stature of the state courts. Justice O'Connor has stated:

> If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions when a full and fair adjudication has been given in the state court. 3/

The second question in Part I is as follows:

> Is it not likely that there will have to be extensive litigation in individual cases as to what exactly is meant by a "full and fair" interpretation of Constitutional law? For example, would it be "fair" for a state court to base its decision on an unappealed district court case if several districts have decided a case differently?

Response: Experience with existing standards of review of a comparable nature indicates that no unusual amount of litigation will result. A state adjudication would normally be "full and fair" in the intended sense if the resulting factual and non-factual determinations were reasonable and were arrived at by a process consistent with due process. Examples of limited standards of review applicable to legal as well as factual determinations appear in other contexts in federal law. For example, a federal appellate court will not consider a claim of trial error to which no objection was made at trial unless it constitutes "plain error." This limiting standard of review extends to pure questions of law, such as the formulation of jury instructions. 4/

3/ O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 William & Mary L. Rev. 801, 814-815 (1981).

4/ See Sponsor's Statement, supra note 2, at S11856.

A second analogy is provided by the standard for judicial review of the constitutionality of state executive action in suits for damages under 42 U.S.C. § 1983. In such suits state executive officials are generally given a "good faith" defense or immunity, under which the official incurs no liability if he reasonably believed that his actions were lawful. Hence, the disposition depends not on whether the official was correct in his view of federal law in the reviewing court's estimation, but on whether the official's view of federal law and its implications under the circumstances was reasonable. 5/ While all standards of review occasionally give rise to interpretive litigation, experience does not show that limited standards of this sort are more troublesome than other types of standards.

The question also contains a more specific inquiry which asks, in substance, whether a state court interpretation of federal law would automatically be reasonable in the sense of the "full and fair" standard if it was consistent with the view of a single district judge. This question could seldom arise as a practical matter since (i) non-factual issues which arise in habeas corpus litigation are usually questions of application of law to fact rather than pure questions of law, and (ii) the positions of the state courts on unsettled questions of federal law usually fall within the range of options presented in the decisions of the federal courts of appeals. For the few cases in which this question might arise, the answer is obviously no. District judges vary greatly in ability and propensities, and will occasionally take positions that are simply unreasonable in light of Supreme Court precedent or constitutional history. Since there is nothing in the statement of the standard or in its underlying policies or legislative history to support a conclusive presumption of reasonableness for the views of district judges, unsupported by endorsement at the level of the federal courts of appeals, it is difficult to see how that question could become a subject of litigation.

The third question in Part I is:

> Proponents of the bill have stated the "full and fair" adjudication is to be measured by a standard of "reasonableness." Do you agree? Do you think a definition should be set forth in the statute itself?

Response: The intended interpretation of the "full and fair" standard has been maintained consistently in the legislative history of the proposals. The essential requirements are that the state determination be reasonable and that it be arrived at in a manner consistent with applicable federal procedural requirements, including due process. Appropriate allowances would also be made for re-adjudication in cases of subsequent discovery of new evidence and subsequent changes of law. 6/

We have stated that we would have no objection to codification of the intended interpretation in the bill. Suitable language for that purpose appears in the hearing record on S. 2216 of the 97th Congress. 7/

5/ See id.

6/ See Sponsor's Statement, supra note 2, at S11855-57; Hearing, supra note 1, at 33-34; id. at 93-98.

7/ See Hearing, supra note 1, at 33-34.

II. PROCEDURAL DEFAULTS

The questions in Part II relate to the proposed codification of the "cause and prejudice" standard. The first question is as follows:

> Is it necessary to codify the cause and prejudice rules established by the Supreme Court?

Response: "Necessity" is a matter of degree, but it is certainly desirable to do so. The Supreme Court has not provided answers to the most important questions concerning the meaning of "cause" in the five years since the standard was initially adopted. In particular, the circumstances in which attorney error constitutes "cause" to excuse a procedural default remain uncertain. This has resulted in a large volume of litigation in the lower courts, an abundance of obscure and conflicting interpretations, and inconsistent treatment of similar cases. If a clear, general standard can be achieved through legislation the benefits of doing so are apparent.

The second question in Part II is as follows:

> Last year the Supreme Court emphasized the need for flexibility in determining "cause" and "prejudice". In the case of Engle v. Isaac the Court stated: "The terms 'cause' and 'actual prejudice' are not rigid concepts. They take their meaning from principles of comity and finality discussed above. In appropriate circumstances they must yield to the imperative of a fundamentally unjust incarceration [citation]." Won't codification of the Supreme Court's rules remove the judicial flexibility necessary to consider individual cases?

Response: The rules proposed in Title VI are in no way rigid or inflexible. They have been carefully designed so as to strike an appropriate balance between the need for flexibility and the need for consistency and reasonably definite standards.

The question may reflect a misunderstanding of the Supreme Court's views on this issue which has been earnestly promoted in the testimony of the American Civil Liberties Union on the reform proposals. 8/ The tenor of this misunderstanding is that the Court believes that no definite rules governing the "cause and prejudice" inquiry can be stated and that the ultimate decision concerning the excuse of a default must be left to individual judges' subjective sense as to what is just in particular cases.

8/ See Statement of the American Civil Liberties Union on S. 829 Before the Senate Comm. on the Judiciary, at 24-25 (May 18, 1983).

This is clearly not the view of the Supreme Court. In Engle v. Isaac, 9/ for example, the Court laid down two categorical rules partially defining the "cause" inquiry: (i) the perceived futility of raising a claim in state proceedings, because the state has consistently followed a contrary rule, is not "cause" to excuse a procedural default, and (ii) the fact that the support for a claim rests in part on decisions rendered after a default is not "cause" unless at the time of the default the defendants "lacked the tools to construct their constitutional claim." 10/ There is, in fact, nothing in the passage quoted in the question which conflicts with the establishment of such rules. The quoted passage only states that the "cause and prejudice" standard does not bar raising in habeas corpus proceedings every claim defaulted on in state proceedings, but allows claims to be raised in appropriate circumstances, notwithstanding a default, in order to avoid injustice. The codification proposed in Title VI is fully consistent with this point.

The third and final question concerning the "cause and prejudice" standard is as follows:

> Should the "cause" and "prejudice" provision be amended to include a "safety valve" provision such as an exception for cases in which strict application of the statute would result in manifest injustice?

Response: This has already been partially answered in the response to the preceding question. Qualifying the cause and prejudice standard with such an exception would produce an authorization for excusing procedural defaults broader than that of current law. It would, for example, enable district judges to override the rule established by the Supreme Court in Engle v. Isaac that the alleged futility of raising a claim is not "cause" in cases in which they believed that complying with the rule would result in manifest injustice. 11/

It is also dubious that a standard so qualified would have much meaning or effect. This point is discussed below in connection with the corresponding question on the time limitation proposal.

III. STATUTE OF LIMITATIONS

The opening statement of Part III notes that the reform proposals would create a general one year limitation period for habeas corpus and a corresponding two-year period for federal prisoners' collateral attacks. It goes on to state that claims are now dismissed "only when the prosecution can show it has been prejudiced by delay."

9/ 456 U.S. 107 (1982).

10/ See id. at 130-34.

11/ The rule stated in Engle v. Isaac would, of course, apply under the formulation of Title VI, which does not include the supposed futility of raising a claim among the grounds for a finding of "cause."

These statements are misleading. Rule 9(a) of the habeas corpus procedural rules 12/ states that a petition may be dismissed if the state has been prejudiced in its ability to respond, unless the petition is based on grounds which could not reasonably have been discovered prior to the prejudicial occurrences. As the language of the Rule suggests, dismissal under the Rule is a matter of discretion, and a judge may entertain a petition notwithstanding the existence of prejudice to the state when he feels it is "in the interest of justice" to do so. 13/ For this reason and others, Rule 9(a) has not been a meaningful check on belated petitions. 14/

It may also be noted that no other limitation on the review or re-opening of criminal judgments in the federal courts depends on a showing that the state has been prejudiced by a defendant's delay. The rules proposed in Title VI are, in fact, quite generous in comparison with other federal limitation rules. The proposed habeas corpus limitation would be a one year period, normally running from exhaustion of state remedies. The starting point of the limitation period would be deferred in appropriate cases, including cases in which the right asserted was initially recognized at a later point by the Supreme Court and cases in which the factual basis of the claim could not reasonably be discovered till a later point. The corresponding two year time limit for federal prisoners, normally running from finality of judgment, would be subject to the same exceptions.

By contrast, under existing rules state prisoners seekin direct review in the Supreme Court must apply within 90 days, subject to a possible 60 day extension, with no extensions or exceptions allowed beyond that. 15/ As a second illustration, federal prisoners alleging discovery of proof of their innocence after trial must move for a new trial within two years of finality of judgment. No extensions or exceptions are recognized to that period. 16/

12/ See 28 U.S.C. foll. § 2254.

A substantially identical rule 9(a) appears in the procedural rules governing collateral attacks by federal prisoners. See 28 U.S.C. foll. § 2255.

13/ See Advisory Committee Note to Rule 9(a), 28 U.S.C. foll. § 2254.

14/ See, e.g., Spalding v. Aiken, No. 82-665 (Supreme Court April 18, 1983) (district judge attempting to dismiss petition under Rule 9(a) twice reversed on appeal, where triple-murderer filed petition fourteen years after conviction asserting claims previously raised and rejected in state appeal).

15/ See Sup. Ct. R. 11, 22.

16/ See Fed. R. Crim. P. 33.

Following the introductory remarks, Part II poses four specific questions. The first is as follows:

> In your opinion how much abuse occurs in current law? How many prisoners purposely delay the presentation of their claims in the hope that the passage of time will undermine the prosecution's ability to dispute their claims in court?

Response: In capital cases, deliberate delay in filing is the normal practice. This practice, together with repetitive filing, has effectively nullified the capital punishment legislation of the states. 17/

With respect to non-capital cases, the question appears to confuse the question of abuse with the question of deliberate delay. If, for example, a single prisoner files dozens of petitions, that constitutes abuse on any reasonable understanding of the term, whether or not the prisoner was consciously aware of potential claims at an earlier point but for some reason withheld them until later filings. 18/ Needless to say, the imposition of other time limits in criminal procedure 19/ does not depend on the assumption that defendants deliberately delay the assertion of potential claims. The propriety and desirability of a time limit for collateral remedies is dependent to no greater degree on such an assumption.

The second question in Part III is as follows:

> What percentage of petitions filed by prisoners in your state occur within that time period (and therefore would not be affected by the bill?)

Response: This question is apparently addressed to state officials and is not apposite to the Department of Justice.

The third question in Part III is:

> Will the time limitations give prisoners an adequate opportunity to research and present their habeas petitions?

17/ See Statement of Justice Lewis F. Powell Before the Eleventh Circuit Conference in Savannah, Georgia, May 8-10, 1983, at 9-14; Attorney General William French Smith, "Proposals for Habeas Corpus Reform" in P. McGuigan & R. Rader, eds., Criminal Justice Reform, at 145-46 (Free Congress Research and Education Foundation 1983).

18/ See Statement of Justice Lewis F. Powell Before the A.B.A. Division of Judicial Administration, San Francisco, California, Aug. 9, 1982, at 9 n.10 (footnote)(30 petitions by single prisoner).

19/ See text accompanying notes 15-16 supra.

Response: The proposed time limitation rules allow ample time for the preparation and presentation of claims. The usual starting point for the limitation period for habeas corpus petitions would be exhaustion of state remedies. Exhaustion is normally accomplished by presenting a claim initially to a state trial court, and from there taking it up on review to the highest court of the state. When a prisoner has already presented his claims in state proceedings at the trial and appellate level, it is very reasonable to require that he re-present the same claims to a federal habeas court within a year thereafter.

The proposed period of two years from finality for federal prisoners is also fully adequate. As noted earlier, the basic period is the same as that for new-trial motions based on newly discovered evidence under Criminal Procedure Rule 33. The proposed limitation rule for federal prisoners' collateral attacks is, moreover, subject to a number of exceptions favorable to the prisoner which do not appear in the Rule 33 remedy. 20/

The final question in Part III is:

> Should the statute of limitations include a "safety valve" provision, such as an exception for cases in which strict application of the statute would result in "manifest injustice"?

Response: An amendment of this sort is inconsistent with the purpose of the reform and would undermine its effect. It bears emphasizing once again that the proposed limitation rules are already more forgiving of delay than comparable time limits in other areas of criminal procedure; other, stricter time limits are subject to no "manifest injustice" exception. 21/

The basic problem of the current system is the absence of any rule that provides meaningful assurance of an end to litigation. A standardless "manifest injustice" exception, leaving the applicability of the time limitation to the subjective sense of individual judges, would suffer from the same shortcoming as the essentially standardless "laches" doctrine of Habeas Corpus Rule 9(a). 22/

Specific problems that would arise can readily be imagined. One may ask, for example, whether conviction of a defendant whose counsel is incompetent constitutes a "manifest injustice." If a petitioner's contention that his counsel was incompetent were sufficient to put the habeas court to inquiry and to require response by the state, then a limitation rule would have little meaning. Claims of incompetent counsel are already the most common type of allegation in habeas corpus petitions, 23/ and other kinds of claims can be effectively recast as counsel incompetence claims by alleging that counsel's failure to raise them made his assistance constitutionally ineffective.

The example of incompetence-of-counsel claims is merely illustrative; similar questions would arise with respect to many other types of claims. For example, it would presumably be argued that the "manifest injustice" exception is brought into play by

---

20/ See text accompanying note 16 supra.

21/ See text accompanying notes 15-16 supra.

22/ See text accompanying notes 12-14 supra.

23/ See P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 4(a), 12 (Federal Justice Research Program 1979).

such allegations in a petition as denial of counsel, coerced confession, knowing prosecutorial use of false evidence, prosecutorial withholding of exculpatory evidence, judge and jury bias, violation of plea bargains, and insufficiency of the evidence to support a conviction. To an unpredictable extent individual judges would agree and entertain petitions notwithstanding the expiration of the time limitation period.

IV. THE WORKLOAD PROBLEM

Part IV poses the following question:

> According to the Administrative Office of the U.S. Courts, nearly 97% of all state habeas petitions are dismissed pretrial. Doesn't this suggest that the courts are successfully selecting and processing meritorious cases? Is it responsible or fair to limit all prisoners' access to the courts at the risk of the 3% or so who may be wrongly imprisoned?

Response: As the question notes, the proportion of habeas corpus cases in which evidentiary hearings ("trials") are held is small. This is because the habeas corpus jurisdiction of the district courts is quasi-appellate in character, usually involving a decision on the state record together with written submissions by the state attorney general's office. Hence, concluding that no undue burden results from habeas corpus cases because evidentiary hearings are uncommon is much like concluding that the federal courts of appeals do no work because the number of trials they conduct is zero. The low incidence of evidentiary hearings says nothing about whether the courts are "successfully selecting and processing meritorious cases." Rather, it reflects the fact that the state record is adequate for purposes of the review in most instances. 24/

The inference suggested in the question that 3% of prisoners are "wrongly imprisoned" because evidentiary hearings are held in about 3% of habeas corpus cases is a complete non sequitur. The occurrence of an evidentiary hearing has no particular relationship to the validity or invalidity of the petitioner's claims or to the likelihood that he has been wrongly imprisoned.

The work involved in processing habeas corpus cases is, for the most part, the type of work characteristic of appellate proceedings. In connection with a typical petition, the state is required to transmit records and to respond to the legal and factual contentions raised by the petitioner. The district judge must review the record to the extent necessary and re-determine every claim that is properly presented, working from the evidentiary basis set out in the record together with the submissions and arguments of the parties. Frequently the district court's decision is appealed, resulting in additional work for judges, state officials and defense counsel at the level of the federal courts of appeals. Since a prisoner is required to exhaust state remedies before seeking federal habeas corpus, the lure of an additional level of review in the federal courts results in increased recourse to state remedies. 25/ The easy availability of federal habeas corpus accordingly increases the workload of the state courts as well as the federal courts.

24/ For criteria affecting the holding of evidentiary hearings under current law, see 28 U.S.C. § 2254(d); Townsend v. Sain, 372 U.S. 293, 312-18 (1963).

25/ The workload question is discussed in greater detail in Hearing, supra note 1, at 42-44.

Responses to Senator Biden's Questions regarding Exclusionary Rule Reform:

Question No. 1. "What is your view if proposals to allow a civil damage action against the United States if the Exclusionary Rule is limited?

- Are not juries unlikely to rule against a guilty defendant even if his Fourth Amendment rights were clearly violated?

- If this Committee were to authorize civil damage suits against the government for violations of Fourth Amendment rights, shouldn't we also allow the award of attorneys fees? Should punitive damages be authorized in addition to actual damages to deter future constitutional violations?"

Answers: The administration opposes jury trials in civil actions against the United States. Juries may indeed be tempted to find against a criminal defendant because of the type of person he is rather than follow the law as provided by the Court through instructions. In a similar vein, juries may be expected to be inclined to emotionally skew a decision in favor of a single party plaintiff against a deep pocket defendant such as the United States. In the thirty-five years since the United States waived its sovereign immunity with enactment of the Federal Tort Claims Act, jury trials have not been authorized against the United States. There has been no showing that bench trials work to the detriment of either party under the Federal Tort Claims Act. The primary reason for providing bench or non-jury trials is the belief that the government will be unfairly exposed to disproportionately high damage awards and may unfairly be the subject of bias in liability findings. To put it another way, it is not difficult to imagine a juror thinking to himself, "What is a million dollars to the United States?" On the other side of the coin, it is not difficult to imagine a juror finding against the claim of a political activist

plaintiff or a convicted criminal plaintiff despite the fact that that person was the victim of a constitutional infraction. In either case, the consequences would be unjust and unfortunate. In addition, there would be increased delays as a result of jury proceedings and increased expense for all parties including plaintiffs. For all of these reasons we think it would be unwise to single out constitutional torts for jury trials under the Federal Tort Claims Act.

We oppose any provision which would award additional attorneys fees to prevailing plaintiffs against the government in a tort case. First, it is not necessary given the current scheme of the Federal Tort Claims Act which provides that up to 25% of any judgment may be paid to the plaintiff's attorney. This is the manner in which reimbursement of attorneys has been handled under the law of tort in the United States for over 200 years. We fail to see why a plaintiff who happens to be suing the government should be treated any differently from any other tort plaintiff. It is certain that the availability of attorneys fees would invite artful pleading by plaintiff's counsel and increased litigation over the propriety of the pleadings as well as the amount of any fees. Providing fees in constitutional tort cases would also serve as a strong incentive for the courts to find constitutional implications in what would otherwise be properly classified as common law torts. Finally, awarding attorneys fees to plaintiffs would suffer from a lack of even-handedness. Experience has shown that a large proportion of constitutional tort cases are frivolous and malicious. The possibility of an award of attorneys fees will encourage such actions particularly if the United States cannot seek such an award when it prevails. Accordingly, we would oppose any new attorneys fees provision under the Federal Tort Claims Act.

Punitive damages should not be authorized against the United States. The primary object of tort law is to attempt to compensate victims for losses they have suffered. By permitting punitive damages to be awarded against the United States plaintiffs who have suffered little or no compensable injury could receive a windfall out of all proportion to their injury. This would seem to be illogical and unfair to the taxpayers. In addition, we note that the concept of punitive damages is one of punishment as opposed to compensation. Legal authorities are overwhelmingly of the view that such punishment is inappropriate against a governmental entity or institution because the punishment is borne by the innocent citizens who comprise the body politic. Moreover, in order to adequately punish the federal government, the damage award would have to be huge and grossly disproportionate to any injuries suffered. In a fairly recent case the Supreme Court rejected the concept of punitive damages against a municiple government. Fact Concerts Inc. v. The City of Newport, 453 U.S. 247 (1981). We think this decision to be correct and that an opposite policy would be extremely unwise and unprecedented.

THE EXCLUSIONARY RULE

2. It has been argued that deterrence of police misconduct is an important function of the exclusionary rule.

Q. Doesn't a "reasonable good faith" exception as proposed by the administration reward ignorance of the Constitution?

A. A reasonable good faith rule requires more than an assessment of the subjective state of mind of the officer who conducted the search. Such a rule would also require a showing that the officer's good faith belief in the lawfulness of the search is grounded in objective reasonableness. The reasonable good faith exception to the exclusionary rule was adopted by the Fifth Circuit en banc in United States v. Williams, 622 F.2d 830 (5th Cir. 1980). The Williams opinion was based as an exhaustive analysis of all relevant Supreme Court cases and noted explicitly that "the belief [in the lawfulness of the search] in addition to being held in subjective good faith, must be grounded in an objective reasonableness. It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully." 622 F. 2d 830, 841 fn. 4a. This objective standard by which the reasonableness of the officer's belief would be tested would ensure that ignorance of the constitution and the relevant cases construing the Fourth Amendment would in no way be rewarded under the exception to the exclusionary rule which the Department supports. As stated by Justice White in his concuring opinion in Illinois v. Gates, ___ U.S. ___, No. 81-430, June 8, 1983, slip op. p. 16, fn. 15: "Grounding the modification [of the exclusionary rule on reasonable good faith] ... retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment."

Q. What disciplinary procedures if any, exist to respond to official misconduct in violation of the Fourth Amendment. How often have they been employed?

A. DOJ order 1752.1A, dated April 27, 1981 and presently in effect lists several "offenses" by Department of Justice employees that could result in disciplinary action. We would be happy to make the entire order which describes the disciplinary process available to the Committee at its request. Three "offenses" listed in the order are concerned with improper searches and seizures. A page from DOJ order 1752.1A summarizing these "offenses" and setting forth possible punishments is attached for your information. Since the DOJ order went into effect, no employees have been punished for an improper search or seizure.

DOJ order 1752.1A applies to all components of the Department of Justice except the FBI because traditionally the FBI has been permitted to promulgate and employ its own disciplinary rules and regulations. However, the FBI considers that negligent, reckless, or intentional violations of constitutional rights are actionable offenses under its own Schedule of Disciplinary Offenses and Penalties. An illegal search would be covered by a category in the schedule proscribing criminal, dishonest, immoral, infamous, or notoriously disgraceful conduct. The punishment may extend to removal in an appropriate case, even for a first offense.

Q. What civil tort remedies now exist for victims of illegal searches? How often are they used and what is the result?

A. From the adoption of the Fourth Amendment in 1791 until the Supreme Court's decision in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), a person whose rights had been violated by a federal officer conducting a search without a warrant, without probable cause, or in an otherwise improper manner could not recover compensation in federal court from either the government or the officer. The government was shielded by sovereign immunity and the absence of an act of Congress providing a cause of action was thought to

shield the officer from personal liability. However, in Bivens the Supreme court held that federal courts could award the victim of an illegal search damages recoverable from the officer notwithstanding the absence of a Congressional act creating such a cause of action.

Since 1971, there have been an estimated 10,000 Bivens suits, which are also known as constitutional tort actions since their primary characteristic is an allegation of a personal cause of action for a tort arising directly out of a provision of the Constitution such as the Fourth Amendment. The lower federal courts have extended the Bivens tort action to claims arising out of virtually the entire bill of rights and records are not maintained by the Department on the number of Bivens suits that allege Fourth Amendment violations. Fewer than 20 Bivens cases have resulted in judgements against the federal officer defendants and in over half of these the officers have successfully appealed or prevailed on post-trial motions, so in only a very few cases has an officer had to pay damages. Approximately 2400 Bivens cases are presently pending.

Q. In your opinion, how much is "reasonable good faith" likely to differ between individual police officers and between different areas of the country?

A. Initially, it should be noted that the reasonable good faith exception to the exclusionary rule would apply only in federal courts under the Department's proposed legislation. Normally, federal officers such as FBI or DEA agents conduct searches for evidence presented in federal court. We would expect the "reasonable" portion of the reasonable good faith exception -- the portion which is concerned with the officer's knowledge of the law of search and seizure -- to be uniform for all full time federal officers throughout the United States.

To the extent that state and local officers conduct searches, the fruits of which occasionally are offered as evidence in federal courts, we would expect only very minor differences in what constitutes reasonable knowledge of Fourth

Amendment law. We would expect all such officers to be knowledgeable of the so-called "bright line" rules laid down in this area from time to time by the Supreme Court.

3. Critics of the current exclusionary rule argue that it allows many criminals to escape conviction. While I know of no one who wants to see the guilty go unpunished, the impact of the exclusionary rule has been examined in two studies:

In 1978 the GAO surveyed 3,000 cases in 38 U.S. Attorneys offices and found only four-tenths of one percent of declined cases were due to Fourth Amendment search and seizure problems. The report concluded "resources expended were modest when compared with total resources used in the criminal justice system."

The National Institute of Justice recently found 4.8 percent of the cases it studied in California to be rejected on search and seizure grounds from 1976 through 1979.

Q. Have there been any other studies of the impact of the exclusionary rule in obtaining convictions?

Q. Have there been any studies of the impact of the exclusionary rule on police conduct?

Q. Has there been any analysis of the quality of police training since the Supreme Court implemented the exclusionary rule?

Q. Utah, Colorado, and Arizona recently enacted good faith statutes. Has there been a study of the effect of those laws?

Q. Can't these studies be interpreted as evidence that the exclusionary rule works?

Q. Shouldn't Congress have answers to such questions before we Act?

Q. Should we change a protection of a valuable Constitutional right without further information?

A. Since all of the above questions deal with whether studies have been done that would support or refute the wisdom of a reasonable good faith exception to the exclusionary rule, we

will attempt to answer them en bloc. Initially, we do not make any claim that modification of the exclusionary rule will, by itself, reduce the rate of crime. On the other hand, as we have pointed out in testimony before the Committee over the past two years, the rule operates to free known murderers, robbers and drug traffickers and such a rule of evidence that leads to those results without a reasonable purpose to support it is intolerable. As the Committee is aware, the ostensible purpose of the rule is almost always stated by the courts to be deterrence of unlawful police conduct.

The literature on the exclusionary rule has been voluminous. (Indeed, a member of the Committee, Senator Mathias, has been among those contributing to this body of articles. See "The Exclusionary Rule Revisited," 28 Loyola Law Review 1 (1982) in which the author questions the constitutionality of a reasonable good faith exception to the rule. As the Committee is aware, we are confident our proposal would pass constitutional muster.) In our view, this extensive collection of material has failed to support an argument that the rule accomplishes its alleged rationale of deterrence. As the Supreme Court has stated following a review of the literature that existed at the time: "No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has any deterrent effect even in the situations in which it is now applied. United States v. Janis, 428 U.S. 433, 450 fn. 22 (1976).

As for studies of the exclusionary rule to assess its impact on the conviction rate and on police conduct and training, the summary preface to the NIJ study describes the 1978 GAO study as "the only systematic look at the effects of the exclusionary rule which has been conducted in the past ten years." We would also take issue with the implicit conclusions of the GAO report that since less than half of one percent of the cases declined were due to the exclusionary rule it is not a significant criminal

justice issue. First, the GAO report is analytically flawed because it only considered cases formally entered into the records of the participating U.S. Attorney's Office and did not take into account the cases informally discussed by Assistant U.S. Attorneys and law enforcement officers and declined without a written entry into the system of records. Second, as the Committee is aware, the rule is a necessary consideration of every police arrest and of every seizure of physical evidence, and is the overwhelming component of drug case litigation. Moreover, litigation of exclusionary rule issues contributes to the appellate court overload. Thus, the argument of supporters of the rule that it is of no real moment is, in our view, totally disingenuous. Furthermore, any studies that would indicate that the rule has resulted in an improvement in police conduct and training would hardly be unexpected. We would emphasize, however, that the same high standards of police conduct would be required under our proposal as are presently mandated. As explained in answer to the previous question, police conduct must be informed to be reasonable. Finally, we are unaware of the existence of studies focusing on the recent experiences in Utah, Colorado and Arizona, but would be pleased to consider any brought to our attention.

4. The Administration's proposal does not elaborate on the test to be employed in determining whether a warrantless search was conducted in good faith.

How will the court determine a good faith exception in warrantless searches? Isn't there a risk of chaos in the Courts as the various district and circuit courts try to reach their own interpretations?

A. We doubt that there will be significant differences in the federal courts in determining what constitutes a reasonable good faith violation of the Fourth Amendment. There has already developed a body of law covering what constitutes such a

violation in connection with Bivens, or constitutional tort, suits discussed in connection with question two. After the Supreme Court found that the plaintiff in Bivens had a direct cause of action under the Constitution against the federal officers who had arrested him and searched his apartment, it remanded the case to the court of appeals for a determination of whether the officers were entitled to any sort of immunity due to their status. The court of appeals held that they were entitled to qualified immunity. Specifically, the court held that it was a valid defense to an alleged constitutional tort for the federal officers to prove that they "acted in the matter complained of in good faith and with a reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted." Bivens v. Six Unknown, Named Agents of the Federal Bureau of Narcotics, 456 F. 2d 1339, 1341. Establishing such reasonable good faith is the way in which most Bivens suits which reach trial are defended. Thus, the development of a reasonable good faith exception to the exclusionary rule would parallel and draw upon this existing body of law.

APPENDIX 1. STANDARD SCHEDULE OF DISCIPLINARY OFFENSES AND PENALTIES FOR EMPLOYEES OF THE U. S. DEPARTMENT OF JUSTICE.

NATURE OF OFFENSE	EXPLANATION	DISCIPLINE			REKONING PERIOD	REMARKS
		First Offense	Second Offense	Third Offense		
26. Intentional violations of rules governing searches and seizures.	Example: False statements in obtaining warrants, disregard of warrant requirements.	Official reprimand to removal.	15-day suspension to removal.	Removal.	2 yrs.	
27. Reckless disregard of rules governing searches and seizures.	Example: Gross errors in obtaining warrants when standard procedure is to check further and there is time to check further.	Official reprimand to removal.	15-day suspension to removal.	Removal.	1 yr.	
28. Negligent violations of rules governing searches and seizures.	Example: Executing warrant at wrong address, failing to check names of suspects.	Official reprimand to 1-day suspension.	Official reprimand to 5-day suspension.	Official reprimand to removal.	1 yr.	

Senator BIDEN. I assume Senator Specter will pursue the question on speedy trial, and whether or not the administration would object to shortening pretrial detention from 90 to 60 days. The bail provision in S. 829 is substantially what this committee reported last Congress. I will let Senator Specter address the speedy trial issue.

Let me talk about the drug strategy for just a minute. It is conspicuous by its absence in this bill. And let me just say, straight out, that maybe as a consequence of your leaving, things seem not to be moving as smoothly as the administration has predicted they would.

I read yesterday a newspaper article in the Times which reported that the president of the antidrug task force is falling behind in organization. Officials said delays are also caused by difference of opinion about the allocation of resources in the chain of command among participating agencies.

Also, Customs is still apparently complaining about DEA, to the point where the highest levels of these agencies are having some real clashes. I understand there is even a disagreement within the Justice Department as to who should be running the task force in the field.

You start out with a task force proposal to coordinate research and policy. You say you have complete control over the budgets of the participating agencies, to really make the task force successful. Yet then 3 years later, in the fiscal year 1984 budget proposal, the administration gives back to Treasury budget authority over their participation in the task force. Now the administration has introduced task forces under the Vice President's Organized Crime Task Force.

My question is——

The CHAIRMAN. Your time is up.

Senator BIDEN. My time is up.

Well, let me ask one that is not for the record.

Who is in charge?

Mr. GIULIANI. Well, Senator, first of all, the report in the New York Times, at least the lead that you read, is entirely inaccurate. The task forces are completely on schedule, and it is somewhat frustrating, because from the very beginning, from the first moment that this program was announced, back in October, it was made very, very clear, by everyone, that it would take almost a full year to get the task forces fully operational, and for a very good reason. We were moving 1,000 to 1,500 agents into new work, and if you did that precipitously, if you just moved those 1,000 or 1,500 agents into that new work immediately, they would have to drop the other important things that they were doing, and law enforcement would suffer tremendously, so rather than immediately moving them over into the task forces as we announced in October, we were going to ramp up the task forces.

They began in January, and they are now about one-third to about one-half staffed, and they are entirely and completely on schedule.

The CHAIRMAN. Senator Specter.

Senator BIDEN. I would like to submit the rest for the record, if I may.

The CHAIRMAN. Without objection, that will be done.

Senator BIDEN. Good luck in your new job coordinating the task force.

Mr. GIULIANI. Thank you.

[The following was received for the record:]

Responses to Senator Biden's questions

regarding the death penalty

1. With respect to crimes under the federal criminal code that would be punishable by death under the Administration's Bill, has there been an increase in such crimes other than the general rise in the crime rate that specifically demonstrates the need for a death penalty statute since the Supreme Court's 1972 decision in Furman?

As the question suggests, there has been a striking increase in the crime rate in the United States over the past two decades. This trend extends to homicide, the primary offense to which a death penalty statute would, under certain circumstances, be applicable. For example, the estimated rate of murder and non-negligent manslaughter has nearly doubled since 1960:

Estimated number and rate of murder and non-negligent manslaughter in the United States known to police, 1960-1979:[1]

Year	Number of Offenses	Rate per 10,000 Inhabitants
1960	9,110	5.1
1961	8,740	4.8
1962	8,530	4.6
1963	8,640	4.6
1964	9,360	4.9
1965	9,960	5.1
1966	11,040	5.6
1967	12,240	6.2
1968	13,800	6.9
1969	14,760	7.3
1970	16,000	7.9
1971	17,780	8.6
1972	18,670	9.0
1973	19,640	9.4
1974	20,710	9.8
1975	20,510	9.6
1976	18,780	8.8
1977	19,120	8.8
1978	19,560	9.0
1979	21,460	9.7

[1] U.S. Department of Justice, Sourcebook of Criminal Justice Statistics 1981 293 (1982).

The number of defendants charged with homicide in federal court over roughly the same period indicates a similar trend:

Number of defendants charged with homicide in United States District Court, 1961-1981:[2/]

Year	Number of Defendants Charged
1961	51
1962	32
1963	44
1964	43
1965	53
1966	54
1967	53
1968	65
1969	57
1970	67
1971	93
1972	85
1973	104
1974	138
1975	138
1976	161
1977	153
1978	159
1979	150
1980	170
1981	168

While a cursory comparison of these two sets of statistics suggests that the increase in the number of federally punishable homicides is greater than the increase in the rate of homicide nationwide, absent a comprehensive analysis of truly comparable data, we would refrain from concluding that the increase in

2/ Administrative Office of United States Courts, Federal Offenders in the United States District Court, 1981, Table H-7 (Washington, D.C. 1982). It is our understanding that these statistics represent defendants charged with a homicide offense, per se, and thus would not include certain cases of felony-murder, e.g., a murder committed in the course of a federal bank robbery, where the offense charged is the underlying felony.

federally punishable homicides is significantly greater than the already alarming national increase. However, we do not believe that the propriety of a federal death penalty statute turns on proof of a disparate increase in the rate of homicides over which there is federal jurisdiction. Indeed, certain types of federal homicides, for example assassination of the President or a federal judge, would, we expect, occur with such infrequency that the incidence of their commission would bear little relationship to the national murder rate. The relative infrequency of the commission of such murders in which there is a unusually strong federal interest in prosecution, however, is no reason for barring application of an appropriately severe sanction when merited in a particular case.

2. What is the evidence that a federal death penalty statute would diminish the incidence of crimes? And what is your opinion of the conclusion that the availability of the death penalty actually illicit more violent crime by providing a public, dramatic spectical of official violent homicide on the part of the government?

Attempts to use methods of statistical analysis to measure the deterrent effect of capital punishment have reached differing conclusions and have been subject to attack with respect to methodology. The published debate generated by Professor Ehrlich's research on the deterrence question is illustrative:

Ehrlich, "The Deterrent Effect of Capital Punishment," 65 American Economic Review 397 (1975).

Passell, "The Deterrent Effect of the Death Penalty: A Statistical Test," 28 Stanford Law Review 61 (175).

Bowers and Pierce, "The Illusion of Deterrence in Issac Ehrlich's Research on Capital Punishment," 85 Yale Law Journal 187 (1975).

Ehrlich, "Deterrence: Evidence and Inference," 85 Yale Law Journal 209 (1975).

Peck, "The Deterrent Effect of Capital Punishment: Ehrlich and his Critics," 85 Yale Law Journal 359 (1976).

Ehrlich, "Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence," 85 Journal of Political Economy 741 (1977).

Some attempts to show a "brutalization" effect of capital punishment (i.e., an increase in violent crime occasioned by an execution) are summarized in Bowers and Pierce, "Deterrence or Brutalization: What is the Effect of Executions?" 26 Crime and Delinquency 453 (1980). The work cited in this article, however, is less than persuasive. For example, failure to show an increase in homicide immediately following an execution in one study is reconciled with contrary results in other studies by suggesting "delayed brutalization," and the authors themselves cite serious methodological flaws in certain of the studies, even though it is clear that they are strong proponents of the "brutalization" theory.

3. Granting that the likelihood of executing someone who is actually innocent of the crime is small, given the elaborate process of trial, appeals and post-conviction remedies, doesn't it remain true that none of our institutions are infalable and that the occasional execution of an innocent person is a logical certainty? There have been numerous news reports in recent years about convicted murders who turned out to be innocent and were then released. What has happened to the principle that "it is better that 10 guilty people go free than that one innocent person be punished"?

> In one example Freddie Pitts and Wilbert Lee were sentenced to death in Florida in 1963. their execution was delayed because the question of capital punishment was being heard in the U.S. Supreme Court.
>
> Meanwhile, another man confessed. The evidence pointed to his guilt. It still took years of legal battle, until 1975, before the governor's pardon came for Pitts and Lee.

> Twelve years and 48 days after the court had ordered them executed, Freddie Pitts and Wilbert Lee walked out of prison. Had the question of the death penalty not been before the courts--had their sentences been carried out on schedule--Pitts and Lee would have died innocent men.
>
> Yet just four months after Pitts and Lee were released, history repeated itself. Four innocent men had spent 18 months on death row in New Mexico, convicted of a gory mutilation slaying . The four were members of a motorcycle gang that had passed through town. They made an easy target for local authorities. Despite a weak case, the proseuctor had no trouble getting a conviction.
>
> The execution was delayed as the Supreme Court once again heard a death penalty case. While the four waited on death row, another man confessed. He even drew a map of the murder site.
>
> Death is a punishment absolute. Final. There are no more appeals. No reversals. It is an irrevocable punishment carried out by a criminal justice sytem that is far from perfect. And can never be perfect, as long as it is run by human beings. Because human beings make mistakes.
>
> What if these men had been executed? Would anyone have come forth with new evidence? Would anyone have spent years to prove their innocence? What difference would a confession have made? For how many innocent people has the truth come too late?
>
> Our criminal justice system is supposed to insure against such injustice.

Certainly, it is impossible to construct a criminal justice system which would absolutely assure no possibility of error. Nonetheless, even if some risk of error is inherent in our system, where the death penalty is at issue, we must reduce that risk of error as much as possible. This is the very reason that additional safeguards, not applicable in ordinary criminal cases, are included in our death penalty legislation to protect against arbitrariness and the influence of prejudice.

4. Every last country in western Europe as well as Canada and Mexico have abolished the death penalty, despite their problems of crime and their greater problems in some of those countries of terrorism and political assassination. United Natins bodies, Amnesty International, the Pope and other voices worthy of respect, have called for the abolition of capital punishment. We have about 1,200 people on death row now and are sentencing additionally some 250 people to death a year under state laws. Why do you think the federal government should add to that prospective blood bath, especially when the death penalty has never been proven to deter crime?

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. Moreover, the Administration's position is in accord with the views of the majority of the American public. Since the Furman decision, more than two-thirds of the State legislatures have enacted death penalty laws designed to meet the constitutional requirements articulated by the Supreme Court over the last decade, and national public opinion polls consistently show that a large majority of our citizens support death penalty laws.

5. Won't life in prison without the possibility of parole be just as effective as in accomplishing the goals of capital punishment--without risking the death of an innocent human being?

We believe life imprisonment without the possibility of parole would not, in certain cases, be as effective a punishment as the death penalty. First, there are some offenses which are so harmful and so reprehensible that not even life imprisonment would represent an adequately just and proportionate response to the defendant's crime. Second, with respect to certain crimes involving calculation and premeditation, the death penalty, as a more severe sanction, can be a more effective deterrent. Third, capital punishment assures that a brutal murderer cannot again

take the life of an innocent victim. Proponents of the life imprisonment alternative have asserted that it serves this "incapacitation" purpose of sentencing equally as well as imposition of the death penalty. While this may be true with respect to protecting members of the public at large, it affords no such protection to potential victims at the facility in which the prisoner is incarcerated, victims who would include both correctional officers and other inmates. Moreover, in the case of a prisoner already under a life sentence, were the death penalty unavailable, there would be no available sanction to punish or deter his commission of another murder while in prison.

6. In the 50 years between 1930-1980, according to justice department figures, there were 33 persons executed by federal authorities, fewer than 1 a year. Some of those offenders could no doubt have been tried as well as under state laws, others were executed under extremely controversial circumstantes(for example, the Rosenburgs in the 1950's), at least 10 of the 33 were executed under provisions that the U.S. Supreme Court has by now defined as constitutionally impermissible (for rape, armed robbery or kidnapping). If the Federal death penalty is going to be used so rarely, doesn't this suggest that it is not needed at all? And if it is going to be used at such a rate isn't it true that what ever deterrent effect some people think capital punishment might have would not come into play under federal statute?

6. Clearly, a federal death penalty statute would be applicable in far fewer cases than would State death penalty provisions. This is because the vast majority of first-degree murders, the offenses for which the death penalty would be most frequently applicable, occur in circumstances giving rise to State, rather than federal, jurisdiction. The infrequency with which a federal death penalty provision might be invoked (relative to the rate at which State death penalty provisions might be applied) is, however, no justification for precluding application of the sanction in appropriate federal cases. For example, cases involving paid assassination of a federal judge or wartime espionage are likely to be rare. Yet, under certain circum-

stances, these are the very sorts of offenses for which the death penalty might be appropriate. The fact that such cases arise infrequently is no more a justification for failing to provide the opportunity for imposition of a proportionate punishment than it would be for Congress to decline to provide federal jurisdiction over these offenses. Congress has provided for federal jurisdiction over these sorts of offenses because of the substantial federal interests implicated, and vindication of these interests requires tnat appropriate sanctions be available. The suggestion that a federal death penalty is not necessary because in particularly heinous cases we could decline prosecution in favor of a State prosecution where the death penalty would be available under the State's law, makes a mockery of the appropriate exercise of federal criminal jurisdiction and would require us to abdicate the law enforcement responsibilities conferred upon us by the Congress in the very sorts of cases where the reasons for federal prosecution might be most compelling. Moreover, the assumption that concurrent State jurisdiction will always exist is unfounded. There are numerous areas of exclusive federal jurisdiction in which the option of State prosecution will not be present.

Senator Biden's Questions on

Research and Statistics

Mr. Jensen, as I understand this proposal you would consolidate the Bureau of Justice Statistics, National Institute of Justice and the grant agency together under an Assistance Attorney General. This Assistant Attorney General would have final authority over grants, staff and policy for all these agencies.

I have a real concern that the independence and ability for the research and statistics programs to provide objective information on crime is threatened under this proposal. What is your opinion on that?

Can you assure this Committee that useful and reliable information will continue and will not be threatened by the transfer of funds from these important programs to increase the pool of funds in the grant program, should this new structure be implemented?

Let me clarify my position on the independence necessary for research and statistics. It is essential that we have a strong research and statistic component that is adequately funded and works in unison with the funding and grant making agency so we can begin to find out what works in fighting crime. Research and evaluation must maintain a degree of automony so as to be in a position to objectively tell us what our course of action should be. We must avoid spenting limited federal dollars on programs that don't work. The only way we will know this is if there is good objective data on the success or failure of these programs.

How much direct control over the operations of each of these programs will the Assistant Attorney General have?

Will he or she be experienced in the application of crime statistics and research to make decisions about the types of projects and studies to be funded by the Bureau of Justice Statistics and National Institute of Justice?

Responses to Senator Biden's questions regarding Research and Statistics:

While it is true that the Administration's proposal would consolidate the National Institute of Justice and the Bureau of Justice Statistics along with a new Bureau of Justice Programs under the general authority of the Assistant Attorney General, the day-to-day operations of these three Bureaus will be the sole responsibility of the individual Bureau directors. As you know, funds may not be transferred from research or statistics to another function without prior Congressional approval for the reprogramming. I do not envision the necessity for such a request inasmuch as it has never arisen during the history of agencies responsible for support of state and local criminal justice. The Administration has consistently supported the research and statistics functions.

JUSTICE ASSISTANCE QUESTIONS

1. Mr. Attorney General, the bipartisan crime bill that the President vetoed last January included a number of provisions one of which was a Justice Assistance program. I assume that was one provision you did not object to?

   The justice assistance portion of H.R.3963 was the product of last-minute efforts at compromise between the views of the Senate, House and the Administration during the final hours of the 97th Congress. Although well intentioned, the result was a seriously deficient product which only marginally reflected the streamlined program desired by all parties.

2. I understand that the Justice Assistance proposal in S.829 is different from the provision agreed to in the bipartisan crime package. Why is that?

   As noted above, H.R.3963 fell far short of the objectives identified during the Senate and House committee hearings on the justice assistance proposals. It failed to focus Federal financial assistance on violent and repeat offenders; it would have permitted Federal funds to be used to pay for state and local administrative costs; it would have continued the fragmented and uncoordinated organizational arrangement; and, it failed to include the requested improvements in the Public Safety Officers' Benefits program. S.829 is designed to rectify those shortcomings while, at the same time, incorporating the major characteristics of H.R.3963.

3. I understand Congressman Hughes' Justice Assistance bill is pending floor action this week in the House. That bill is very different from the bill you are proposing here. Can you explain to me the difference in bills?

   H.R.2175, as passed by the House, is very similar in most respects to S.829. Both provide for block and discretionary grant funding. Both seek to limit Federal funding to programs or projects with a demonstrated track record of success. Both seek to establish a program of emergency Federal assistance. The Administration proposal sharpens the focus of the Federal program on violent crime, repeat offenders, victim/witness assistance and crime prevention, and it also streamlines the organizational structure of the research, statistical and financial assistance programs.

4. When we went to conference with the House in December, I was concerned about protecting the independence of research and statistics and believe we drafted a bipartisan bill that was acceptable to both the House and Senate. Realizing that if and when this bill is passed in the Senate it will go to conference with Congressman Hughes' bill, I am curious why you just didn't go with the bipartisan language we all agreed to in December?

   Does the Justice Department have an objection to a substitute amendment that contains the bipartisan language?

   Because of the concerns noted in 1 and 2 above, the Administration redrafted the troublesome portions of H.R.3963 and submitted as Title VIII what we consider to be a significantly improved proposal. The Department would therefore strongly object to the substitution of language from H.R.3963 of the 97th Congress.

The CHAIRMAN. Senator Specter.

Senator SPECTER. I would like to commend the Department of Justice, and you gentlemen, for this package which you have put together. It is a very large effort, and I am hopeful that we can move it forward. I appreciate the fact that representatives from the Department came to visit with me about it. There are quite a number of parts of it, and I have a number of questions.

I am concerned that we move as much as we can as promptly as we can. If we can move the entire package, and come to a resolution of the entire package, it is not obviously going to be something that everybody in Congress will necessarily agree with, but I do commend the Department for pushing ahead with it, and trying to bring it to a rapid conclusion.

With respect to the bail provision, I think I know your position, but I would like to broach that subject, since I have gotten that assignment from Senator Biden. I have concerns about the provisions governing pretrial detention. It is a very complex matter, with strong arguments on both sides, involving the need for the protection of the community, as opposed to the issue of constitutional rights and the presumption of innocence.

I am concerned about a rule which permits pretrial detention for as long as 90 days. I am frankly concerned about a rule that permits detention as long as 60 days. It would be my hope that this procedure could be utilized within a timeframe of 60 days.

We had hearings in the Appropriations Subcommittee of the District of Columbia last week, and noted the very small number of applications made under that pretrial or preventative detention procedure—something like 50 in the course of the year.

My question is why could it not be structured so that in those few cases where defendants are held in custody, a severe change in our procedure, they could not be brought to trial in a more prompt period of time than 90 days?

Mr. GIULIANI. Senator, the difference between 60 and 90 days is, I think——

Senator SPECTER. Is 30 days.

Mr. GIULIANI. Is an important one, given the kinds of cases that generally would be the ones in which you would have pretrial detention in the Federal system.

Basically these are going to be drug cases. There will be some violent crime cases on a sporadic basis, but in large measure, situations in which pretrial detention is going to be used in the Federal system will be for the major defendants, in the largest drug cases, and it could be difficult to bring those cases to trial within 60 days, it is going to be difficult to do it within 90 days, although it will be done.

You are not talking about a one-defendant, two-defendant case. You are very often talking about a 13, 14 defendant case, in which the 2 or 3 leaders of the drug operation would be the ones who would be incarcerated pretrial if this bill becomes law, and very often the people do not speak English, therefore, you need interpreters.

The trial is a very major undertaking, it is not just a one or two defendant trial that could be tried quickly. So I could see some real dangers in having a hard and fast 60-day rule. Although, on the

other side of it, The Speedy Trial Act that we now have a number of years of experience with in the Federal system has not been a tremendous burden for the Federal prosecutors to comply with. It has been a much greater burden for defense lawyers, who more often than not are the reasons why, in fact, in 80 percent, and 90 percent of the situations where there is delay, it is at the request of the defense, not at the request of the Government.

So it is something that I would like to look into more carefully, and normally I would agree with you. I think a case where we are dealing with the kinds of crimes, for example, that you would basically be dealing with in the District of Columbia, or in a local jurisdiction, I would agree completely with you, that a 60-day limitation would be the more appropriate one.

But the fear that I have is that what we would basically be dealing with here are complex cases, and that difference of 30 days could be a significant one, but I think it is something we should look into more carefully, and I certainly agree with your concerns.

Senator SPECTER. Well, we will see what will happen with the legislative result, and it may be that the 90-day rule prevails. If that is so, I would hope that the Justice Department would take a close look at the timing of those cases and, to the extent possible, bring all those defendants to trial at the earliest possible date, perhaps even in advance of 60 days.

But let us judge from the experience, if we can get it through to see where we are heading, and in addressing this concern, to the perspective U.S. attorney for the very important southern district of Manhattan, it is a sounding which could be of some utility in a very critical area.

I have expressed this view to the U.S. attorneys in Pennsylvania and, wherever I have a chance, I will continue to do so.

When we talked about the package a few days ago, Mr. Giuliani, we discussed the issue of juvenile coverage, and I have raised a number of points with you and Mr. McConnell, that we wanted to explore.

The chairman has asked me to preside over the hearings on May 19, and I have sent a letter to Attorney General Smith, asking that the specifics be prepared. I will utilize that time, rather than take time now, from this full committee hearing.

But I wanted to call that to your attention so that you might make a special effort to see that we are in a position to explore those issues on May 19.

Mr. GIULIANI. I will, Senator.

Senator SPECTER. Mr. Jensen, first, I compliment you on your designation for the Associate Attorney General's position.

One of the subjects we talked about the other day concerns the seizure issue, and I have since gotten hold of the opinion of the fifth circuit and noted that it was a 1980 decision, I would be interested to know if the Department of Justice has made an effort in any other judicial forum, to have the good-faith rule carried forward as a matter of judge-made case law?

Mr. JENSEN. Yes, as a matter of fact, in the *Illinois* v. *Gates* case, that Senator Biden alluded to, the Justice Department filed an amicus curiae brief which fully supported the statement of the rea-

sonable good-faith test. So that argument was specifically made, it was presented to the Court by the Solicitor General.

Senator SPECTER. In which Court was that?

Mr. JENSEN. That was *Illinois* v. *Gates.*

Senator SPECTER. That was the Supreme Court?

Mr. JENSEN. Yes.

Senator SPECTER. I am familiar with that, and we talked about it. They may rule on this issue, or they may decide on other grounds.

Mr. JENSEN. Yes, it is pending now.

Senator SPECTER. But has the issue been raised in any other circuit? Where does *Illinois* v. *Gates* come from, the Illinois appellate courts?

Mr. JENSEN. Yes, but it was a specific case, it was a case that was filed in the Illinois courts, and came up to the Court through certiorari.

Senator SPECTER. But has the Justice Department endeavored to have the good-faith rule adopted by any other circuit court, or U.S. district court?

Mr. JENSEN. We have raised that issue on several occasions, in other circuits. It has not had another definitive ruling as was made in *U.S.* v. *Williams.*

In many of these instances, there could be different kinds of bases for the rulings, but there has been no other definitive ruling by a circuit court on good faith.

Senator SPECTER. There is one other subject that I want to touch upon very briefly.

Yesterday, I proposed an amendment to the budget resolution that yesterday would direct some Federal funding toward construction of prisons, to be used for convicts sentenced under the State habitual offender laws, or other State-enhanced statutes.

This is a bill that I introduced in the 97th Congress, S. 1989, and a bill which has been reintroduced in the 98th Congress, as Senate bill 58.

In the current budget resolution there is an allocation of some $400 million, 750 classification funds, in excess of what the Justice Department has asked for.

In the event that the Senate does not deem it wise to add $100 million, which I am asking for in this resolution, to be supplemented in 2 outyears, would you consider it an appropriate use of funds to direct some of the funding toward that objective? Before you answer, I would like to say just a word or two about the proposition.

The Attorney General's Task Force has recommended $500 million a year in assistance for overcrowding in State prisons. There were, as I think you know, appalling statistics disclosed last year about the overcrowded condition of the prison system in this Nation, with some 42,000 additional inmates in custody, just during the course of the past year.

I frankly have a sense that the national decrease in the crime rate may be attributed to the increased incarceration. I would be interested in your views on that.

Mr. GIULIANI. Senator, I certainly would need more time to discuss it, and look at it, but there is no doubt that the first priority in readjusting the criminal justice system has to be corrections.

I think it is something that we would be very interested in looking at. I cannot give you a definitive answer, but if there is this additional money, and there is a way in which we can use it to assist in dealing with the overcrowding situation of prisons, as we are trying to do with the Federal surplus property amendment that is in this package——

Senator SPECTER. This committee has held extensive hearings on the issue of career criminals. The feeling is that there may be around 200,000 career criminals in this country—men, women who have committed two, three or more burglaries or robberies, or rapes. If we were to provide prison space for them, at about $50,000 a cell, that would cost $10 billion.

I could not attend those hearings, because I was attending the MX hearings, where they were talking about the $20 billion missile system for which we cannot find housing, and the thought is on my mind now, and I do not propose to house them in Federal prisons——

Senator BIDEN. Maybe if we put them together—the MX and the career criminals.

Senator SPECTER. Get 200,000 birds——

Senator BIDEN. Career criminals, that is right.

Senator SPECTER. Kill two birds with one stone, house 200,000 career criminals for the cost of one missile.

But my thought is that if we ever intend to get serious about the problem of habitual offenders, and if we were to incarcerate those 200,000 in this country, based on the Commission on Criminal Justice Standards and Goals for 1973, to reduce violent crime by in excess of 50 percent, that is a $10 billion expenditure which might be well worth directing our attention to, and what I am trying to do is put a foot in the door, with a start of that program this year.

Thank you very much, Mr. Giuliani.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Jensen, I have just one question here, and then I am going to turn this hearing over to Senator Specter.

Is it not true that a reasonable good faith belief in the lawfulness of the conduct is a well established defense for a police officer who sues in a civil case for violation of constitutional rights?

Mr. JENSEN. In constitutional tort cases, that is correct, Senator.

The CHAIRMAN. Now, our next witness is Mr. John Walker, from the Department of Treasury.

Mr. Walker, we are very pleased to have you here, and I have another engagement. I am going to ask Senator Specter to continue the hearing.

You have a long statement. I believe you can summarize it.

STATEMENT OF JOHN M. WALKER, JR.

Mr. WALKER. Thank you very much, Mr. Chairman.

Yes, I would like to ask that my complete statement be made a part of the record, and then I would like to summarize from it.

The CHAIRMAN. Without objection, that will be done.

Mr. WALKER. Mr. Chairman and members of the subcommittee, thank you for affording me the opportunity to present the views of the Treasury Department on the proposed Comprehensive Crime

Control Act of 1983. From Treasury's perspective, this proposed legislation would provide urgently needed reforms that are critical to our law enforcement efforts. We strongly support enactment of this legislation as a package because of the importance of addressing deficiencies in our criminal justice system in a systematic and comprehensive manner. I believe that this bill achieves this goal and will, on the whole, make a significant contribution to our Nation's struggle against crime.

In my testimony today, I will concentrate on those provisions that are of particular importance to the enforcement efforts of the Treasury Department, including those in which Justice and Treasury currently share joint law enforcement responsibilities.

This bill would strengthen Treasury law enforcement by streamlining criminal and civil forfeiture procedures, improving enforcement against currency violations under the Bank Secrecy Act, mitigating liability of law enforcement officers under the Federal Tort Claims Act and improving enforcement against forged endorsements of Federal securities, bank fraud, bribery of bank officers, and receipt of stolen bank property. I will address each of these topics separately.

Turning to the criminal and civil forfeiture provisions under title IV. By revising the laws governing criminal and civil forfeiture, this bill would increase the effectiveness of an essential Federal weapon against drug trafficking and organized crime. This expanded forfeiture authority will greatly assist the operations of the Drug and Organized Crime Task Forces announced by the President last October. Seizure of the ill-gotten proceeds of drug trafficking deprives the trafficker of the fruits of his crimes and the financial base for further drug dealing.

Today, criminal forfeitures can occur only when the enterprise requirements under the Racketeer-Influenced and Corrupt Corrupt Organizations and the Continuing Criminal Enterprise statutes are met. Title IV of the bill would strengthen the criminal forfeiture power by causing it to be triggered by a simple felony drug offense. It would then provide for the forfeiture of all proceeds from drug offenses and property used to commit them. The bill would thus provide a valuable complement to the other statutory enforcement measures, including the Bank Secrecy Act and relevant provisions of the Internal Revenue Code, that are designed to deprive drug traffickers of the assets they need to continue their illicit operations.

Additionally, several new provisions will bring greater effectiveness to the Federal criminal forfeiture process in general. These include new authority for courts to enter restraining orders against the transfers of forfeitable assets during the preindictment stages of a case. In instances where a restraining order may be insufficient, such as where property is easily moved or concealed, the Government would be empowered to obtain a warrant authorizing seizure of the property. Courts would also be able to void transfers that have already occurred and, in some circumstances, order the forfeiture of substitute assets.

The bill would also improve the method of payment for expenses incurred by the Government in conducting forfeiture actions by es-

tablishing forfeiture funds in the Departments of Justice and Treasury.

The establishment of these funds would allow the Government to conduct forfeiture actions with much greater dispatch while promoting overall cost savings. Better storage and maintenance of seized property would result, because Justice and Treasury would be able to balance forfeiture expenses with forfeiture proceeds.

Senator SPECTER [presiding]. How much do you think it likely that the Government would take in on forfeiture proceeds, Mr. Walker?

Mr. WALKER. Well, I think that we can estimate that with forfeiture proceeds, the ability to seize and to forfeit and seize and sell administratively, we are talking in the many tens of millions of dollars, perhaps hundreds of millions of dollars.

Senator SPECTER. To what extent are there any proceeds for forfeiture available at the present time?

Mr. WALKER. Well, there are not. The forfeiture proceeds today go into the general fund. So they are not available now for the use in defraying expenses of forfeiture, or for paying for the budgets of the law enforcement agencies involved.

Senator SPECTER. How much money was seized as a result of forfeitures, say, in the last year?

Mr. WALKER. Well, I can supply that figure in some detail for you, for the record. But in terms of the currency forfeitures, we are talking in terms of many tens of millions of dollars, perhaps, $50 million, perhaps more. We will supply that.

Senator SPECTER. We would be interested to know that.

Mr. WALKER. Yes.

[The following was subsequently received for the record:]

The total amount of currency and property seized and forfeited in fiscal year 1982 is not precisely known. However, a joint study team of the U.S. Department of Justice estimate that property appraised at approximately $245 million was subject to judicial forfeiture in fiscal 1982. The study did not include an estimate of the total amount of currency subject to forfeiture.

In addition, the magnitude of combined civil and judicial forfeiture can be seen in the following statistics from Customs and DEA. For fiscal year 1982, U.S. Customs reported a total of $239,912,507 in currency and property seized and subject to forfeiture as a result of its use in violation of the laws enforced by Customs. These assets were in the following categories:

Monetary instruments	$32,757,121
Vehicles	35,935,720
Aircraft	34,742,505
Vessels	44,461,893
General merchandise	92,015,268
Total	239,912,507

DEA reported a total figure of $106,656,948 in currency and property seized and subject to forfeiture. A breakdown according to the type of asset was not available but is currently in preparation by DEA.

Senator SPECTER. Mr. Walker, how, if at all, does this forfeiture bill differ from the bill which was enacted, was passed, rather, by the Congress last year, part of the seven point package which the President vetoed?

Mr. WALKER. I think, in substance, it contains most of the same provisions. But substantively, we do not have a major difference there.

Senator SPECTER. No major differences?

Mr. WALKER. Right.

Senator SPECTER. Last year, when we were negotiating this, at the very end, there had been a representation that the Justice Department wanted something substantially stronger than what had been passed, and there was some discussion with Congressman Hughes, in the House, on this.

Mr. WALKER. Senator Specter, I would like to clarify my statement.

I was speaking largely from the Customs forfeiture provisions, in terms of Treasury's interests, but I would like Mr. Jensen or Mr. Giuliani to address the Justice Department's views with regard to your last question.

Mr. JENSEN. Senator, if I may, there were some significant areas that the Justice Department wanted to see in the forfeiture realm that were not part of the legislation that was passed.

For example, it did not deal with the issues of profits and proceeds in RICO cases, for example. That was not part of the bill that was passed, and that was a thing that we sought.

Senator SPECTER. The House version did not have RICO forfeiture?

Mr. JENSEN. No. And it did not deal with another major issue, and that is when the assets are dissipated, and you do have an ability to seek forfeiture, and you can trace proceeds and profits, and get an order about that, but they have now been dissipated. Under the bill that we suggested, you could go after substitute assets, and that is not a part of the bill that was passed. Those are very major portions of the Department's position that were not within the bill.

Mr. GIULIANI. Mr. Chairman, it was part of the bill that was passed by the Senate, or favored by this committee, essentially Senator Biden's version of it that we supported, and the provisions that Mr. Jensen mentioned were not part of the bill that eventually passed in the Congress.

Senator SPECTER. You may proceed.

Mr. WALKER. In addition to the direct expenses of forfeiture, the forfeiture funds would also provide for payment of compensation to informants. For example, under the existing section 619 of the Tariff Act, a Treasury informant whose information leads to a seizure and forfeiture may receive 25 percent of the net amount recovered, not to exceed $50,000. The $50,000 maximum amount, established by law in 1935, long before the era of multimillion-dollar drug deals accompanied by gangland slayings of suspected informants, is no longer adequate for this purpose. This bill would increase the maximum amount threefold.

Part D of title IV is of particular interest to Treasury and the U.S. Customs Service. This part would amend the Tariff Act of 1930 to appreciably streamline the procedures for seizure and civil forfeiture of property under the customs laws. One change would make administrative forfeiture proceedings available in any forfeiture involving conveyances used to transport illicit drugs, without limitation as to the value of the conveyance.

It is clear, on the other hand, that administrative forfeiture is far less costly and time-consuming, both for the Government and for interested parties. This bill would accordingly extend its appli-

cability in two additional ways. First, administrative forfeiture could be used for any seized merchandise for which importation is prohibited, without regard to value.

Second, for all other property, it could be used if the value of the seized property did not exceed $100,000. I want to stress that the rights of legitimate claimants, including lienholders, would in no way be infringed by these legislative changes. Interested parties would retain the right to have the ownership of the property judicially determined, which they could exercise by merely posting a bond and thus requiring the Government to initiate a judicial forfeiture proceeding.

Taken together, these legislative changes in the criminal and civil forfeiture laws would increase the efficiency of the forfeiture process, conserve judicial resources, promote overall Federal law enforcement, and contribute to better law enforcement at the State and local level. Most significantly, they would provide strong new sanctions to counter the menace of drug trafficking and the crimes related to it.

Mr. Chairman, turning to the currency violations under the Bank Secrecy Act, which Treasury is vitally interested in, I would like to address the legislative changes proposed by title XII of the bill.

As you know, Mr. Chairman, the enforcement of currency reporting requirements under the Bank Secrecy Act is critical to this Nation's battle against drug trafficking and organized crime.

As I testified last March 15, before the Subcommittee on Investigations of the Senate Governmental Affairs Committee, the tracking of unusual cash flows that is made possible by the act's reporting requirements frequently leads to the identification and prosecution of large criminal organizations. However, as I also indicated at that time, Treasury's experience in the enforcement of the act has pointed to the need to strengthen some of its provisions. This bill responds to that need and I believe that the revisions it proposes will overcome many of the statutory weaknesses that currently are allowing some transactions, particularly international transactions, to go unreported.

First, the revisions contained in title XII of this bill will raise the criminal penalty for willful violation of domestic currency reporting requirements from the present misdemeanor level to the felony level, with an authorized 5-year imprisonment and $50,000 fine. We believe that this level of punishment is appropriate given the seriousness of these offenses and their established relationship to drug trafficking.

The second change would amend the Act to provide that an attempt to transport, as well as the actual transportation of unreported currency or monetary instruments into or out of the United States, would be a violation punishable under title 31. This amendment would clarify an uncertainty in existing law that has caused a few courts to conclude that the currency or monetary instruments must physically be outside of the United States before the law is violated. By that time, the offender is beyond our jurisdiction and hence not subject to Federal arrest authority. Another amendment would raise the amount covered by the reporting requirement for importation and exportation of currency and mone-

tary instruments from $5,000 to $10,000. This amendment will ease the reporting requirement on legitimate international travelers without adversely affecting the detection of criminal activity.

Title XII of this bill revises the search provisions of the Bank Secrecy Act to authorize customs officers to conduct a warrantless search of any person, vehicle, or container entering or leaving the United States, if the officer has reasonable cause to believe cash or monetary instruments are being transported without the filing of required reports. While this authority is available for inbound border searches and for outbound border searches involving merchandise, most courts have not extended it to cover outbound searches incident to suspected currency violations.

There are several other important amendments proposed in title XII. One of them would authorize the payment of awards for persons who provide information that leads to a fine, civil penalty, or forfeiture under the currency reporting laws. The amount is limited to one-fourth of any recovery and may not exceed $150,000. While this may seem to be a high maximum amount, it has to be viewed in light of the huge amounts of currency typically involved in these cases.

Mr. Chairman, I might just report that as I was coming up here today we were informed that as a part of Operation Greenback down in south Florida, our agents had seized $4 million. This gives you some idea of the magnitude of the currency involved in these cases.

Senator SPECTER. Mr. Walker, I would like to interrupt you for a minute, if I may, before you proceed. I am going to have to depart here in just a minute. But one question that I would like to broach with you this morning is the subject of the drug coordinator—part of the legislative package passed by the Congress last year—the principal reason for the President's veto of the seven part package.

I start by expressing my appreciation to you for your cooperation in analyzing that with me, and others last year, on behalf of the Treasury Department.

My question is, How are things going now with respect to overall coordination of the attack on the drug problem, as seen from the perspective of the Treasury Department?

Mr. WALKER. Mr. Chairman, I feel that the coordination today is better than it has ever been. I might report that——

Senator SPECTER. How is the coordination implemented?

Mr. WALKER. Since we talked, the President announced the establishment of the National Narcotics Border Interdiction System, headed by the Vice President, and under the leadership, on an operational basis, of Admiral Murphy, who is the Vice President's Chief of Staff. That office is now providing senior executive supervision and coordination of the interdiction effort that Treasury is so vitally interested in. This includes the coordination of the resources of the Defense Department, the Coast Guard and the Customs Service, as well as Justice agencies. The Department of State is also respected in this effort.

Senator SPECTER. Does the situation ever arise where one department, as a practical matter, has to tell another department what to do, or issue an order, or have some controversy between two major departments working on the drug problem?

Mr. WALKER. Well, there are circumstances, obviously, where departments may differ, but the mechanism that is in place right now is to use the President himself, as his authority has been delegated down to the Vice President, and through him to Admiral Murphy, to resolve disputes of this kind. So far we have not had any problems with this.

Senator SPECTER. Thank you very much.

Senator BIDEN [presiding]. Thank you.

I have questions. If you want to complete your testimony at this point, please continue.

Mr. WALKER. I think I can summarize it pretty quickly.

Other changes in the Bank Secrecy Act would add currency violations to the list of racketeering activities under the Racketeer-Influenced and Corrupt Organizations Act, or RICO. This result would allow these offenses to serve as the predicate for a RICO prosecution. The final change would add currency offenses to the list of crimes for which a court order authorizing electronic surveillance may be obtained. This amendment recognizes that currency laws are frequently violated by persons involved in major crimes, but also that the substantive nature of these crimes is frequently unknown when the investigation commences.

Mr. Chairman, each of these amendments to the laws governing currency and foreign transactions will, we believe, improve the tools of our enforcement effort against drug trafficking and organized crime and complement the increased resources we are devoting to this effort

Mr. Chairman, on another issue, and one that is critical to all Federal law enforcement, the Treasury Department strongly supports the amendments that title XIII of this bill would make in the Federal Tort Claims Act. Under present law as articulated in the *Bivens* case, a Federal law enforcement official can be held personally liable for conduct occurring within the scope of his office or employment that later turns out to be a violation, even though the official believed his conduct to be permissible.

Basically, these amendments would substitute the U.S. Government as the defendant in a lawsuit against a law enforcement agent or officer for a constitutional tort alleged to have been committed by the agent or officer acting within the scope of his office or employment.

The threat of personal liability today hangs like a Damocles sword over the heads of law enforcement officials and has inhibited them from taking an aggressive approach in enforcing the law. The fact that these suits often turn out to lack merit does not affect the need for this legislation; as much as the threat of liability, it is the threat of the lawsuit itself, with all of its attendant time, expense and uncertainty, that inhibits proper enforcement conduct.

Title XIII would make the United States liable for all constitutional torts committed by its employees. Successful litigants would be compensated with minimum liquidated damages of $1,000 or, in the case of continuing torts, $100 per day, up to $15,000. Litigants would also be entitled to any actual damages that they could establish. In the litigation, the United States would have available to it all of the defenses that would have been available to the employee.

Even with governmental liability for these torts, deterrence against the commission of constitutional torts of the type subject today to *Bivens* suits would remain. Not only would there be the exposure of the public proceedings, but disciplinary action would also be triggered under the provisions of this bill.

In all, the mechanism that title XIII would put into place would uphold the rights of litigants and deter unconstitutional conduct. At the same time, it would insure that law enforcement officers are not unfairly and unduly inhibited in performing their official duties.

Mr. Chairman, Treasury is also vitally interested in the provisions of the bill set forth in title XV. I will not go into them in great detail now, but these deal with the question of forged endorsements of Federal securities, bank fraud, bank bribery, and receipt of stolen bank property.

Mr. Chairman, again, I appreciate the opportunity to appear before you and members of this committee to express Treasury's strong support for passage of the Comprehensive Crime Control Act of 1983. It is, we believe, a legislative package that will strengthen Treasury law enforcement as it provides long-needed remedies for Federal law enforcement in general.

Senator BIDEN. Thank you very much.

[The prepared statement of John Walker follows:]

PREPARED STATEMENT OF JOHN M. WALKER, JR.

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

THANK YOU FOR AFFORDING ME THE OPPORTUNITY TO PRESENT THE VIEWS OF THE TREASURY DEPARTMENT ON THE PROPOSED COMPREHENSIVE CRIME CONTROL ACT OF 1983. FROM TREASURY'S PERSPECTIVE, THIS PROPOSED LEGISLATION WOULD PROVIDE URGENTLY NEEDED REFORMS THAT ARE CRITICAL TO OUR LAW ENFORCEMENT EFFORTS. WE STRONGLY SUPPORT ENACTMENT OF THIS LEGISLATION AS A PACKAGE BECAUSE OF THE IMPORTANCE OF ADDRESSING DEFICIENCIES IN OUR CRIMINAL JUSTICE SYSTEM IN A SYSTEMATIC AND COMPREHENSIVE MANNER. I BELIEVE THAT THIS BILL ACHIEVES THIS GOAL AND WILL, ON THE WHOLE, MAKE A SIGNIFICANT CONTRIBUTION TO OUR NATION'S STRUGGLE AGAINST CRIME. IN MY TESTIMONY TODAY, I WILL CONCENTRATE ON THOSE PROVISIONS THAT ARE OF PARTICULAR IMPORTANCE TO THE ENFORCEMENT EFFORTS OF THE TREASURY DEPARTMENT, INCLUDING THOSE IN WHICH JUSTICE AND TREASURY CURRENTLY SHARE JOINT LAW ENFORCEMENT RESPONSIBILITIES.

THIS BILL WOULD STRENGTHEN TREASURY LAW ENFORCEMENT BY STREAMLINING CRIMINAL AND CIVIL FORFEITURE PROCEDURES, IMPROVING ENFORCEMENT AGAINST CURRENCY VIOLATIONS UNDER THE BANK SECRECY ACT, MITIGATING LIABILITY OF LAW ENFORCEMENT OFFICERS UNDER THE FEDERAL TORT CLAIMS ACT AND IMPROVING ENFORCEMENT AGAINST FORGED ENDORSEMENTS OF FEDERAL SECURITIES, BANK FRAUD, BRIBERY OF BANK OFFICERS, AND RECEIPT OF STOLEN BANK PROPERTY. I WILL ADDRESS EACH OF THESE TOPICS SEPARATELY.

CRIMINAL AND CIVIL FORFEITURE

BY REVISING THE LAWS GOVERNING CRIMINAL AND CIVIL FORFEITURE, THIS BILL WOULD INCREASE THE EFFECTIVENESS OF AN ESSENTIAL FEDERAL WEAPON AGAINST DRUG TRAFFICKING AND ORGANIZED CRIME. THIS EXPANDED FORFEITURE AUTHORITY WILL GREATLY ASSIST THE OPERATIONS OF THE DRUG AND ORGANIZED CRIME TASK FORCES ANNOUNCED BY THE PRESIDENT LAST OCTOBER. SEIZURE OF THE ILL-GOTTEN PROCEEDS OF DRUG TRAFFICKING DEPRIVES THE TRAFFICKER OF THE FRUITS OF HIS CRIMES AND THE FINANCIAL BASE FOR FURTHER DRUG DEALING.

TODAY, CRIMINAL FORFEITURES CAN OCCUR ONLY WHEN THE ENTERPRISE REQUIREMENTS UNDER THE RACKETEER-INFLUENCED AND CORRUPT ORGANIZATIONS AND THE CONTINUING CRIMINAL ENTERPRISE STATUTES ARE MET.

TITLE IV OF THE BILL WOULD STRENGTHEN THE CRIMINAL FORFEITURE POWER BY CAUSING IT TO BE TRIGGERED BY A SINGLE FELONY DRUG OFFENSE. IT WOULD THEN PROVIDE FOR THE FORFEITURE OF ALL PROCEEDS FROM DRUG OFFENSES AND PROPERTY USED TO COMMIT THEM. THE BILL WOULD THUS PROVIDE A VALUABLE COMPLEMENT TO THE OTHER STATUTORY ENFORCEMENT MEASURES, INCLUDING THE BANK SECRECY ACT AND RELEVANT PROVISIONS OF THE INTERNAL REVENUE CODE, THAT ARE DESIGNED TO DEPRIVE DRUG TRAFFICKERS OF THE ASSETS THEY NEED TO CONTINUE THEIR ILLICIT OPERATIONS.

ADDITIONALLY, SEVERAL NEW PROVISIONS WILL BRING GREATER EFFECTIVENESS TO THE FEDERAL CRIMINAL FORFEITURE PROCESS IN GENERAL. THESE INCLUDE NEW AUTHORITY FOR COURTS TO ENTER RESTRAINING ORDERS AGAINST THE TRANSFERS OF FORFEITABLE ASSETS DURING THE PRE-INDICTMENT STAGES OF A CASE. IN INSTANCES WHERE A RESTRAINING ORDER MAY BE INSUFFICIENT, SUCH AS WHERE PROPERTY IS EASILY MOVED OR CONCEALED, THE GOVERNMENT WOULD BE EMPOWERED TO OBTAIN A WARRANT AUTHORIZING SEIZURE OF THE PROPERTY. COURTS WOULD ALSO BE ABLE TO VOID TRANSFERS THAT HAVE ALREADY OCCURRED AND, IN SOME CIRCUMSTANCES, ORDER THE FORFEITURE OF SUBSTITUTE ASSETS.

THE BILL WOULD ALSO IMPROVE THE METHOD OF PAYMENT FOR EXPENSES INCURRED BY THE GOVERNMENT IN CONDUCTING FORFEITURE ACTIONS BY ESTABLISHING FORFEITURE FUNDS IN THE DEPARTMENTS OF JUSTICE AND TREASURY. IN THE JUSTICE DEPARTMENT, THE DRUG ASSETS FORFEITURE FUND WOULD CONTAIN THE PROCEEDS FROM FORFEITURES OF DRUG-RELATED ASSETS. IN TREASURY, THE CUSTOMS FORFEITURE FUND WOULD CONTAIN THE PROCEEDS FROM THE DISPOSITION OF ANY PROPERTY FORFEITED UNDER THE LAWS ENFORCED BY THE CUSTOMS SERVICE, INCLUDING CURRENCY AND MONETARY INSTRUMENTS FORFEITED UNDER THE BANK SECRECY ACT. EACH OF THESE FUNDS WOULD BE ESTABLISHED ON A FOUR-YEAR TRIAL BASIS, WITH MAXIMUM PAYMENTS AUTHORIZED FOR EACH FISCAL YEAR. AT THE END OF EACH FISCAL YEAR, ANY AMOUNT IN THE FUNDS THAT EXCEEDS THE APPROPRIATED AMOUNTS FOR THAT YEAR WOULD BE DEPOSITED IN THE GENERAL FUND OF THE U.S. TREASURY.

THE ESTABLISHMENT OF THESE FUNDS WOULD ALLOW THE GOVERNMENT TO CONDUCT FORFEITURE ACTIONS WITH MUCH GREATER DISPATCH WHILE PROMOTING OVERALL COST SAVINGS. BETTER STORAGE AND MAINTENANCE OF SEIZED PROPERTY WOULD RESULT, BECAUSE JUSTICE AND TREASURY WOULD BE ABLE

TO BALANCE FORFEITURE EXPENSES WITH FORFEITURE PROCEEDS. IN THE CUSTOMS SERVICE, THE PRESENT PROCEDURE IS HARMFUL TO ITS LAW ENFORCEMENT MISSION SINCE FORFEITURE EXPENSES TEND TO REDUCE FUNDS AVAILABLE FOR DIRECT LAW ENFORCEMENT PURPOSES. IN ADDITION, THE PRESENT PROCEDURE, SINCE IT ENTAILS SEPARATE ACCOUNTING FOR EACH INDIVIDUAL FORFEITURE, IS INEFFICIENT AND UNNECESSARILY BURDENSOME. UNDER THE NEW FUNDS, JUSTICE AND TREASURY WOULD AVOID THESE NEEDLESS COMPLICATIONS; YET OVERALL ACCOUNTABILITY TO THE CONGRESS WOULD BE RETAINED, THROUGH THE ANNUAL REPORTING REQUIREMENTS PROVIDED BY THE BILL. THE PROVISIONS ESTABLISHING THESE FUNDS AND RETAINING ACCOUNTABILITY TO THE CONGRESS REFLECT THE RECOMMENDATIONS MADE IN THE RECENT DRAFT GAO STUDY ON THE DISPOSITION OF PROPERTY SEIZED BY FEDERAL LAW ENFORCEMENT AGENCIES.

IN ADDITION TO THE DIRECT EXPENSES OF FORFEITURE, THE FORFEITURE FUNDS WOULD ALSO PROVIDE FOR PAYMENT OF COMPENSATION TO INFORMANTS. FOR EXAMPLE, UNDER THE EXISTING §619 OF THE TARIFF ACT, A TREASURY INFORMANT WHOSE INFORMATION LEADS TO A SEIZURE AND FORFEITURE MAY RECEIVE 25% OF THE NET AMOUNT RECOVERED, NOT TO EXCEED $50,000. THE $50,000 MAXIMUM AMOUNT, ESTABLISHED BY LAW IN 1935, LONG BEFORE THE ERA OF MULTI-MILLION DOLLAR DRUG DEALS ACCOMPANIED BY GANGLAND SLAYINGS OF SUSPECTED INFORMANTS, IS NO LONGER ADEQUATE FOR THIS PURPOSE. THIS BILL WOULD INCREASE THE MAXIMUM AMOUNT THREEFOLD.

OTHER FORFEITURE PROVISIONS IN THE BILL WILL PROMOTE ASSISTANCE BY, AND COOPERATION WITH, OTHER FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AGENCIES. BOTH JUSTICE AND TREASURY WOULD BE AUTHORIZED TO TRANSFER FORFEITED PROPERTY TO ANOTHER FEDERAL AGENCY OR TO ANY STATE OR LOCAL LAW ENFORCEMENT AGENCY THAT PARTICIPATED IN THE CASE THAT RESULTED IN THE SEIZURE OR FORFEITURE. UNDER PRESENT LAW AND GSA REGULATIONS, IT IS VERY DIFFICULT FOR AN AGENCY PROVIDING ASSISTANCE IN LAW ENFORCEMENT TO OBTAIN USE OF THE PROPERTY SEIZED. THIS IS UNFORTUNATE, BECAUSE A LARGE NUMBER OF FEDERAL SEIZURES AND FORFEITURES ALSO INVOLVE STATE AND LOCAL CRIMINAL INVESTIGATIONS AND PROSECUTIONS, AND THEREBY IMPOSE A SUBSTANTIAL BURDEN ON STATE AND LOCAL RESOURCES. IN ADDITION, OTHER FEDERAL AGENCIES MAY, IN MANY INSTANCES, BE ABLE TO BENEFIT FROM PARTICULAR PROPERTY OBTAINED THROUGH A FORFEITURE PROCEEDING.

SECTION 418 WOULD FURTHER AMEND THE TARIFF ACT TO AUTHORIZE THE SECRETARY OF THE TREASURY TO DISCONTINUE ANY FORFEITURE PROCEEDING IN FAVOR OF THE INSTITUTION OF STATE OR LOCAL FORFEITURE PROCEEDINGS, UNDER APPLICABLE STATE AND LOCAL FORFEITURE LAWS.

PART D OF TITLE IV IS OF PARTICULAR INTEREST TO TREASURY AND THE UNITED STATES CUSTOMS SERVICE. THIS PART WOULD AMEND THE TARIFF ACT OF 1930 TO APPRECIABLY STREAMLINE THE PROCEDURES FOR SEIZURE AND CIVIL FORFEITURE OF PROPERTY UNDER THE CUSTOMS LAWS. ONE CHANGE WOULD MAKE ADMINISTRATIVE FORFEITURE PROCEEDINGS AVAILABLE IN ANY FORFEITURE INVOLVING CONVEYANCES USED TO TRANSPORT ILLICIT DRUGS, WITHOUT LIMITATION AS TO THE VALUE OF THE CONVEYANCE.

UNDER PRESENT LAW, ANY PROPERTY SEIZED, INCLUDING CONVEYANCES USED IN DRUG TRAFFICKING, MUST BE DISPOSED OF THROUGH JUDICIAL FORFEITURE IF THE VALUE OF THE PROPERTY IS GREATER THAN $10,000. BECAUSE THE NUMBER OF SEIZURES OF CONVEYANCES BY CUSTOMS HAS INCREASED EXPONENTIALLY IN RECENT YEARS, THIS LIMITATION HAS LED TO AN ENORMOUS BACKLOG OF JUDICIAL FORFEITURE CASES. IT HAS ALSO CREATED A MAJOR PROBLEM OF STORAGE FOR SEIZED CONVEYANCES, WHICH IN TURN HAS LED TO UNNECESSARY COSTS FOR PROLONGED STORAGE, AND FREQUENTLY TO PHYSICAL DETERIORATION OF THE PROPERTY INVOLVED. IN FISCAL YEAR 1982, CUSTOMS SEIZED APPROXIMATELY 6,700 CONVEYANCES, WITH A TOTAL VALUE OF $114 MILLION. THE CONVEYANCES SEIZED WERE WORTH, ON THE AVERAGE, APPROXIMATELY $17,000. THE AVERAGE VESSEL WAS WORTH $89,000, AND THE AVERAGE AIRCRAFT WAS WORTH $168,000. IT IS APPARENT FROM THESE FIGURES THAT THE EXISTING DOLLAR LIMITATION ON ADMINISTRATIVE FORFEITURE, GIVEN THE EFFECTS OF INFLATION AND THE ENORMOUS RESOURCES OF THE DRUG SMUGGLER, IS NOW OF LITTLE USEFULNESS IN THE PROMPT AND EFFICIENT DISPOSITION OF THE VAST MAJORITY OF FORFEITURE CASES.

IT IS CLEAR, ON THE OTHER HAND, THAT ADMINISTRATIVE FORFEITURE IS FAR LESS COSTLY AND TIME-CONSUMING, BOTH FOR THE GOVERNMENT AND FOR INTERESTED PARTIES. THIS BILL WOULD ACCORDINGLY EXTEND ITS APPLICABILITY IN TWO ADDITIONAL WAYS. FIRST, ADMINISTRATIVE FORFEITURE COULD BE USED FOR ANY SEIZED MERCHANDISE FOR WHICH IMPORTATION IS PROHIBITED, WITHOUT REGARD TO VALUE. SECOND, FOR ALL OTHER PROPERTY, IT COULD BE USED IF THE VALUE OF THE SEIZED

PROPERTY DID NOT EXCEED $100,000. I WANT TO STRESS THAT THE RIGHTS OF LEGITIMATE CLAIMANTS, INCLUDING LIENHOLDERS, WOULD IN NO WAY BE INFRINGED BY THESE LEGISLATIVE CHANGES. INTERESTED PARTIES WOULD RETAIN THE RIGHT TO HAVE THE OWNERSHIP OF THE PROPERTY JUDICIALLY DETERMINED, WHICH THEY COULD EXERCISE BY MERELY POSTING A BOND AND THUS REQUIRING THE GOVERNMENT TO INITIATE A JUDICIAL FORFEITURE PROCEEDING.

THIS BILL WOULD ALSO CHANGE THE BOND REQUIREMENT, TO DISCOURAGE FRIVOLOUS SUITS AND TO MORE ACCURATELY REFLECT THE COSTS TO THE GOVERNMENT OF PURSUING A JUDICIAL FORFEITURE. THE PRESENT BOND AMOUNT, $250, DATES BACK TO 1844, WHEN IT REPRESENTED TWO-AND-A-HALF TIMES THE $100 LIMIT ON ADMINISTRATIVE FORFEITURE. THE BILL WOULD ESTABLISH A BOND AMOUNT OF THE LESSER OF $5000 OR 10% OF THE VALUE OF THE PROPERTY, BUT IN NO EVENT LESS THAN $250. HOWEVER, IT SHOULD BE NOTED THAT UNDER EXISTING CUSTOMS PROCEDURES, PERSONS UPON WHOM THE BOND REQUIREMENT WOULD POSE AN ECONOMIC HARDSHIP MAY REQUEST WAIVER OF THE BOND BY COMPLETING AN AFFIDAVIT ON FINANCIAL INABILITY. CUSTOMS WOULD, OF COURSE, RETAIN THIS PROCEDURE UNDER THE NEW BOND REQUIREMENTS.

TAKEN TOGETHER, THESE LEGISLATIVE CHANGES IN THE CRIMINAL AND CIVIL FORFEITURE LAWS WOULD INCREASE THE EFFICIENCY OF THE FORFEITURE PROCESS, CONSERVE JUDICIAL RESOURCES, PROMOTE OVERALL FEDERAL LAW ENFORCEMENT, AND CONTRIBUTE TO BETTER LAW ENFORCEMENT AT THE STATE AND LOCAL LEVEL. MOST SIGNIFICANTLY, THEY WOULD PROVIDE STRONG NEW SANCTIONS TO COUNTER THE MENACE OF DRUG TRAFFICKING AND THE CRIMES RELATED TO IT.

CURRENCY VIOLATIONS UNDER THE BANK SECRECY ACT

I WOULD NOW LIKE TO ADDRESS THE LEGISLATIVE CHANGES PROPOSED BY TITLE XII OF THIS BILL. MR. CHAIRMAN, AS YOU KNOW, THE ENFORCEMENT OF CURRENCY REPORTING REQUIREMENTS UNDER THE BANK SECRECY ACT IS CRITICAL TO THIS NATION'S BATTLE AGAINST DRUG TRAFFICKING AND ORGANIZED CRIME. AS I TESTIFIED LAST MARCH 15, BEFORE THE SUBCOMMITTEE ON INVESTIGATIONS OF THE SENATE GOVERNMENTAL AFFAIRS COMMITTEE, THE TRACKING OF UNUSUAL CASH FLOWS THAT IS MADE POSSIBLE BY THE ACT'S REPORTING REQUIREMENTS FREQUENTLY LEADS TO THE IDENTIFICATION AND PROSECUTION OF LARGE CRIMINAL ORGANIZATIONS. HOWEVER, AS I

ALSO INDICATED AT THAT TIME, TREASURY'S EXPERIENCE IN THE ENFORCEMENT OF THE ACT HAS POINTED TO THE NEED TO STRENGTHEN SOME OF ITS PROVISIONS. THIS BILL RESPONDS TO THAT NEED AND I BELIEVE THAT THE REVISIONS IT PROPOSES WILL OVERCOME MANY OF THE STATUTORY WEAKNESSES THAT CURRENTLY ARE ALLOWING SOME TRANSACTIONS, PARTICULARLY INTERNATIONAL TRANSACTIONS, TO GO UNREPORTED.

FIRST, THE REVISIONS CONTAINED IN TITLE XII OF THIS BILL WILL RAISE THE CRIMINAL PENALTY FOR WILLFUL VIOLATION OF DOMESTIC CURRENCY REPORTING REQUIREMENTS FROM THE PRESENT MISDEMEANOR LEVEL TO THE FELONY LEVEL, WITH AN AUTHORIZED FIVE-YEAR IMPRISONMENT AND $50,000 FINE. WE BELIEVE THAT THIS LEVEL OF PUNISHMENT IS APPROPRIATE GIVEN THE SERIOUSNESS OF THESE OFFENSES AND THEIR ESTABLISHED RELATIONSHIP TO DRUG TRAFFICKING.

THE SECOND CHANGE WOULD AMEND THE ACT TO PROVIDE THAT AN ATTEMPT TO TRANSPORT, AS WELL AS THE ACTUAL TRANSPORTATION OF UNREPORTED CURRENCY OR MONETARY INSTRUMENTS INTO OR OUT OF THE UNITED STATES, WOULD BE A VIOLATION PUNISHABLE UNDER TITLE 31. THIS AMENDMENT WOULD CLARIFY AN UNCERTAINTY IN EXISTING LAW THAT HAS CAUSED A FEW COURTS TO CONCLUDE THAT THE CURRENCY OR MONETARY INSTRUMENTS MUST PHYSICALLY BE OUTSIDE OF THE UNITED STATES BEFORE THE LAW IS VIOLATED. BY THAT TIME, THE OFFENDER IS BEYOND OUR JURISDICTION AND HENCE NOT SUBJECT TO FEDERAL ARREST AUTHORITY. ANOTHER AMENDMENT WOULD RAISE THE AMOUNT COVERED BY THE REPORTING REQUIREMENT FOR IMPORTATION AND EXPORTATION OF CURRENCY AND MONETARY INSTRUMENTS FROM $5,000 TO $10,000. THIS AMENDMENT WILL EASE THE REPORTING REQUIREMENT ON LEGITIMATE INTERNATIONAL TRAVELERS WITHOUT ADVERSELY AFFECTING THE DETECTION OF CRIMINAL ACTIVITY.

TITLE XII OF THIS BILL REVISES THE SEARCH PROVISIONS OF THE BANK SECRECY ACT TO AUTHORIZE CUSTOMS OFFICERS TO CONDUCT A WARRANTLESS SEARCH OF ANY PERSON, VEHICLE OR CONTAINER ENTERING OR LEAVING THE UNITED STATES, IF THE OFFICER HAS REASONABLE CAUSE TO BELIEVE CASH OR MONETARY INSTRUMENTS ARE BEING TRANSPORTED WITHOUT THE FILING OF REQUIRED REPORTS. WHILE THIS AUTHORITY IS AVAILABLE FOR INBOUND BORDER SEARCHES AND FOR OUTBOUND BORDER SEARCHES INVOLVING MERCHANDISE, MOST COURTS HAVE NOT EXTENDED IT TO COVER OUTBOUND SEARCHES INCIDENT TO SUSPECTED CURRENCY VIOLATIONS.

THERE ARE SEVERAL OTHER IMPORTANT AMENDMENTS PROPOSED IN TITLE XII. ONE OF THEM WOULD AUTHORIZE THE PAYMENT OF AWARDS FOR PERSONS WHO PROVIDE INFORMATION THAT LEADS TO A FINE, CIVIL PENALTY, OR FORFEITURE UNDER THE CURRENCY REPORTING LAWS. THE AMOUNT IS LIMITED TO ONE-FOURTH OF ANY RECOVERY AND MAY NOT EXCEED $150,000. WHILE THIS MAY SEEM TO BE A HIGH MAXIMUM AMOUNT, IT MUST BE VIEWED IN LIGHT OF THE HUGE AMOUNTS OF CURRENCY TYPICALLY INVOLVED. FURTHERMORE, IT MUST BE REMEMBERED THAT INFORMANTS ON MONEY LAUNDERING OPERATIONS TAKE A GREAT PERSONAL RISK IN PROVIDING INFORMATION, AND THAT THIS TYPE OF INFORMATION IS ESSENTIAL IF WE ARE TO MAKE FURTHER INROADS ON THESE ILLICIT ACTIVITIES. ANOTHER CHANGE WOULD ADD CURRENCY VIOLATIONS TO THE LIST OF RACKETEERING ACTIVITIES UNDER THE RACKETEER-INFLUENCED AND CORRUPT ORGANIZATIONS ACT, OR RICO. THE RESULT WOULD ALLOW THESE OFFENSES TO SERVE AS THE PREDICATE FOR A RICO PROSECUTION. THE FINAL CHANGE WOULD ADD CURRENCY OFFENSES TO THE LIST OF CRIMES FOR WHICH A COURT ORDER AUTHORIZING ELECTRONIC SURVEILLANCE MAY BE OBTAINED. THIS AMENDMENT RECOGNIZES THAT CURRENCY LAWS ARE FREQUENTLY VIOLATED BY PERSONS INVOLVED IN MAJOR CRIMES, BUT ALSO THAT THE SUBSTANTIVE NATURE OF THE UNDERLYING CRIMINAL ACTIVITY IS FREQUENTLY UNKNOWN WHEN THE INVESTIGATION COMMENCES.

MR. CHAIRMAN, EACH OF THESE AMENDMENTS TO THE LAWS GOVERNING CURRENCY AND FOREIGN TRANSACTIONS WILL IMPROVE THE TOOLS OF OUR ENFORCEMENT EFFORT AGAINST DRUG TRAFFICKING AND ORGANIZED CRIME AND COMPLEMENT THE INCREASED RESOURCES WE ARE DEVOTING TO THIS EFFORT.

LIABILITY UNDER THE FEDERAL TORT CLAIMS ACT

MR. CHAIRMAN, ON ANOTHER ISSUE, ONE THAT IS CRITICAL TO ALL FEDERAL LAW ENFORCEMENT, THE TREASURY DEPARTMENT STRONGLY SUPPORTS THE AMENDMENTS THAT TITLE XIII OF THIS BILL WOULD MAKE IN THE FEDERAL TORT CLAIMS ACT. UNDER PRESENT LAW AS ARTICULATED IN THE BIVENS CASE, A FEDERAL LAW ENFORCEMENT OFFICIAL CAN BE HELD PERSONALLY LIABLE FOR CONDUCT OCCURRING WITHIN THE SCOPE OF HIS OFFICE OR EMPLOYMENT THAT LATER TURNS OUT TO BE A CONSTITUTIONAL VIOLATION, EVEN THOUGH THE OFFICIAL BELIEVED HIS CONDUCT TO BE PERMISSIBLE.

BASICALLY, THESE AMENDMENTS WOULD SUBSTITUTE THE UNITED STATES

GOVERNMENT AS THE DEFENDANT IN A LAWSUIT AGAINST A LAW ENFORCEMENT AGENT OR OFFICER FOR A CONSTITUTIONAL TORT ALLEGED TO HAVE BEEN COMMITTED BY THE AGENT OR OFFICER ACTING WITHIN THE SCOPE OF HIS OFFICE OR EMPLOYMENT.

THE THREAT OF PERSONAL LIABILITY TODAY HANGS LIKE A DAMOCLES SWORD OVER THE HEADS OF LAW ENFORCEMENT OFFICIALS AND HAS INHIBITED THEM FROM TAKING AN AGGRESSIVE APPROACH IN ENFORCING THE LAW. THE FACT THAT THESE SUITS OFTEN TURN OUT TO LACK MERIT DOES NOT AFFECT THE NEED FOR THIS LEGISLATION; AS MUCH AS THE THREAT OF LIABILITY, IT IS THE THREAT OF THE LAWSUIT ITSELF, WITH ALL OF ITS ATTENDANT TIME, EXPENSE AND UNCERTAINTY, THAT INHIBITS PROPER ENFORCEMENT CONDUCT.

TITLE XIII WOULD MAKE THE UNITED STATES LIABLE FOR ALL CONSTITUTIONAL TORTS COMMITTED BY ITS EMPLOYEES. SUCCESSFUL LITIGANTS WOULD BE COMPENSATED WITH MINIMUM LIQUIDATED DAMAGES OF $1,000 OR, IN THE CASE OF CONTINUING TORTS, $100 PER DAY, UP TO $15,000. LITIGANTS WOULD ALSO BE ENTITLED TO ANY ACTUAL DAMAGES THAT THEY COULD ESTABLISH. IN THE LITIGATION, THE UNITED STATES WOULD HAVE AVAILABLE TO IT ALL OF THE DEFENSES THAT WOULD HAVE BEEN AVAILABLE TO THE EMPLOYEE. THUS, THE LIABILITY OF THE UNITED STATES WOULD NOT BE A STRICT LIABILITY SUCH AS WOULD, FOR EXAMPLE, MAKE THE UNITED STATES LIABLE IN EVERY CASE IN WHICH EVIDENCE IS SUPPRESSED ON CONSTITUTIONAL GROUNDS. RATHER, THE GOVERNMENT WOULD BE LIABLE ONLY IF THE CONDUCT IN QUESTION WERE UNREASONABLE UNDER THE CIRCUMSTANCES, INCLUDING APPLICABLE CONSTITUTIONAL MANDATES.

EVEN WITH GOVERNMENTAL LIABILITY FOR THESE TORTS, DETERRENCE AGAINST THE COMMISSION OF CONSTITUTIONAL TORTS OF THE TYPE SUBJECT TODAY TO BIVENS SUITS WOULD REMAIN. NOT ONLY WOULD THERE BE THE EXPOSURE OF THE PUBLIC PROCEEDINGS, BUT DISCIPLINARY ACTION WOULD ALSO BE TRIGGERED UNDER THE PROVISIONS OF THIS BILL.

IN ALL, THE MECHANISM THAT TITLE XIII WOULD PUT INTO PLACE WOULD UPHOLD THE RIGHTS OF LITIGANTS AND DETER UNCONSTITUTIONAL CONDUCT. AT THE SAME TIME, IT WOULD ENSURE THAT LAW ENFORCEMENT OFFICERS ARE NOT UNFAIRLY AND UNDULY INHIBITED IN PERFORMING THEIR OFFICIAL DUTIES.

Enforcement Against Forged Endorsements of Federal Securities

Another problem of concern to Treasury that this bill would remedy involves enforcement against forged endorsements of Treasury checks, bonds, and other Federal securities. Title XIV would introduce into the Criminal Code a new section making it a felony to forge an endorsement or signature on any United States security or securities having a value in excess of $500. It would also prohibit the passing of, and the attempting to pass, such securities with the intent to defraud, as well as the receipt of such securities with knowledge of their false character. Offenses involving securities of $500 or less in value would be treated as misdemeanors under the new section.

To summarize briefly, the problem under present law is that these crimes must be prosecuted under Section 495 of the Code, a general provision that does not specifically cover Government securities and does not apply to endorsements. There are gaps in the coverage of this section; for example, it is possible for a thief to steal a Treasury check endorsed by a payee, endorse his own name, and obtain the proceeds, without violating Section 495. This new legislation, by allowing for prosecution of forged endorsements and signatures under one section, would correct these deficiencies and greatly assist the Secret Service, which under present law has the responsibility for enforcement against these offenses.

Enforcement Against Bank Bribery, Bank Fraud, and Receipt of Stolen Bank Property

Finally, this bill would remedy certain deficiencies in the criminal code that pertain to crimes involving banks. Treasury has particular interest in correcting these deficiencies because of its responsibilities for the regulation of banking, exercised by the Comptroller of the Currency. One problem is that it is often difficult to prosecute bank fraud because current statutory provisions do not directly apply to this offense. In most cases, the Government must resort to the prohibitions against embezzlement and misapplication of funds, or those applying to false statements and false loan applications.

A RECURRING SITUATION THAT HAS POSED PROBLEMS IS THE LOANING OF MONEY BY BANK OFFICIALS TO A THIRD PARTY, WITH THE INTENT THAT THE PROCEEDS OF THE LOAN WILL BE TURNED OVER TO THE BANKING OFFICIAL FOR HIS OWN USE. SOME COURTS HAVE HELD THAT HIS CONDUCT DOES NOT CONSTITUTE MISAPPLICATION UNLESS THE DEBTOR WAS FICTITIOUS, FINANCIALLY IRRESPONSIBLE, OR WAS ASSURED BY THE BANK OFFICIAL THAT HE WOULD NOT BE LOOKED TO FOR REPAYMENT. WITH RESPECT TO USE OF THE FALSE STATEMENT STATUTES, COURTS HAVE OCCASIONALLY HELD THAT OFFICERS MAKING SUCH LOANS FOR THEIR OWN BENEFIT AND CONCEALING THEIR EXISTENCE FROM BANK DIRECTORS, DOES NOT CONSTITUTE A FALSE STATEMENT ON THE BOOKS AND RECORDS OF THE BANK.

IN ADDITION TO DEFINING A SPECIFIC OFFENSE FOR DEFRAUDING ANY FINANCIAL INSTITUTION THAT IS FEDERALLY CHARTERED OR INSURED, THIS BILL ALSO UPDATES AND REVISES THE CODE PROVISIONS ON BANK BRIBERY. THE PRESENT STATUTE IS UNDULY COMPLEX AND FAILS TO COVER CERTAIN FINANCIAL INSTITUTIONS, SUCH AS FEDERALLY-INSURED CREDIT UNIONS AND MEMBER BANKS OF THE FEDERAL HOME LOAN BANK SYSTEM. THE NEW PROVISION WOULD PROHIBIT ANY BANK OFFICER, EMPLOYEE, OR AGENT FROM RECEIVING ANYTHING OF VALUE FROM ANY PERSON, OTHER THAN HIS FINANCIAL INSTITUTION, IN CONNECTION WITH ANY TRANSACTION OF THAT INSTITUTION. THE PENALTY IS INCREASED FROM ONE YEAR TO FIVE YEARS' IMPRISONMENT, AND THE MAXIMUM FINE IS INCREASED FROM $5,000 TO THREE TIMES THE AMOUNT OF THE BRIBE.

WITH REGARD TO RECEIPT OF STOLEN BANK PROPERTY, THIS BILL CORRECTS A PROBLEM THAT HAS MADE PROSECUTIONS OF THIS TYPE UNNECESSARILY DIFFICULT. UNDER THE NEW PROVISION, THE GOVERNMENT MUST PROVE THAT THE DEFENDANT KNEW THE PROPERTY RECEIVED WAS STOLEN, BUT NEED NOT SHOW KNOWLEDGE THAT THE PROPERTY WAS STOLEN FROM A BANK.

IN GENERAL, THESE SECTIONS OF THE BILL PROVIDE A STATUTORY BASIS TO STRENGTHEN THE PROSECUTION OF ILLEGAL ACTIVITIES INVOLVING FEDERALLY-SUPERVISED FINANCIAL INSTITUTIONS. WE BELIEVE THESE REFORMS ARE NECESSARY TO ENSURE THE CONTINUED INTEGRITY OF THE FEDERAL BANKING SYSTEM.

MR. CHAIRMAN, AGAIN, I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE YOU AND MEMBERS OF THIS COMMITTEE TO EXPRESS TREASURY'S STRONG SUPPORT FOR PASSAGE OF THE COMPREHENSIVE CRIME CONTROL ACT OF 1983. IT IS A LEGISLATIVE PACKAGE THAT WILL STRENGTHEN TREASURY LAW ENFORCEMENT AS IT PROVIDES LONG-NEEDED REMEDIES FOR FEDERAL LAW ENFORCEMENT IN GENERAL.

Senator BIDEN. I do not want to keep you fellows too far beyond your lunch. I have many questions, but I will not take advantage of the fact that I am presiding. I will ask for unanimous consent, and then grant it, so that the series of questions, about 20 or so that I have on the Torts Claims Act, forfeiture and other provisions, may be submitted for the record. I would then ask that you respond.

[The following was received for the record:]

Responses to Senator Biden's Questions regarding Tort Claims Amendments:

Question No. 1. "Tort Claims actions act against federal employees for violations of constitutional rights have clearly served as a deterrent to such activities. However, neither federal employees or victims are served by the present system. If financial liability is removed, how will individual federal employees be deterred from such activities?"

Answer. The record developed during consideration of this legislation demonstrates that incidents of willful rights violations are extremely rare. Therefore it has been generally accepted that the deterrence being experienced is primarily deterrence of proper and needed governmental action. Section 1305(c) of the bill provides that the Attorney General shall forward correspondence to the head of an employee's department or agency for investigation or disciplinary action when the actions of the employee result in a judgment against the United States or a settlement paid by the United States. Through this measure serious agency disciplinary action may be initiated against a transgressing federal employee. This sanction should not be minimized. It can result in penalties ranging from reprimand to demotion to permanent loss of one's chosen livelihood. The multitude of other sanctions available are as follows: The proposal contains no immunity from prosecution for a violation of federal criminal laws, particularly those concerning civil rights. In addition to formal agency disciplinary action, performance appraisals and scrutiny by agency Inspectors General serve as deterrents. Congressional oversight and the public media also act as restraints. Court challenges seeking injunctive relief are an additional check. Finally, the fact that an employee is relieved of personal financial liability does not mean that his conduct is not brought into serious question by trial proceedings brought in a case against the United States as a result of his alleged wrongdoing. He will still be the

subject of a lawsuit and, particularly if qualified immunity remains an issue, his conduct will be the subject of serious public and governmental scrutiny in the objective forum of a federal district court. While some observers have ignored or discounted this factor, an employee's interest in his professional reputation and personal pride is a major motivating factor with respect to official conduct. Thus, sanctions remaining and supplemented by chapter XIII of S. 829 amply deter official misconduct in the place of what is now a futile damages remedy.

Question No. 2. "The House bill proposed a jury trial against the government with additional damages of up to $100,000 'if the conduct giving rise to the tort claim was undertaken with the malicious intention to cause a deprivation of constitutional rights or with reckless disregard for the plaintiff's constitutional rights.' Doesn't this meet the goals of the legislation by compensating victims and encourage the government to supervise employees and discipline employees who violate constitutional rights?"

Answer. It should first be noted that the phrase "reckless disregard" has been stricken from the House bill by amendment. Legislation of this nature seeks to achieve a balance between the compensatory interests of claimants and public resources. Moreover, the object of tort law is to attempt to compensate victims for losses they have suffered. With those concepts in mind, an additional award such as that contained in the House bill, which bears no relationship to compensation for injury, seems illogical and unfair to the citizenry as a whole. The possibility of an unfair windfall for the plaintiff exists that has no reasonable relationship to any damage suffered. Such a provision will encourage many plaintiffs who have suffered virtually no injury to take the chance in lottery fashion on winning the bonus award by alleging malice.

Thus, it is submitted that such a provision is neither appropriate nor in the public interest.

Question No. 3. "In the past, enactment of Tort Claims Act Amendments has been prevented by opposition to the proposal that the government be allowed to invoke the 'good faith' defense available to its employees when sued as individuals.

"What purpose will be served by the government invoking the defense other than reducing compensation to victims whose rights have been violated?

Won't the immunity reduce the level of supervision of employees?

Isn't it likely that extending the immunity to the government will complice litigation, contrary to the purpose of the admendment by requiring employees to prove their good faith?"

Answer. It is extremely important to understand at the outset that the issue of qualified immunity no longer is one of good faith. On June 24, 1982, the Supreme Court in the case of Harlow v. Butterfield, ___ U.S. ___; 50 U.S.L.W. 4815 eliminated good faith from the test of qualified immunity. What remains is an inquiry into whether the conduct of the employee was objectively reasonable. Thus, the issue in the debate over the qualified immunity defense is whether the government should be entitled to show that what its employee did was reasonable under all of the circumstances. This of course, is the same concept through which any employer is entitled to defend the actions of an employee under the doctrine of respondeat superior. Were the defense to be waived, the government would face strict liability in an era of frequently vague and constantly shifting law, where monumental decisions applied retroactively could subject the government to massive liability to tens of thousands of persons for actions thought to be perfectly appropriate when taken, and where complex legal doctrines can be translated

into day-to-day operating instructions only with the greatest difficulty--an absolute liability standard requiring omniscient decisionmaking would prove unworkable." See, statement of Loren A. Smith before the Subcommittee on Administrative Practice, May 26, 1983.

The often glib response to this argument is that there should always be compensation when a right is violated. The problem is that both the law and facts of a given circumstance are often terribly unclear and whether some right has been violated cannot be determined until a particular issue sifts its way through the courts years after the fact. To quote from recent testimony presented in the Senate, "The biggest misstatement that I've heard here today is that a public official who is reasonably well-versed on his job knows what the law is. There is no way anybody can know what the law is until you finally count it up in the court of last resort--where it is a split decision, typically." Id. Judge Jerre Williams, Fifth Circuit, United States Court of Appeals.

To put it another way, were the defense waived, the United States would pay damages in cases where courts determined with 20-20 hindsight that violations had occurred in a difficult factual or procedural setting even though the conduct or the process at the time was properly motivated and eminently reasonable.

In addition, it is waiver of the defense rather than preservation of it that will reduce the level of proper supervision of employees. 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. A witness before the Senate testified that the interest of deterrence of official misconduct requires preservation of the qualified immunity defense. This is so because, in a strict liability situation, the actions of the reasonable employee will be found just as

culpable as the actions of the employee who acted unreasonably. Thus, there will be no standard toward which an employee can strive to avoid a successful attack on his or her reputation as a public servant.

Finally, elimination of the defense would seriously detract from the ability of the courts to fully consider allegations of official misconduct. It is very much in the public interest to have a full ventilation in an objective public forum of such allegations. If the issue of the reasonableness of the conduct of the federal employee is declared irrelevant by eliminating the defense, all pertinent facts which impact on this basic tort concept of reasonableness may be declared irrelevant. The effect would be that the public and the Congress would never learn the true merits of the case and that the people of the United States would be subjected to judgment without a full hearing. While preservation of the defense may be viewed as a complicating factor in litigation, that consideration is outweighed by the interest of ventilating the merits of the contoversies that will surface. Moreover, it is clearly not in the interest of the United States to streamline cases to the point where the United States cannot defend itself and is reduced to the position of simply paying claims. Finally, it must not be overlooked that passage of the current proposal intact will enable the United States to settle cases for the first time which are premised upon a theory of constitutional rights. As a result, a case turning on the issue of qualified immunity can be settled when there is litigative risk to both sides. Thus, the difficult cases will be disposed of much more quickly.

RESPONSES TO SENTENCING QUESTIONS OF SENATOR BIDEN

Question 1

Both the bipartisan Crime bill, as it passed the Senate on September 30, 1982, and S. 829, the Administration's bill, provide for the creation of a Sentencing Commission as an independent body in the judicial Branch. Both bills provide that the President, after consultation with representatives consisting of judges, prosecuting and defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice system, appoint this seven-member commission. Do you believe that judges should have representation on this commission? Should any sentencing bill specify that a certain number of judges should be chosen to sit on the Sentencing Commission?

Answer to Question 1

It is important that judges with federal sentencing experience participate in the development of the sentencing guidelines. This participation should include both membership of current or past federal judges on the commission and active participation by members of the federal judiciary, acting alone or through the Judicial Conference, in the development of the guidelines. Participation of judges is especially important in assuring that the sentencing guidelines provide enough detail to take into account commonly occurring factors that should affect the sentencing decision, while they avoid such complexity that judges will have difficulty in applying them. In addition, a number of past and current federal judges have been very active in the sentencing reform movement, and their participation in the guidelines development process should be encouraged. Finally, it is important that the Federal judiciary feel a commitment to making the guidelines process work well. This goal can, we believe, be far more readily achieved with membership of Federal judges on the Commission than without it. Whether the

legislation should specify that federal judges should be on the Commission, and, if so, whether the legislation should state a specific number of federal judges, are questions on which the Department of Justice defers to the judgment of the Committee on the Judiciary.

Question 2

Instead of establishing a Sentencing Commission to develop guidelines for sentencing, would it be preferable to authorize the Judicial Conference of the United States to perform this task?

Answer to Question 2

The Department of Justice strongly recommends that the sentencing guidelines be promulgated by a Sentencing Commission in the Judicial Branch, rather than by the Judicial Conference of the United States, for a number of reasons. First, a Sentencing Commission, with members appointed by the President with advice and consent of the Senate, will be far more visible than a committee of the Judicial Conference might be. This visibility is important to assure public awareness and understanding of the sentencing guidelines process. Second, promulgation of the sentencing guidelines by the Judicial Conference would probably be more time-consuming than promulgation of the guidelines by a Sentencing Commission. The Judicial Conference meets only twice a year, so that if it had any difficulties with guidelines suggested by its committee, there would be substantial delay in resolving them. In addition, the fact that the sentencing guidelines would be suggested by a committee of the Judicial Conference and then promulgated by the Judicial Conference would, in and of itself, add an additional layer to the sentencing guidelines development process. This is not to say that, as noted in the response to question 1, it is not important that the Judicial Conference play a very active role in the guidelines promulgation process. Third, the Judicial Conference proposal

anticipates that the members of the guidelines drafting agency would be part-time, while the Sentencing Commission proposal recommends that the members be full-time. The Department thinks that, at least during the drafting of the initial set of guidelines and the first few years of experience under the new guidelines system, it is very important that the drafting agency have members who are able to devote all their professional energies to issues of federal sentencing policy. Fourth, the Sentencing Commission legislation contemplates a special staff assigned to the Sentencing Commission while the Judicial Conference proposal appears to contemplate that the staff for the guidelines effort be drawn from the staffs of the Administrative Office of the United States and the Federal Judicial Center. Any guidelines drafting agency would be expected, of course, to draw upon the expertise and background of these staffs, particularly in the data collection, research, and training areas. We do think, however, that there should be provision for a staff that can work full-time on sentencing matters without the necessity of juggling other responsibilities.

Question 3

Parole has been referred to as a "safety valve" of the criminal justice system, yet it would be eliminated in the sentencing title of the Administration bill. The bipartisan bill of last Congress authorized a defendant or the Bureau of Prisons to motion for reduction of a long sentence after six years and at the end of the guideline years. Do you agree this safety net is necessary if parole is abolished? What would replace such a "safety valve" if parole were abolished?

Answer to Question 3

It is not necessary to retain the "safety valve" described in the question if parole is abolished. Under current law, parole serves as a rudimentary, one-way safety valve in a system that provides no standards whatsoever for sentencing judges in determining the appropriate sentences. Parole serves the necessary function of evening out widely disparate sentences that vary according to factors other than offense and offender characteristics that should affect the sentence. This function of the Parole Commission is totally unnecessary in the sentencing guidelines system. If there is a long sentence under the proposed system, it would result from the fact that the offense and offender characteristics in the particular case warranted a high sentence and not because a high sentence had been imposed that is not justified by the facts of the case -- and such a sentence above the guidelines range would be subject to appellate review in any event.

The bill provides several protections against unjustifiably long sentences. First, a defendant who is sentenced above the guidelines range that applies to his case may appeal that sentence on the ground that it is unreasonable. Second, while S. 829 does not contain a provision for extra review of sentences that exceed six years, it does provide for modification of a prison term in two specific instances. The court may reduce any term of imprisonment -- not just an unusually long one -- if, upon motion of the Director of the Bureau of Prisons, it finds that there are extraordinary and compelling reasons to do so. This provision was included to cover situations, such as terminal illness of a prisoner, that may justify the reduction of a sentence because of a change in the circumstances that originally justified imposition of a particular sentence. In addition, if the Sentencing Commission amends the sentencing guidelines applicable to a particular offense and in the course of doing so lowers the terms of imprisonment that apply for the offense, it may recommend that prisoners already sentenced under the old

guidelines be given the benefit of the sentence reduction. Thus, for example, if there were a substantial change in the community view of the seriousness of an offense, such that the Sentencing Commission found that a substantial reduction was appropriate, it could also recommend making that reduction applicable even to persons already incarcerated.

Because the bill already provides one level of appeal of a sentence, and the two instances described in which sentences may be reduced, it is difficult to see what other circumstances might necessitate the inclusion of a "safety valve". The original sentence would have been imposed for the purpose of incapacitation, deterrence, or punishment, or a combination of these, purposes -- purposes of sentencing that logically require a determinate sentence. Since the bill makes ample provision for changing the term of imprisonment for humanitarian reasons, it is not apparent that such a "safety valve" would be of any real value. It would, moreover, detract from the certainty and determinacy that the new system is designed to achieve.

Question 4

Some have argued that the Parole Commission should be retained along with a Sentencing Commission. What are your views regarding retention of the Parole Commission? What is your opinion of the proposal to sunset the Parole Commission 5 years after the bill?

Answer to Question 4

The Department of Justice strongly opposes the retention of the Parole Commission except temporarily for purposes of setting release dates for persons sentenced before the guidelines system is in place. This opposition extends not only to the suggestions that the Parole Commission be retained, at least temporarily, to carry on purposes similar to those under current law, but also to the suggestion of the Judicial Conference that the Parole

Commission be retained to set prison release conditions and determine what sanctions should be applied to a releasee who violates them.

The Justice Department is especially opposed to the suggestion that the Parole Commission be retained, whether temporarily or not, for purposes of evaluating whether terms of imprisonment imposed under a sentencing guidelines system are appropriate. The sentencing guidelines will have been issued after public comment and hearings, and after careful congressional scrutiny. Once the guidelines are in place, a sentencing judge will have to impose sentence in accordance with the guidelines unless he finds that a factor not adequately considered in the promulgation of the guidelines should affect the sentence. If he finds such a factor, he must state specific reasons for imposing sentence outside the guidelines, and that sentence will be subject to appellate review on the grounds that it was unreasonable. Under such a system, it is difficult to see what purpose would be served by retaining the Parole Commission to review terms of imprisonment. We see no justification for review of a sentence by an executive branch agency, acting outside public scrutiny, second-guessing the guidelines issued by the Judicial Branch after congressional scrutiny or a sentence outside the guidelines that was already subject to appellate review. We believe that retention of the Parole Commission in such a system could be extremely detrimental to the success of the guidelines system. The Sentencing Commission would not know whether to attempt to set terms of imprisonment according to the length of time it found a prisoner should actually serve or whether it should recommend terms of imprisonment that assumed that most prisoners would be released on their parole eligibility dates. In addition, there is a substantial danger that the Sentencing Commission would create one set of guidelines following its views of the purposes of sentencing while the

Parole Commission developed a different set of guidelines based on different views. Once the guidelines were in place, much of the current confusion as to the role of the judiciary versus the role of the Parole Commission in setting terms of imprisonment would continue under such an approach. Moreover, there would be some danger that sentencing judges would be reluctant to change their sentencing practices in order to impose terms of imprisonment that reflected the actual terms to be served rather than artificially inflating the sentences, as occurs today, in order to anticipate the actions of the Parole Commission. Thus, keeping the sentencing guidelines and the parole system side by side could result in substantially undermining the ability of the sentencing guidelines system to accomplish its purposes.

The Department of Justice also opposes the suggestion of the Judicial Conference that the Parole Commission determine whether a prisoner has earned good time credit in prison, setting the conditions of parole release, and determining the sanctions for violations of release conditions. The Bureau of Prisons today determines whether prisoners have earned good time. We see no reason to change this, especially since the Parole Commission is a multi-million dollar agency that is far more cumbersome than is necessary to serve that purpose. Under S. 668 and S. 829, in addition, the sentencing judge determines the term of supervised release that will follow a term of imprisonment, if any, and sets the conditions on that release. The factors that go into the determination that a term of supervised release will be needed, and what conditions should be imposed on that term, are known at the time of sentencing. There is no reason to retain a special agency to set the conditions of release, nor should the length of that term depend upon how much good time the defendant happens to earn. If the term of supervised release is entirely dependent on the amount of good time a prisoner earns, the result would often be that the person with the worst behavior in prison would receive the least street supervision after his release and the person with the best behavior would receive a substantial period of street supervision even though he probably would not need it.

S. 668 and S. 829 contemplate, instead, that the term and conditions of supervised release following a term of imprisonment will be based on the offense and offender characteristics known at the time of sentencing and that no special agency will be required to set good time or the conditions of release. If a releasee violates the conditions of supervised release, the conditions of that release can be modified to provide a higher level of supervision, including, if appropriate, a requirement that the defendant undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, and, if necessary, remain in a specified institution. Another possible condition of supervised release that might be added if a defendant's violations warrant it would be a requirement that the defendant reside at a community correctional facility for all or part of the remaining term. In a serious case, the contempt powers of the court could be used to achieve further incarceration of the defendant. Of course, if the release violation is the commission of a new offense, the fact that the defendant was on release at the time the offense was charged would be taken into account into the setting of bail conditions, and the defendant could be prosecuted for the new offense. Incidentally, the Department would not object to an amendment specifically recognizing that the courts may use their contempt powers in the case of a violation of an order setting forth the conditions of the term of supervised release.

Question 5

Would the movement toward determinate sentencing be likely to increase the already burgeoning prison population?

Answer to Question 5

The creation of a determinate sentencing system in place of an indeterminate one will not, in itself, cause an increase in the prison population. A determinate sentencing system simply results in the imposition of terms of imprisonment that reflect

the actual time to be served rather than being artificially inflated in order to take into account the functioning of the parole system. Only if sentencing guidelines promulgated under a determinate sentencing system included higher terms of imprisonment than are served today or if there was an increase in the number of persons prosecuted for offenses for which prison terms are recommended, would there be an increase in the prison population. Sentencing guidelines could as well recommend lower terms of imprisonment for some offenses than are served today. One of the advantages of a sentencing guidelines system with determinate sentencing is that it is possible for the criminal justice system to determine precisely what impact, if any, a change in current sentencing practices or in the mix of cases prosecuted will have on the prison population and on other aspects of the criminal justice system. Under today's system, even if we know how many people will be prosecuted for a particular offense, we have no way of knowing with any reasonable degree of certainty what impact sentencing a particular percentage of those persons to prison will have on the prison population since we do not know how long those prisoners will actually serve.

Question 6

Some critics contend that permitting appellate review of sentences by the Government in cases in which a sentence is more lenient than that established by the Guidelines would constitute double jeopardy. Could you respond to this allegation?

Answer to Question 6

Government appeal of sentences, on behalf of the public, is clearly constitutional. The Supreme Court in United States v. DiFrancesco, 449 U.S. 117 (1980) upheld the constitutionality of a provision in current law that permits a sentence imposed under the dangerous special offender provisions to be increased upon appeal by the United States. In doing so, the Court said:

> The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence. We have noted...the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent. These considerations, however, have no significant application to the prosecution's statutorily granted right to review a sentence. This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence. Under § 3576, the appeal is to be taken promptly and is essentially on the record of the sentencing court. The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired. To be sure, the appeal may prolong the period of any anxiety that may exist, but it does so only for the finite period provided by the statute. The appeal is no more of an ordeal than any government appeal under 18 U.S.C. § 3731 from the dismissal of an indictment or information. The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him. The defendant is subject to no risk of being harrassed and then convicted, although innocent. Furthermore, a sentence is characteristically determined in large part on the basis of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is non-adversary in nature.

The appeal provisions in S. 668 and S. 829 are similar to the appeal provision discussed by the Supreme Court in this long quotation. Under both statutes, it is clear that the defendant has no expectation of finality in the sentence, since in both instances the appeal rights of the government are set forth plainly in the statute. The appeal in both instances is limited, and, in fact, under S. 668 and S. 829, since the only sentence that would be appealable would be one outside sentencing guidelines or one that involved an incorrect application of the guidelines, the appeal is even more limited than it is under the dangerous special offender provisions. In neither case does the limited appeal involve a re-trial or approximate the ordeal of a trial on the basic issue of guilt or innocence, and the appeal would be essentially on the record of the sentencing court.

Those who question whether there is a double jeopardy problem with the appellate review of sentence at the instigation of the government base their argument on the Supreme Court decision in Bullington v. Missouri, 451 U.S. 430 (1981), a case that involves the sentencing proceeding under a death penalty statute in Missouri. In that case, the jury, in a proceeding separate from the trial of the defendant, found that the prosecution did not prove beyond a reasonable doubt, as required by the statute, that there were aggravating factors in the case that had to exist before the death penalty could be imposed. The Supreme Court found that, because of the special bifurcated procedure, the fact that the government was charged with proving aggravating factors beyond a reasonable doubt, and the special nature of a death sentence, that the jury had in effect acquitted the defendant of the aggravating factors that were necessary for imposition of a death sentence. The court was very careful to distinguish the proceedings from the normal sentencing hearing situation, and we are satisfied that the case does not cast any doubt at all on the constitutionality of government appeal of sentences in ordinary cases.

Question 7

S. 829 requires the Sentencing Commission to impose a substantial term of imprisonment for so called "career criminals," those who have two or more prior convictions for felonies committed on different occasions. Will such a practice exacerbate the problem of overcrowding in prisons and jails? Are two convictions too few for this purpose? Would it alleviate the problem if the number of convictions were revised to three?

Answer to Question 7

This provision, in itself, should not have an appreciable impact on the problem of overcrowding in prisons and jails. In a recent study conducted for the Department of Justice using almost

6,000 federal cases, the prior record of the defendant, using a single period of incarceration of a year or more as the criterion, was a strong predictor, for almost every felony studied, of both the judge's decision to incarcerate an offender and the length of the period of incarceration. It was not a strong predictor that a judge would incarcerate a person convicted of homicide because the offense is so serious that most offenders are incarcerated whether they have a record or not, although it was still a strong predictor of the length of a prison term. For the offenses of bank robbery, drug trafficking, forgery, bank embezzlement, false claims, mail fraud, and a random selection of other offenses, the existence of a criminal history was a strong predictor of a decision to incarcerate, and for those offenses plus homicide and tax fraud, it was a strong predictor of the length of the term of imprisonment. See INSLAW, Inc., and Yankelovich, Skelly, and White, Inc., Federal Sentencing: Toward a More Explicit Policy of Criminal Sanctions, pp. II-34 to II-35 (1981). Since the rate of incarceration of a person convicted of a felony who has previously been incarcerated for only one felony is already quite high, it does not appear that the provision in the bill will have much impact on that rate. Instead, the sentencing guidelines system should result in a more rational pattern than exists today in determining the amount of time that a defendant is to be imprisoned in light of his criminal record.

Responses to Organized Crime and Task Force Questions

1. Direct funding in FY 84 for the Treasury Drug Task Force agencies.

Funding requested for FY 1984 by the Administration for the Task Force initiative provides for full-year funding for the program. In FY 1984, the Administration is requesting funds in the OCDE appropriation totalling 1,130 staff and $105,949,000 to reimburse components of the Department of Justice for participation in Drug Task Force activities. Funds totalling 500 positions and $32,867,000 to provide for Department of the Treasury participation in the Drug Task Forces are requested as direct appropriations to the agencies involved--the Internal Revenue Service, the U. S. Customs Service, and the Bureau of Alcohol, Tobacco and Firearms.

Further, the Task Force management structure for each of the 12 Task Force regions and the districts within each region is in place and functioning. By September 1, 1983, the Task Forces will be totally staffed by the prosecutors, agents and support personnel proposed in the FY 83 budget.

With the management and operational structures in place, the Attorney General will continue to have full responsibility for the Organized Crime Drug Enforcement effort and determine the level of participation required from the Department of the Treasury. The Drug Task Force effort to date has been marked by the utmost degree of cooperation among the participating agencies. Because of this shared commitment to the success of the program, the participation levels established by the Attorney General for Treasury enforcement operations could be funded from the Treasury appropriation (once the Task Forces have been established).

2. How many cabinet councils, legal policy committees, working groups, etc., are you on that have been set up by this Administration to "direct" the federal effort against drug abuse and organized crime?

The purpose of these councils, committees, groups, etc., is to provide mechanisms for senior officials of the Administration to improve the coordination and efficiency of federal law enforcement efforts, with particular emphasis on drug-related crime. For example, this has been accomplished through the establishment of the Cabinet Council on Legal Policy, which is chaired by the Attorney General and whose membership includes all Cabinet officers with responsibility for narcotics law enforcement. Working through the Cabinet Council, the White House Office on Drug Policy is an integral part of the process by which a comprehensive and coordinated narcotics enforcement policy is carried out.

3. Which of these groups has the ultimate authority to direct federal drug control efforts?

There is no single group or agency that has the ultimate authority to direct federal drug control efforts. The drug problem facing America today cannot be address by a single agency or program ranging from education to prosecution. Therefore, this Administration's drug control efforts covers a broad range of initiatives and involves a number of diverse agencies and department, requiring coordination at the cabinet and senior official levels.

4. To what extent are the Organized Crime and Drug Enforcement Task Forces modeled after the South Florida Task Force, and how are the two different?

The 12 Organized Crime Drug Enforcement Task Forces evolved from the South Florida experience. As in the South Florida effort, the 12 Drug Task Forces are designed to have specifically dedicated

attorneys, agents and support staff available to investigate and prosecute major drug traffickers and drug trafficking organizations. The 12 Drug Task Forces are different in two principal ways: first, the 12 Drug Task Forces add new resources to the federal drug enforcement effort; and second, the primary enforcement techniques will be long term, complex investigations rather than interdiction.

NNBIS is designed to coordinate the work of those federal agencies with existing responsibilities and capabilities for interdiction of sea-borne, air-borne and cross-border importation of narcotics. As a result, NNBIS will complement but not replicate the duties of the regional Drug Enforcement Task Forces operated by the Department of Justice. NNBIS will monitor suspected smuggling activity originating outside national borders and destine for the United States, and will coordinate agencies' seizure of contraband and arrests of persons involved in illegal drug importation.

5. Is there an Organized Crime and Drug Enforcement-type Task Force planned for Florida? Will additional funding be required?

The Department of Justice is seeking operating funds and additional positions of a Florida Task Force in FY 1985. In the interim, 9 attorneys have been allocated to Florida to support the already increased enforcement and prosecution demands being generated in the state. Further, the three Florida U. S. Attorneys are included in the planning and coordination efforts of the 12 Drug Task Force.

6. How do these two types of Task Forces relate to the new National Narcotics Border Interdiction System (NNBIS) Task Force that have been recently announced?

The South Florida Task Force, on June 17, 1983, became one of the six regional centers of the National Narcotics Border Interdiction System. As stated, NNBIS is designed to coordinate the work of those federal agencies with existing responsibilities and capabilities for interdiction of sea-borne, air-borne and cross-border importation of narcotics; and will complement but not replicate the duties of the regional Drug Enforcement Task Forces operated by the Department of Justice.

7. What are the numbers of staff from each agency?

	Support Positions Allocated	Professional Positions Allocated	As Of:	Professional Positions Filled	Professional Positions Backfilled
FBI	77	334	6/17	326	228
DEA	63*	274	6/17	274	167
IRS	35**	185	6/3	84	86
Customs	58†	142	6/3	70	42
ATF	8	72††	6/3	22	5
USMS	0	12	6/3	12	12
Agency Subtotals:	241	1,019		788	540
AUSAs	146	200		67	60
Totals:	387	1,219		855	600

* DEA has allocated only 34 of its 63 support positions across the country, leaving 29 remaining positions yets to distribute.

** 5 of these 35 support positions have been assigned to the Treasury Financial Law Enforcement Center, Washington, D. C.

† Customs has distributed only 25 of its 58 support positions across the country, and has assigned 33 of those 58 positions to the Treasury Financial Law Enforcement Center in Washington.

†† ATF has distributed only 54 of its 72 agent positions across the country, and has retained a pool of 18 agents for use in any district on a work-year basis as need arise.

8. Are all positions authorized in Fiscal Year 1983 actually to be filled this fiscal year? If not, why not?

Yes, all positions will be filled and the 12 Drug Task Forces fully operational by September 1.

9. What is the current or most up-to-date total of staff on-board at each of the twelve Task Forces? How many of these are located in the core-city, and how many secondary cities have Organized Crime and Drug Enforcement Task Force staffing?

There are over 855 attorneys and agents on-board the 12 Drug Task Forces (refer to the response to question 7), with the program scheduled to be at full strength on September 1. The assignment and hiring of Task Froce personnel are now processing at a pace to meet this deadline. Therefore, the attorney, agent and support personnel allocations for the individual Task Forces are provided as a better representation of the program staffing efforts.

10. The 1984 Budget includes separate appproprіations for Justice and Treasury components of the Task Forces. How will the Attorney General be able to control the allocation of resources under these separate budget appropriations?

This issue was addressed in response to question one.

11. What is the status of hiring and training agents to replace those assigned to the Task Forces?

As stated in response to question 7, 600 new agents and attorneys have been hired. The training of all new agents should be completed or underway by the end of FY 1983. The hiring and training process used by the agencies for new agents is not, and ought not be an instantaneous one. The agencies are choosing these new agents with customary care since they recognize that these new agents join as full-time permanent agents.

12. Has a baseline number of agents working on drug enforcement in each participating agency been established, in order to show that the Task Forces represent an increase over previous levels?

This issue is being address in the development of the Drug Task Force information system.

13. How will Justice decide whether the Task Force program is an effective use of drug enforcement resources?

The Department is in the process of developing a complete information system and evaluation design specifically for the Drug Task Force program. The information system and evaluation design is intended to collect and analyze the usual measurements (arrests, seizures, etc.) as well as attempt to assess the effectiveness of the Task Force approach.

14. When would such an evaluation be conducted?

The Department of Justice will conduct an evaluation to fulfill the reporting requirements of the Annual Report to the President and Congress requested in the December 20, 1982, conference report.

15. Are mechanisms in place to collect the data needed to conduct this type of evaluation?

An information system is being developed specifically for the Drug Task Force program for several reasons: first, case-management; second, resources allocation; third, coordination and control of statistical information; fourth, evaluation; and finally, reporting. The information system should be designed by mid-summer and field tested by early fall.

16. Has any evaluation of the results of the South Florida Task Force been conducted? What is the reason for the discrepancies in the figures quoted by various officials (i.e., for arrests, seizures, etc.)? If no reliable data and evaluation exists for South Florida, how can Justice support its statements relating to the Task Forces?

There has been no formal evaluation conducted on the South Florida Task Force operation. There has been much Congressional oversight and currently GAO is conducting an on-site review.

There has been releasable data provided on the South Florida effort. Most recently, the Vice President, when announcing the NNBIS operation, stated:

"The records shows that in South Florida, we have made progress not only in terms of combating crime and thwarting the efforts of drug smugglers, but also in terms of improving the morale of the people of the area. We have brought them hope for the future especially as it relates to the quality of life in Miami and the surrounding areas.

"In February 1981, a public opinion survey taken by Miami business leaders asked this question: 'Are you seriously considering moving out of the area because of the crime and drug problems?' Thirty-nine percent of the respondees said they were. The same poll was taken in February of this year and only nine percent said they were considering leaving...

"While the war on narcotics continues in South Florida, there is impressive evidence that we are making solid progress. Drug arrests are up 27 percent. Marijuana seizures are up 23 percent. Cocaine seizures are up 54 percent. In the past fifteen months we have seized nearly three million pounds of marijuana and more than 17 thousands pounds of cocaine in and around the South Florida area. The street value of those drugs is about $5 billion."

17. Are agency reporting systems coordinated to prevent duplication of results claimed by each agency?

Yes, the Drug Task Force information system being developed will prevent reporting duplications.

18. How many of the cases now being pursued by the Task Forces are primarily of the financial-investigation type and how many are primarily the more traditional informant- or how many are primarly the more traditional informant- or undercover-type? Which agencies initiated these cases?

As a result of the preliminary district-by-district assessment of the drug trafficking and the initial case review process, 260 active cases were selected as having met Task Force case standards and available Task Force resources were committed. These initial Task Force cases, being predominately complex multi-agency investigations of the organizers and financiers of high-level drug

trafficking enterprises, usually have more than one focus and numbers presented below will total more than the approved 260 Task Force cases.

Type of Activity	Number of Cases
Importation	128
Manufacture	21
Distribution	188
Financial Underwriting	34
Money Laundering	79
Public Corruption	22

Ninety-nine percent of all Task Force cases involve more than one investigative agency. The following chart provides an overview of the number of cases worked by Treasury agencies, by Justice agencies and by both Treasury and Justice agencies.

Department	Cases
Treasury (IRS, Customs, ATF)	17
Justice (FBI and DEA)	53
Joint Treasury and Justice	190
	260

In addition, state and local law enforcement agencies are actively participating in a majority of the cases.

19. How are targets for Task Force investigations being selected? Are the targets the best available cases that have some opening for investigation, or are they the highest known traffickers regardless of how easy or difficult an investigation would be?

All the investigative and prosecutive resources assigned to date are working on the 260 Task Force cases. These 260 cases have been approved by the United States Attorneys for the judicial districts involved, the Task Force Coordinators, and by officials of the Department here in Washington to ensure that they meet the strict standards established for Task Force cases. Responsibility for future Task Force targeting and case selection will rest with the agents and attorneys in the fields. These professionals are best prepared to deal with the nuances of a case and institute a successful prosecution. In the future, all Task Force cases will be approved in the field and not in Washington as was the case with the initial 260 cases selected.

Future investigations and case selection will develop from the best available opportunities as well as targeting major drug traffickers and trafficking organizations, including the financiers and money launders. Targeting and case selection will focus on causing the most long-term damage to major drug trafficking and financial enterprises, not on easy arrests and convictions.

20. What criteria are being used to assure that the highest-level trafficking organizations and individuals are being targeted?

The Guidelines for the Drug Enforcement Task Forces provide the standards upon which the U. S. Attorneys, the Assistant U. S. Attorney Task Force Coordinator, and the investigative agency Task Force Coordinators will make the operational investigation and prosecution selections.

Further, the program's organization ensures careful monitoring of the Task Force effort, including case selection, by the Department of Justice and the participating federal investigative agencies. The program is directed by a Working Group, which is chaired by the Associate Attorney General and managed through the Associate's office.

Senator BIDEN. Let me ask a few questions.

Mr. Walker, do you think Customs should have continuing investigative authority like they had in the Florida task force, and they do not have now? Customs builds a case, and they think they should follow up. As I understand it now, they have to turn it over to DEA, or some other agency, and they cannot followup.

Do you think you should maintain that authority?

Mr. WALKER. Well, we start off with the fact that prior to the Florida task force, Customs on a seizure would turn the case over to DEA, and it was our concern that these cases were not being fully followed up, not because DEA was not doing its job in the best way it could, but simply because it did not fit in with DEA's priorities.

Consequently, as the Florida task force was established, we also established, through Justice-Treasury cooperation, a working joint task group, consisting of DEA and Customs, and this group is still in effect. The Florida task force has not been disbanded; it is continuing with full vitality, and this joint task group is still in effect, following up on investigations of interdictions by Customs.

We are currently in the discussion stage with DEA to establish other joint task groups, as the needs arise, to handle interdictions around the country. So right now I do not feel that the situation needs any legislative action. I think it can be handled between the departments, in terms of their working it out between themselves.

Senator BIDEN. I can sympathize with the different departments. You remind me of the Democratic Party—I apologize if I offend you—the Democratic Party 2 weeks before the general election. We all get together and say "Oh, we all love one another, we are all doing well," I realize that is part of the political process so I do not know even why I asked the question, to tell you the truth.

I am glad to hear all is well, all is unified, and things are moving smoothly, and it is really clicking along, and I hope you continue to have these consultative commissions and groups, and it all works out. I just want you to know, a whisper in your ear—if you need help: holler. You can do it quietly. You can send up a message, and I can release an unauthorized report, and Mr. Giuliani can be accused of violating the law. [Laughter.]

Senator BIDEN. Now, I would like to pursue, if I may, the forfeiture provisions. I think we are all pretty much in agreement, at least on the Senate side, but changing the law is only half the problem. Maybe it is only about a third of the solution. One of the things we found with extensive hearings, and with great cooperation, I might add, from Justice and the last two administrations, is that part of the problem is exercising the authority once you have it.

Mr. Walker, I would like to ask you whether or not you believe that Treasury employees receive adequate training regarding enforcement of forfeiture laws?

Mr. WALKER. Well, I think that they do right now. I think there is adequate training, but the problem is that, as we see it, our hands are tied because the administrative forfeiture provisions are so low in terms of the threshold amounts that we are faced with having to maintain custody of huge quantities of forfeited or seized vehicles that have yet to be forfeited judicially. These include air-

planes, boats, and cars that are tying up the efforts of people who would otherwise be out enforcing the law.

I think the training aspect of it is being handled, but that still is a long way from solving the problem.

Senator BIDEN. I was going to ask you whether you see any coordination problems in the joint jurisdictions of Treasury, Justice, DEA, and others in enforcement of the forfeiture laws. I will not ask you that, because obviously you do not see any.

But I would like to ask you, how does that coordination work now?

Mr. WALKER. In the forfeiture aspects?

Senator BIDEN. Forfeiture aspects. Obviously it has been going smoothly.

Mr. WALKER. Well, my experience is that with forfeiture, at least, problems of coordination have not surfaced to my level. If there are problems, they do not seem to be paramount, or major. Most of the forfeitures, however, are conducted independently.

In other words, DEA will seize, or Customs will seize, and then each one will conduct its own proceedings.

Senator BIDEN. Is that not part of the problem?

Mr. WALKER. What part? I mean——

Senator BIDEN. Well, it seems as though it results in double counting and other coordination problems, in terms of who builds the case. It is one thing to seize the Lear Jet, or the single engine Piper Cub that landed with the cocaine, or whatever substance it was smuggling in. It is another thing to use the forfeiture statutes to trace the assets with which Justice is most concerned so that it is able to go after the entire empire. That is what the drug rings are in many cases, where the dollars have already been laundered into legitimate businesses. Many times the handling of a forfeiture, or the seizure of the plane, impacts upon the building of the case and in following additional assets all the way through the chain of that particular organization. What I worry about is that narcotics law enforcement officers, like police officers are understandably interested in collars--in arrests. That is the measure by which we judge their effectiveness. Prosecutors, as Mr. Giuliani knows better than I, sometimes consider the notch on the gun in terms of convictions; that is, the number of convictions, rather than the scope and the depth of the effort. It works the same way with forfeiture proceedings.

It seems to me that we, at least in the past, have not built cases well, and I think that creates a great deal of confusion. When DEA and Justice are trying to build a major forfeiture case, are you all called in, in the sense that you are told: Now such and such organization, which we understand is going to have a major drop over here, is involved in a major effort we have going to build forfeiture cases, and we would like you to do such and such.

Do you understand what I am trying to say?

Mr. WALKER. Yes, I think there is complete coordination on that score. You are talking about an ongoing investigation, where a forfeiture case is being built, and DEA uncovers information that there is going to be some sort of an importation.

In those cases, Customs is notified, participates, and contributes to the coordination of the case, and very often, there is virtually no problem in that kind of a case.

With coordination between the Bureaus, we have two different kinds of forfeiture. One is the seizure at the time of interdiction, the other is a kind of forfeiture that is built after a judicial proceeding. They really are separate, and they can be viewed separately.

Justice clearly runs the latter, and DEA generally puts those cases together, but to the extent that there is coordination with the Treasury Department in, say, the financial aspects of the case, that does not seem to be posing any problem.

Mr. GIULIANI. Senator, may I just add something to what you are saying?

Senator BIDEN. Sure.

Mr. GIULIANI. I do not think seriously we are really here saying that there are no problems in the coordination as among all of the agencies that are involved in drug enforcement. There are problems, and there always will be.

John and I were assistant U.S. attorneys together in the Southern District of New York, 8 or 10 years ago, and there were really problems then, and basically you had agencies almost shooting with each other over who gets credit for, as you point out, who gets credit for the arrest, or who gets credit for the informant, and who gets to use the informant, and I think we have come a long way.

The prior administration, this administration, with the help of the Congress, and a lot of other people are interested in this, and I think we have come a long way in doing a much better job of coordinating it. Usually the best way to coordinate an activity like this, that ends up solving all of the problems, and that is pretty much the philosophy that John has used at Treasury, and that we have used at Justice, is to get the agents to work together. If you can put them together in the field, working together on an investigation, all of a sudden they find that they can share information, that it is to their mutual benefit to share information, and a lot of the stereotypes that one agency has about another breakdown.

When we first got involved in the coordination of the FBI and DEA, there were an awful lot of stereotypes that the FBI had about DEA, and that DEA had about the FBI. Judge Webster selected one particular FBI agent to negotiate with another DEA agent as to the guidelines that they would come out with, and the agent, after about 3 or 4 days of negotiating, came to my office and said, hey, you know something, those guys actually are pretty good. And that is exactly what has happened now with the FBI and DEA working together.

There will still be problems, there will still be situations where you want information faster than you get it, or you believe your investigation is very important, and therefore it should be followed up, and somebody disagrees. It is very important that we have mechanisms for bringing those problems up to a high enough level so that if it is necessary, John can sit down, as it has happened on three or four occasions, I guess, with Judge Webster, and Bud Mullen, and work out those problems, and any other ways in which

we can do that better, we are appreciative of considering, and working on.

I think—and I do not mean this to sound like we are boasting, but I think cooperation has worked between, at least Justice and Treasury, Customs, DEA, and FBI, a lot better in the last 2 years, just by virtue of getting together both at a high level and at the agent level, than it ever has before, and there is no reason why that would not continue. It is very important to build institutions that accomplish that as well.

But I believe that cooperation is working better than it ever has before, albeit that there are problems.

Mr. WALKER. If I could just elaborate on that just a little bit.

There is naturally a built-in tendency on the part of every law enforcement agency to build an esprit-de-corps a sense of eliteness about itself, and this tends to inhibit coordination or cooperation, because each agency likes to think of itself as something special.

Without attempting to break down that spirit, there are certainly ways in which mutual respect could be generated between the agencies. One is the use of the joint task force, and we have used joint task forces more, I think, than they have been used in the past, both in south Florida, in the joint task group that between DEA, Customs, I mentioned earlier, and also in the interdiction effort; but also largely through the efforts of Mr. Giuliani in establishing the 12 new joint task groups that were announced by the President last October.

These will, we feel, contribute greatly to reduced tensions and conflicts between agencies, increase cooperation, and maximize the effort.

Also, on a more localized level, the prominent role that is being played by U.S. attorneys, in running joint task groups, is a mechanism that seems to be working. At Treasury, we like to work under U.S. attorneys. We feel that this is a good mechanism for promoting cooperation and coordination among agencies.

Senator BIDEN. If, at Treasury, you like this coordination, why is it that there is the need for Treasury to have separate control of their budget and their personnel in the Organized Crime Task Force. I thought the Attorney General said to us last year that there was not a need for the approach I was suggesting because the task forces would allow him to have the authority they needed in order to make the task forces work.

I am a little confused as to why budgetary control of your portion of the task forces is back in Treasury.

Mr. WALKER. I think, and I would like Rudy to comment on this, I think one of the core principles of the new task force is that we were not setting up a new law enforcement agency. We were taking existing agencies, and providing a framework, a mechanism for coordinating their activities in a meaningful way. We were not setting up a new bureaucracy or authority to which the Congress would appropriate funds.

So one of the principles that was established here was that each agency would retain autonomy over its own people, in terms of administrative controls, and also budget authority, with the exception of the first year.

For the first year, we agreed that Justice would go forward and ask for the funds, in order to expedite the starting up of these task forces. But that was done to speed up the process in the first year only, and was not intended to be any kind of precedent for the future.

Obviously there are considerations, including congressional considerations, that have a bearing on this. We have our own funding levels before our Appropriations Committee.

Senator BIDEN. We misunderstood that, or at least I did. The fiscal year 1983 budget message, which was sent up with the request said, and I quote,

> Single appropriation will provide the Attorney General with the necessary management tool—meaning him—to reallocate resources among the organizational components of the task force, as well as between the regions, with undue delay.

I guess that is your point.

> As Cabinet officer with responsibility for task forces, the Attorney General must have the authority over the resources to approve for the effort. Failure to provide this authority would weaken the Attorney General's ability to coordinate the activities of many of the organizations of the three Cabinet agencies comprising this effort.
>
> Finally, it is believed that the single appropriation will reduce competition among the participating agencies. Previously such efforts have evidenced competition for resources among individual agencies at the expense of the overall effort. From the perspective of Congress, a single appropriation will facilitate the legislative oversight and review of the process.

I do not think it was unreasonable for us to believe that was the way in which this approach would continue. I would be very surprised if the majority thought that it was not going to go that route. It seems as though the reason that it is changing is that the faction fighting is back.

Mr. GIULIANI. It is unfortunate, Senator, that it was written that way. You are absolutely right. It is certainly justifiable to conclude from the way it was originally presented, and what you read, that that was the permanent arrangement, the way in which the task forces will be budgeted. But in fact, from the time that it was first presented, it was supposed to be a budget that the Attorney General would control the first year, for two purposes.

The one that John mentioned, which is because it had to be done quickly, and second, so that it could be formed up with some coherent overview of all of the agents that were going into it, and how they would be deployed throughout the country, and then as soon as possible, and I believe right from the very beginning, that that was the second year.

As soon as possible, budget authority would be returned to the agencies that were involved. Unfortunately, whoever wrote that, concentrated on the first half, and not the second half.

Senator BIDEN. Well, I have trespassed on your time. I will submit a number of questions for the record.

I will conclude with one last question, and one more comment.

The question relates to the death penalty.

Without arguing the merits, or lack thereof, of the death penalty as a deterrent, or whether or not it is constitutionally permissible, or whether or not it is cruel and unusual punishment, I would think this to be a very practical question.

There have been a number of cases, not in the hundreds, but tens of cases, in the last decade and a half that you have documented, where a person who in fact was convicted of a capital offense, was later determined, as a consequence of the appearance of an additional witness, or material in the file, or whatever, to be innocent of the crime. This situation has surfaced in several Pennsylvania cases in the last year and a half.

That is the reason I am against the death penalty. I do not have any constitutional objection, quite frankly. I do not have an objection that relates to the morality of the issue. I do not believe that it is beyond the power of the Government to enforce such a statute.

Consequently, what I have been attempting to promote as an alternative to the death penalty, has been a provision that would require for capital offenses a minimum mandatory sentence with no probation and no parole unless proof that the person did not commit the crime came to light.

Now, my question to you is, as a practical matter, assuming for the moment that the Biden alternative were to prevail, what would be the Department's argument against such a provision?

Is it that this provision would clog the death row, or it would cost too much money? What would be the rationale to oppose such a provision in the law, if the administration would oppose it?

Mr. JENSEN. Perhaps I did not get the full comport of your proposal.

Senator BIDEN. It would be an alternative to the death penalty.

Mr. JENSEN. The alternative would be life in prison?

Senator BIDEN. Without possibility of probation, or parole.

Mr. JENSEN. Then that is simply the issue, on a policy level, or in terms of the criminal justice, or a social level, is whether or not you have the death penalty at all. It gets back to precisely the kind of social decision that you are talking about before. It gets into the whole issue of, in terms of morality, and the social value, and the reason why a criminal justice system ought to have a death penalty.

There are arguments about this, and I think what you are simply taking is the argument that because of your feeling about the inability of the system to arrive at a permanent verdict, that means that you would not have a death penalty. That is an issue of debate.

I would debate it on the other side. But I think that what your argument would be, would simply create a system where you had life imprisonment without parole as being the top level punishment available.

I simply say that our argument, as we put it forward, is that the punishment that ought to be available is the death penalty.

Senator BIDEN. Because it is a stronger deterrent?

Mr. JENSEN. That is correct. It is almost an argument in terms of, that it is, what society wants by way of a criminal justice system sanction for the most egregious and outrageous offenses committed in that society, and that I had some experience in California, trying a lot of cases in this area, and they introduced the concept you talk about, in terms of an alternative, that is, you could have a death penalty or life in prison, without parole. That was a new concept, it was not a part of California law before.

The experience we had was that jurors faced with that decision, when they could decide either death penalty, or life imprisonment without parole, did in fact choose the death penalty.

Senator BIDEN. One last comment. I think that the message that Senator Kennedy and I will try to communicate to the Attorney General, is in very little disagreement with the essential issues.

If I set out a list, and said you could only have four or five things, I would be surprised if the four or five pieces of legislation you picked were not the four or five that the majority of the Senate would pick. I would hope that we could get to the point where we are able to pick out what we can agree upon between the Democratic package that was introduced and the administration's package since they are similar in size and scope, because we have to get something through the House.

I want to publicly thank your Department. I am probably harming your reputation by saying you are a terrific guy. Your congressional liaison has been very, very good, and I hope that will continue. We hope that you do not pigeonhole the bill as a Democratic bill, or a Republican bill, because that will serve only to defeat our common goals.

You saw that happen with the criminal code omnibus bill. Well, this is a minicriminal code, with additional provisions.

Let us work together to see what we can accomplish.

Thank you very much for your time. Good luck, gentlemen, in Manhattan. I hope things work out well for you.

Thank you very much.

[Whereupon, at 12:48 p.m., the subcommittee adjourned, subject to the call of the Chair.]

[The following was received for the record:]

FORMAL STATEMENT

OF

THE DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

REGARDING

S. 829, THE COMPREHENSIVE CRIME CONTROL ACT OF 1983

TITLE I -- Bail Reform

The first title of the "Comprehensive Crime Control Act" addresses a matter of the highest priority: the urgent need for substantial improvements in federal bail law. In recent years, there has been a growing consensus among members of the Congress, the judiciary, the law enforcement community and the public at large, that legislation to cure the striking deficiencies of our bail laws must be enacted.

Certainly, it cannot be said that our current bail system is in all respects a failure. Present law, the Bail Reform Act of 1966, provides a workable and responsive framework for releasing non-violent offenders who pose little risk of flight, and this beneficial aspect of current law is retained in our bail amendments. However, it is with respect to the most serious offenders, the habitual violent or dangerous defendant or the well-heeled drug trafficker, that the system fails. These failures are a source of growing frustration to effective law enforcement and have fostered the public's increasing disillusionment with a criminal justice system that too often appears unable to protect the public safety or to assure that criminals are brought to trial.

To address these problems, the bail reform title of our bill would strengthen the ability of the courts to ensure that defendants appear for trial and would, for the first time, recognize defendant dangerousness as a legitimate consideration

in all bail decisions. The bail reform provisions of our bill are no doubt familiar to many of you. They are virtually identical to comprehensive bail reform legislation passed by the Senate last year by an overwhelming 95 to 1 vote and which, as S. 215, is now pending approval by the Judiciary Committee. As was evidenced in this fully bipartisan vote for strong bail legislation, the current bail reform movement is not a matter of politics or ideology. Rather, it is derived from more than fifteen years of experience with our present bail laws -- an experience that has clearly illustrated the need for change.

For example, in South Florida, despite the fact that the average bond for drug defendants is $75,000, seventeen percent of these defendants never appear for trial. Bonds in the hundreds of thousands of dollars are forfeited as major drug defendants flee the country to avoid prosecution. For persons in the enormously lucrative drug trade -- a trade that has been estimated to run in the tens of billions of dollars annually -- forfeiture of huge bonds has become a simple cost of doing business and ultimately an easily met cost of escaping conviction.

Although this alarming incidence of bail jumping points out the need to improve current law, at least current law provides a framework for addressing the problem of defendants who are very serious flight risks. The problem of the release of extremely dangerous defendants, however, is one that current law virtually ignores. Two cases from the Eastern District of Michigan amply illustrate the need to put considerations of defendant dangerousness on an equal footing with considerations of risk of flight in the courts' bail determinations.

In November of last year, George Gibbs was charged with the armed robbery of a credit union. Despite the violent nature of the offense, very strong evidence of his guilt, and the fact that Gibbs was a suspect in four other armed robberies, the magistrate, over the protests of the government, set a $25,000 bond with only a 10% deposit required, citing his inability under current law to consider evidence of the defendant's dangerousness in setting bail. Although a district judge changed the bond to a

cash surety bond after an appeal by the government, the amount of the bond was not increased, and Gibbs was able to meet it almost immediately. Four days later, Gibbs and a partner held up a bank, striking a teller, threatening to kill the assistant manager, and shooting the police officer who pursued them as they attempted to escape.

The second Michigan case also involved a defendant charged with bank robbery. In 1979, Michael Dorris was convicted of the armed robbery of a Michigan bank. Last year, within a few months after Dorris had been released on parole, the same bank was robbed at gunpoint again. Within hours, the FBI arrested Michael Dorris for this second robbery. He was not far from the scene of the crime and weapons and a large amount of cash were also seized at the time of his arrest. Like George Gibbs, Michael Dorris was soon released on bail. At a subsequent meeting with his parole officer, Dorris was informed that in light of his latest arrest, the officer would seek revocation of his parole. Dorris, who under a rational bail system clearly should have been held in custody in light of the seriousness of the offense charged and his status as a parolee, simply got up and left when the parole officer went to locate a marshal. Inadequate bail laws could do nothing to stop the revolving door of the criminal justice system. Eventually Dorris resurfaced, but only after weeks of valuable FBI investigative effort had been wasted in trying to locate him.

The Administration's proposed bail legislation, like similar bills introduced in this and the last Congresses, sets out a comprehensive statutory scheme that would for the first time provide the federal courts with adequate authority to make release decisions that effectively protect both the integrity of the judicial process and the public safety.

The most prevalent criticism of the current bail system is that it does not permit the courts, except in capital cases, to consider the danger a defendant may pose to others if released.1/

1/ The broad base of support for permitting consideration of defendant dangerousness in all pretrial release decisions is cited in the Judiciary Committee's report on S. 1554 in the last Congress -- legislation that is for the most part identical to the Administration's bail reform proposal. S. Rep. No. 97-317, 97th Cong., 2d Sess. 36-7 (1982).

The sole issue that may be addressed is likelihood that the defendant will appear for trial. Thus our judges are without statutory authority to impose conditions of release geared toward assuring community safety or to deny release to those defendants who pose an especially grave danger to others. As a result, when making release decisions with respect to demonstrably dangerous defendants, judges are faced with a dilemma: they may release the defendant pending trial despite the fear that this will jeopardize the safety of others, or they can find a reason, such as risk of flight, to detain the defendant by imposing a high money bond. Many critics of current bail laws believe that too often the resolution of this dilemma may cause the courts to make intellectually dishonest determinations that the defendant may flee when the real problem is that he appears likely to engage in further dangerous criminal conduct if released. Our law denies the opportunity to address the issue of dangerousness squarely.

Federal bail law must be changed so that it recognizes that the danger a defendant may pose to others is as valid a consideration in the pretrial release decision as is the presently permitted consideration of risk of flight. This change is one of the most important elements of our proposed bail legislation.

Support for giving judges the authority to weigh risks to community safety in bail decisions is widely based and is a response to the growing problem of crimes committed by persons on release -- a problem that exists in spite of what many believe is a not uncommon practice of detaining especially dangerous defendants through the imposition of high money bonds. In a recent study conducted by the Lazar Institute, one out of six defendants were rearrested during the pretrial period. Nearly one-third of these persons were rearrested more than once, and some as many as four times.2/ Similar levels of pretrial crime were reported in a study of release practices in the District of Columbia where thirteen percent of all felony defendants were

2/ Lazar Institute, "Pretrial Release: An Evaluation of Defendant Outcomes and Program Impact" 48 (Washington, D.C. August 1981).

rearrested. Among defendants released on surety bond, the form of conditional release reserved for those who are the greatest bail risks, the incidence of rearrest reached the alarming rate of twenty-five percent.3/

Allowing the courts to consider evidence of dangerousness and to impose conditions of release specifically geared toward reducing the likelihood of further criminal conduct such as third party custody or required drug or alcohol abuse treatment, would be a significant improvement in current law. It is, however, only a partial solution, for we must recognize that with respect to certain defendants, it will be clear that no form of conditional release will be adequate to address the significant threat they will pose to the safety of the innocent public if released. Therefore, it is essential that amendment of our bail laws include, as does our current legislative proposal, authority to deny release altogether in such cases.

Pretrial detention has, in the past, been a very controversial issue. While opposition to this concept still exists, increasing numbers of legislators and persons involved in the criminal justice system have come to realize that authority to deny bail to extremely dangerous defendants is a necessity.4/ Pretrial detention is, of course, already part of our bail system. The authority of the courts to deny release to defendants who are especially serious flight risks or who have threatened jurors or witnesses has been recognized in case law. Pretrial detention based on dangerousness was incorporated in the District of Columbia Code passed by the Congress in 1970 and is authorized under federal juvenile delinquency statutes. Moreover, a significant number of federal defendants are held in custody pending trial because they are unable to meet high money

3/ Institute for Law and Social Research, "Pretrial Release and Misconduct in the District of Columbia" 41 (April 1980).

4/ For a discussion of the constitutionality of pretrial detention, See S. Rep. No. 97-317, supra note 1, at 37-8.

bonds.5/ -- and many argue that at least a portion of these cases of detention result from the imposition of bonds that are more a reflection of a judge's understandable concerns about the threat the defendant poses to others than of concerns that he will not appear for trial.

Of course, the availability of pretrial detention authority will not entirely solve the problem of bail crime, nor is pretrial detention appropriate for other than a small, but identifiable, group of the most dangerous defendants. However, where there is a high probability that a person will commit additional crimes if released pending trial, the need to protect the public becomes sufficiently compelling that a defendant should not be released. This rationale -- that a defendant's interest in remaining free prior to conviction is, in certain circumstances, outweighed by the need to protect societal interests -- is, in essence, that which has served to support court decisions sanctioning the denial of bail to defendants who have threatened jurors or witnesses or who pose significant risks of flight.6/ In such cases, the societal interest at issue is the need to protect the integrity of the judicial process. Surely, the need to protect the innocent from brutal crimes is an equally compelling basis for ordering detention pending trial.

Because of the importance of the defendant's interest which is at stake when pretrial detention is considered, the authority to deny release should be available only in limited types of cases, only after a hearing incorporating significant procedural safeguards, and only when the findings on which the detention order is based are supported by clear and convincing evidence.

5/ For example, in fiscal year 1982, 18.4% of federal defendants were subject to some period of pretrial detention, and 61.3% of those defendants were held for more than ten days. 1982 Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts (hereinafter cited as "1982 Annual Report") 352-5 (Table D-13). It is likely that a good proportion of the more substantial terms of pretrial detention were due to difficulties in meeting high money bonds.

6/ See, e.g., United States v. Wind, 527 F.2d 627 (6th Cir. 1975); United States v. Abrahams, 575 F.2d 3 (1st Cir.), cert. denied, 439 U.S. 821 (1978).

The Administration's pretrial detention provision meets each of these requirements, and so provides a framework in which detention will be ordered only when no other alternative is available.

Our legislation also contains a specialized pretrial detention authority that would have been especially appropriate in the Dorris case we mentioned. This provision allows a temporary ten-day detention of defendants who are arrested while they are already on bail, parole, or probation. During this period, the defendant may be held in custody while the original releasing authorities are contacted and given an opportunity to take appropriate action. A similar provision of the District of Columbia Code has been cited by former United States Attorney Charles Ruff as one of the most effective tools available to his Office in dealing with recidivists.

As the statistics on bail jumping among drug defendants noted earlier indicate, the problems with current federal bail law aren't confined to the area of defendant dangerousness. The goal of assuring appearance at trial -- the very purpose of our present statute -- isn't being adequately met. Therefore, our bail reform proposals include amendments to address this problem as well. First, we provide clear authority for the courts to inquire into the sources of property that will be used to post bond and to reject the use of proceeds of crime for this purpose. Our experience with drug defendants has shown that the forfeiture of even very large bonds in these circumstances is not a sufficient disincentive to flight. Second, our proposals codify the existing authority we mentioned earlier to deny release entirely to persons who are especially severe flight risks. Third, our proposal would enhance the deterrent value of the penalties for bail jumping by making them more closely proportionate to the severity of the offense with which the defendant was charged when he was released and requiring that they run consecutively to any other term of imprisonment imposed.

A final aspect of our proposal -- one that has been incorporated as well in other bail reform bills now before the Congress -- would address what the Attorney General's Task Force on

Violent Crime described as "one of the most disturbing aspects" of current federal bail law, namely a standard which presumptively favors release of convicted persons who are awaiting imposition or execution of sentence or who are appealing their convictions. The Task Force's reasons for recommending that this standard be abandoned are sound ones:

> "First, conviction, in which the defendant's guilt is established beyond a reasonable doubt, is presumptively correct at law. Therefore, while a statutory presumption in favor of release prior to an adjudication of guilt may be appropriate, it is not appropriate after conviction. Second, the adoption of a liberal release policy for convicted persons, particularly during the pendency of lengthy appeals, undermines the deterrent effect of conviction and erodes the community's confidence in the criminal justice system by permitting convicted criminals to remain free even though their guilt has been established beyond a reasonable doubt."7/

In the Administration's bail proposal, post-conviction release would be available only in those cases in which the convicted person is able to produce convincing evidence that he will not flee or pose a danger to the community and, if the person is awaiting appeal, that his appeal raises a substantial question of law or fact likely to result in reversal of his conviction or an order for a new trial. No lesser standard, in our view, is justifiable, particularly since the reversal rate for federal convictions is only approximately ten percent.8/

Substantial improvements in federal bail laws are urgently needed. We can no longer have a statutory scheme that requires judges to ignore disturbing evidence of defendant dangerousness and we must do more to assure that defendants who are seeking release meet their responsibility to appear for trial. The bail amendments proposed by the Administration, and other similar bail reform legislation introduced again this year in the Congress such as S. 215, fulfill these needs and provide a framework for the courts to strike an appropriate balance between the legiti-

---

7/ Attorney General's Task Force on Violent Crime, Washington, D.C., August 17, 1981, at 52.

8/ In fiscal year 1982, the reversal rate for federal criminal cases was 9.7%. 1982 Annual Report, supra note 5 at 196.

mate interests of the defendant and the equally legitimate interests of the public in preserving the integrity of our judicial system and protecting community safety.

TITLE II - SENTENCING REFORM

I. Introduction

The sentence in a criminal case is imposed at the end of a highly structured process designed to assure fairness to the defendant and to the public. Ideally, this sentence will represent society's statement as to the relative seriousness of the defendant's criminal conduct, and will deter criminal conduct by others. Unfortunately, despite the best efforts of the federal criminal justice system under current law, the sentence in a particular criminal case frequently fails to achieve these goals. This is true in large measure because the system fails not only to provide appropriate sentences in many individual cases, but even fails to provide a mechanism that might be capable of consistently achieving such a result.

In the last ten years or so, 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 developed substantial support for an approach by which the shortcomings might be remedied -- the creation of a system such as that set forth in title II of S. 829, a system that couples sentencing guidelines with determinate sentencing. These provisions are substantially identical to sentencing provisions approved by this Committee and the full Senate several times since the enactment of S. 1437 in 1978, most recently in the past Congress with the repeated approval of the sentencing provisions contained in S. 2572 and added by the Senate to H.R. 3963. These provisions also formed the basis of a sentencing reform package passed by the State of Minnesota, which the National Academy of Sciences has recently reported to be the most

successful of any of the State or local sentencing reform efforts. The Minnesota system, while providing less sophisticated guidelines than we contemplate for the federal system, is the only State or local system in operation that is similar to this proposal in every significant respect. In addition, I was pleased to note that the Judicial Conference of the United States has recently proposed legislation that contains a form of determinate sentencing guidelines system.

II. Sentencing Under Current Law and Practice

A. The Sentencing Process

A federal judge might sentence only a few dozen offenders a year, and a particular offender before him for sentencing might be the only person he has sentenced in a year or even longer for committing a particular offense. The judge, while trained in the law, has no special competence in imposing a sentence that will reflect society's values, and federal statutes do little to assist in correcting this problem.

Current federal law provides a sentencing judge with the discretion to impose sentence pursuant to numerous sentencing options and little or no guidance as to how to choose among the options. The statutes contain no statement of the purposes of sentencing, aside from occasional vague references to rehabilitation, and no direction to the judges as to the offense and offender characteristics that should be considered in determining an appropriate sentence. Federal sentencing law is limited mostly to the provision of a maximum term of imprisonment and maximum fine that may be imposed for violating a particular criminal statute, and these maximum sentences only indicate the congressional view of the appropriate sentence for the most serious offense committed by an offender with the most serious criminal record.

As a result of this absence of guidance, judges are left to impose sentences according to their own notions of the purposes of sentences. They are not required to state their reasons for choosing a particular sentence, and many of them do not. Sentences are reviewable only for illegality or for constitutional violation; a sentence that is substantially out of proportion to those for similar offenses committed by similar offenders is not otherwise subject to challenge.

B. Sentencing Options

While current law provides sentencing alternatives of probation, fines, imprisonment, and restitution, the law fails to provide a mechanism to inform sentencing judges how they should choose among them and fails to assure that each option is useable to serve the purposes of sentencing in the best way possible.

1. Probation. -- Probation is treated as a suspension of the imposition or execution of a sentence rather than as a sentence itself. Partly for that reason and partly because current law does not recommend possible probation conditions in any detail, there has been little incentive to impose conditions on probation that might make it a more effective punitive or remedial sanction -- it is generally viewed solely as a vehicle for rehabilitative efforts. This is especially troubling because of the crowded conditions of our prisons. As the Attorney General has stated recently, effective use of probation conditions for many non-violent offenders could alleviate much of the stress on our prison capacity without undermining the desirability of imposing prison sanctions in appropriate cases.

2. Fines. -- The maximum fine levels for criminal offenses vary inexplicably. They usually also reflect penalty levels of a century or more ago, and today are much too low to be a realistic measure of the seriousness of most offenses. They are often so low that they are not a realistic substitute for a

term of imprisonment when the nature of the offense might otherwise justify their use. Even if a fine is imposed, it may be difficult to collect under current law, which relies heavily on cumbersome and inconsistent state collection procedures.

3. Restitution. -- The newly enacted Victim and Witness Protection Act of 1982 contains, as you know, important new provisions for restitution to victims of crime in many federal criminal cases. Early experience with the provisions demonstrates that additional guidance as to how to determine the amount of restitution and how a payment schedule might be tailored to the financial situation of the defendant would be helpful to sentencing judges.

4. Imprisonment. -- Responsibility for imposing a term of imprisonment and determining its length is divided today between the judicial and executive branches. Under a two-step process, the sentencing judge imposes a term of imprisonment and sets the outside limit of the period of time a defendant may spend in prison, and then the Parole Commission decides what portion of the maximum term the defendant will actually serve. This practice was originally based on an outmoded 19th Century rehabilitative theory that has proved to be so faulty that it is no longer followed by the criminal justice system -- yet the outmoded process remains in place trying as best it can to use a more modern approach to sentencing.

Current imprisonment statutes were enacted at a time in which the criminal justice system utilized a "medical model" for determining when a prisoner should be released. Criminality was viewed as a disease that could be cured through rehabilitative programs in a prison setting. While the purpose of the sentence was to rehabilitate, no one could know when that rehabilitation would occur. Therefore, a defendant was sentenced to a term of imprisonment intended to be longer than the time it would take for rehabilitation to occur. Periodically, parole authorities would examine the prisoner's adaptation to the prison

setting in order to determine whether he had been rehabilitated and could be released into society before the expiration of his imposed prison term.

There are two principal problems with this theory: First, many sentences to terms of imprisonment are designed to serve purposes other than or in addition to rehabilitation. They may be designed to deter future criminal conduct by the defendant or others, to protect the public from criminal conduct of the defendant, or to punish the defendant for his conduct. Periodic review of prison behavior is irrelevant to any of these purposes; a sentence for any of these purposes logically should be set for a definite term.

Second, even if the sentence is for purposes of rehabilitation, the theory leading to an indefinite term is unsound. Behavioral scientists have concluded in recent years that there is no reliable means of inducing rehabilitation. More importantly to consideration of this theory, they have also concluded that no one can tell from a prisoner's behavior in prison or before a parole board whether or when he has become rehabilitated. Consequently, the basic reason for an indeterminate sentence and thus for the existence of parole boards has disappeared.

The federal Parole Commission today acknowledges that it cannot tell from a prisoner's behavior whether or 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 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 near the time of his incarceration -- and the Commission now does so in almost all cases.

Thus two branches of government -- at approximately the same time and based on essentially the same information -- set two different sentences to be served by the same defendant, with one of these sentences publicly announced and the lower one that will actually be served announced in private. This occurs because of attempts by the criminal justice system to adapt an outmoded mechanism to modern thinking about sentencing. The result is that the judges attempt to adjust their sentences to override parole guidelines they see as inappropriately harsh or lenient, and that the parole authorities, in attempting to even out the resulting disparity in sentences, regularly ignore the actual sentences imposed by judges.

5. Specialized sentencing statutes. -- Finally, current law contains a number of specialized sentencing statutes that a judge may use in sentencing a specific category of offenders, such as young offenders or drug addicts. These statutes provide little guidance, other than some references to rehabilitation, as to when a judge should use them for a person in the category of offender covered by the statute and when he should not. They also fail to take into account the fact that a particular offender may belong to more than one category covered by these statutes.

One of these statutes, the Youth Corrections Act, has caused particular difficulties. Sentencing judges differ as to whether it should be used at all for violent offenders. Thus, similarly situated offenders sentenced by different judges may be sentenced either under the Act or to a regular adult sentence. Especially since the parole guidelines generally provide less prison time for persons sentenced under the Youth Corrections Act than under regular adult sentencing, the result can be that two young offenders with similar criminal histories who are convicted of similar violent crimes will serve different prison terms simply because they were sentenced under different statutes.

In recent years, a more difficult problem has arisen with the Youth Corrections Act -- the courts have construed the Act to require that the Bureau of Prisons separate YCA offenders from adult offenders. Prisons officials have found the results of complying with these court decisions to be undesirable. Because there are only 1200 YCA offenders now in custody, only three institutions -- located in Petersburg, Virginia; Englewood, California; and Morgantown, West Virginia -- have been set aside to house them, with the result that most of these young offenders must be placed long distances from their homes and families. The placement of all YCA offenders in three institutions has also, in effect, negated the classification process for these inmates. The Bureau classifies inmates into six categories, with level one representing the minimal risk and level six representing the maximum risk. The result of placing these offenders in three institutions is a mixing of the criminally sophisticated with the unsophisticated, the hardened with the naive, the assaultive with the easily victimized, and the first time offender with the repeater. The distance from home, combined with the limited ability to separate these prisoners according to the prisoner classification system, compounds discipline problems with managing a youthful population more prone than an older population to act out and be disruptive.

The Youth Corrections Act should be repealed, not only because age is only one factor that may play a role in determining the appropriate sentence, but because the separate facilities for young offenders sentenced under the Act have proved unworkable. Thus, the Department of Justice strongly disagrees with the suggestion of the Judicial Conference in its proposed bill that sentencing judges be permitted to sentence young offenders to separate facilities.

C. Consequences of the Current System

The almost inevitable result of the proliferation of sentencing options and the lack of statutory guidance as to how to use them is considerable disparity in sentences imposed by federal judges. This disparity has been documented in numerous studies, including one conducted by the Federal Judicial Center of district judges in the Second Circuit and a more recent study conducted for the Department of Justice by INSLAW, Inc. and Yankelovich, Skelly and White, Inc. In the latter study, 208 federal judges were presented with 16 hypothetical cases. They agreed in only 3 of 16 cases on whether to sentence the defendant to prison. The study found that 21 per cent of sentence variation was due to the tendency of some judges to impose generally harsher or more lenient sentences than other judges, rather than to differences in offense or offender characteristics, and that even more variation was due to the tendency of a particular judge to impose harsher or more lenient sentences than other judges for particular classes of offenses or offenders.

Various attempts by the Parole Commission and the judicial branch to reduce this disparity have been ineffective. The parole guidelines have served to reduce disparity in terms of imprisonment, but, as a recent General Accounting Office study shows, they have not been fully successful in doing so. And, of course, the parole guidelines cannot do anything about a probationary sentence that should have been a prison sentence or vice versa, or about an inappropriate level of fine or restitution, or about a prison term that makes a prisoner ineligible for parole on his guidelines date or results in his release before that date.

The judicial branch now supplies sentencing judges with information in the pre-sentence report concerning the parole guidelines probably applicable to the defendant and the kinds and

lengths of sentences that are imposed nationwide and in the judge's district for the defendant's offense. I understand that it is in the process of improving its data collection to include more detailed information on sentences imposed on persons with particular offense and offender characteristics. At this stage, the information is useful to inform judges of past sentencing practices; it is not designed to alter those practices that need to be altered to assure that they adequately reflect sentencing goals.

The perception of sentencing disparity has serious consequences for the public and the criminal justice system. It tends to encourage defendants to relitigate their guilt continually. Combined with the artificial process by which judges impose long prison terms and parole authorities set early release dates shortly thereafter, it serves to undermine public confidence in the criminal justice system, thus robbing the system of some of its potential deterrent effect.

III. Sentencing Under Title II of the Bill

Title II of the bill would completely revise current law to legislate the purposes of sentencing, to create a mechanism to assure rationality and fairness in sentences designed to carry out those purposes, and to provide appellate review of sentences to assure their legality and reasonableness.

A. Legislatively Prescribed Purposes

Title II would for the first time give legislative recognition to the appropriate purposes of sentencing. The stated purposes specifically include reflecting the seriousness of the offense and just punishment, deterrence of criminal conduct, protection of the public from further crimes of the defendant, and providing rehabilitation programs in the most effective manner. The bill deliberately does not favor one purpose over another, since any one of these purposes may be the

major purpose of a sentence in any given case. For example, the the major purpose of a sentence to imprisonment for a violent offender may be just punishment while the major purpose of a sentence to probation conditioned on obtaining mental health treatment for a non-violent offender may be rehabilitation. The bill does recognize that rehabilitation should not be the purpose of sentencing a defendant to imprisonment nor a factor in determining the length of a prison term. Of course, this does not mean that the Department will not continue to make every effort to provide suitable rehabilitation programs to prisoners in its custody. It is simply unfair to send a person to prison for rehabilitation or base the length of that term on whether he is rehabilitated when we recognize that no one knows when or whether a prisoner has been rehabilitated.

B. The Sentencing Process

The sentencing judge would impose sentence after considering the purposes of sentencing and sentencing guidelines promulgated by a commission in the judicial branch that would recommend an appropriate kind and range of sentence for each combination of offense and offender characteristics. The judge would be required to impose sentence in accord with the guidelines recommendation unless he found that a factor in the case was not adequately considered in the guidelines and should affect the sentence. If the judge imposes sentence outside the guidelines, he must state specific reasons for doing so. The question whether the sentence is reasonable is subject to appellate review at the request of the defendant if the sentence is above the guidelines and at the request of the government, made on behalf of the public and personally approved by the Solicitor General or the Attorney General, if it is below the guidelines. If the sentence was to a term of imprisonment, the term imposed by the judge would represent the actual time served less a small amount of credit that could be earned for complying with institution rules. The Parole Commission and its function

of setting release dates would be abolished, and the current practice of judges artificially inflating prison terms because of the parole system would be eliminated. If the sentencing judge thought a defendant would need street supervision following his term of imprisonment, he could impose a term of supervised release to follow the term of imprisonment.

Sentencing guidelines and policy statements would be promulgated by a United States Sentencing Commission in the judicial branch. The Commission would consist of seven members who would be appointed by the President by and with the advice and consent of the Senate, after the President had consulted with judges, prosecutors, defense counsel, and others interested in the criminal justice system for their recommendations. The Commission members, including any members from the federal judiciary, would serve full time and would be paid at the rate of judges of the federal appellate courts. The bill provides for a staff of highly qualified professionals for the Commission, and directs that the Commission, in addition to promulgating guidelines, engage in sentencing research and training.

C. Sentencing Options

Each of the sentencing options would be improved under title II -- and the sentencing guidelines will enable the system to make the most effective use of these improved sentencing options.

1. Probation. -- Probation would become a sentence in itself, rather than a deferral of imposition or execution of another form of sentence. If a sentencing judge imposed probation in a felony case, he would be required to impose, at a minimum, a condition that the defendant pay a fine or restitution or engage in community service. In addition, the judge would be required to impose as a condition of probation in every case a prohibition against committing a new offense. The bill also

lists a number of new conditions that may be imposed on a sentence of probation for consideration of the Sentencing Commission and the judges.

2. Fines. -- Title II significantly increases maximum fine levels for most federal offenses. The maximums are increased to a quarter of a million dollars for an individual convicted of a felony and half a million dollars for an organization convicted of a felony. The amount within that maximum will be determined according to the sentencing guidelines and will be based in part on the defendant's ability to pay and the seriousness of the offense. Fine collection procedures will be improved by permitting reliance on lien procedures patterned after the federal tax laws.

3. Restitution. -- Restitution provisions are substantially similar to the provisions in the Victim and Witness Protection Act of 1982, with the provisions dovetailed into the new sentencing provisions. This will permit the sentencing guidelines and policy statements to provide more detail than is present in current law as to how the amount of restitution should be calculated and methods by which restitution can be imposed so that it can be paid, for example, in installments if the defendant is a salaried employee. S. 829 also provides for government assistance in collecting unpaid restitution, a measure we believe will improve the enforceability of an order of restitution.

4. Imprisonment. -- As discussed earlier, title II completely changes the way in which the length of a term is imposed, abolishing early release on parole and converting to a system in which the sentence imposed by the judge represents the actual time to be served less good time.

It should be noted that S. 829 differs from the sentencing provisions in S. 668 and S. 830 in two respects.

First, it extends slightly the maximum terms of imprisonment that may be imposed for a particular grade of offense. This will give the Sentencing Commission more flexibility in fashioning sentencing recommendations for the most serious offenses. Second, S.829 does not provide for a repeated reexamination by the courts of long sentences. The Department of Justice is of the view that such a provision only serves to create unnecessary and time-consuming court hearings that are contrary to the purpose of creating a system in which final sentences are publicly announced at the time of sentencing. The defendant will have had an earlier opportunity to appeal his sentence if it is unusually high, and we believe that one review is sufficient. S. 829, like the other bills, does permit reexamination of a sentence in other limited circumstances. The Bureau of Prisons may request reduction of a sentence for extraordinary and compelling reasons, such as terminal illness. In addition, if the sentencing guidelines for a particular offense are lowered and it is consistent with a policy statement of the Sentencing Commission, the court, on its own motion or at the request of the defendant or the Bureau of Prisons, may reduce the sentence of a defendant sentenced under the old guidelines. We believe these limited opportunities to change sentences are sufficient to assure reconsideration of sentence whenever justified.

5. Specialized sentencing statutes. -- S. 829 would repeal all the specialized sentencing statutes that create provisions applicable to only one category of offender. The guidelines system is a far preferable method of determining an appropriate sentence for offenders with particular characteristics since it provides for systematic consideration of all offender characteristics at the same time rather than one isolated characteristic.

D. Advantages of Title II Over Current Law

Title II provides numerous advantages over current law. The most important of these is that it will provide a sentencing

mechanism whose purpose is to assure both fair sentences and the appearance of fair sentences. The sentencing guidelines will enable the sentencing judges to determine an appropriate sentence for a defendant with a particular criminal history convicted of a particular offense, knowing that the sentence is fair as compared to the sentences for all other offenders. Everyone, including the defendant, the public, and those in the criminal justice system charged with implementing the sentence, will know at the time of sentencing exactly what the sentence is and why it was imposed. The characteristics of the offense and the offender that result in a sentence different from that for another offender will be apparent -- and if a sentence is inappropriate, it can be corrected on appeal. The appeal mechanism has another advantage over current law -- it will result in the development of a body of case law concerning whether particular reasons legally justify imposing sentences outside the guidelines. The bill permits not only defendant appeal of an unusually high sentence but government appeal of an unusually low one. Government appeal of sentence -- which is clearly constitutional under the case law and is supported by the Judicial Conference assures that balanced case law will develop on questions of the appropriateness of sentencing either above or below the guidelines.

Title II also makes the sentencing options available to a judge more effective. In particular, it makes probation and fines more useable as options to incarceration in appropriate cases. This usefulness is enhanced by placing these options in a sentencing guidelines system that will recommend when their use is appropriate and when it is not.

Title II should also save the government money after the initial start-up phase. It replaces the expensive and cumbersome parole system with a small Sentencing Commission that will not be involved in individual cases. It may reduce somewhat the repeated challenges to a conviction caused by the fact that a

25-694 O - 84 - 10

defendant thinks his sentence is too high. It may also reduce the caseload of probation officers, since it will not automatically result in post-release supervision of an offender if such supervision is unnecessary.

Before closing the discussion of title II, I should note that the Department welcomes the support of the Judicial Conference of the United States of some form of determinate sentencing guidelines system with appellate review of a sentence outside the guidelines. However, the Department wishes to note particular disagreement with two major substantive points of the Judicial Conference proposal. First, the Department would make the Sentencing Commission a full-time body with members selected after participation by all three branches of government rather than, as proposed by the Judicial Conference, a part-time body selected only by the judicial branch. We believe that it is important that the work of the sentencing guidelines agency be carried out by a highly visible entity that is able to devote its full energies to creation of sound federal sentencing policy -- and that this is especially important at the initial stages of guidelines development and implementation.

Second, we disagree with the intriguing suggestion of the Judicial Conference that the Parole Commission be retained with a substantially altered role. Under the proposal, the judge, after considering sentencing guidelines, would set both the parole eligibility date for a convicted defendant sentenced to prison and his maximum term of imprisonment. The defendant would be released on his parole eligibility date unless the Parole Commission determined that he had not substantially complied with prison rules, in which case the Parole Commission would set a release date within the maximum. The Parole Commission would set conditions of parole release and would determine the consequences of parole violations. These provisions would, in effect, keep an expensive and cumbersome agency in existence primarily to carry

out a function that the Bureau of Prisons performs today and should continue to perform -- that of determining credit toward service of sentence for good behavior. In addition, the proposal seems to perpetuate a problem with current law: the person who receives street supervision following his time in prison is the one who has time remaining on his sentence rather than necessarily the person who needs supervision, and the better the prisoner complies with prison rules the longer his street supervision. The result is a waste of resources on supervising defendants who may not need it at the same time the system fails to supervise others who should be supervised.

IV. Conclusion

The Administration strongly recommends the passage of title II of S. 829. We do have a number of minor technical suggestions that we would like to submit to the Subcommittee shortly.

TITLE III - The Exclusionary Rule

Title III of the bill sets our a modification of the Fourth Amendment exclusionary rule to restrain it to its proper role, namely deterring unlawful police conduct. Our proposal is identical to that submitted by the Administration and introduced by Chairman Thurmond as S. 2231 in the 97th Congress. Our proposal is, simply, that the exclusionary rule would not be applied in cases in which the law enforcement officers who conducted the search acted in a reasonable good faith belief that their actions were lawful.

Before discussing this proposal in greater depth, I would like to discuss the origin and development of the rule and some specific cases which illustrate the very real contemporary problems created by the rule in quite a large number of cases. At the outset, however, I think it is important to address one of the most seriously misplaced arguments raised in the current debate over the rule, the impact of the rule on the crime rate.

Supporters of the rule claim that advocates for modification of the present rule argue incorrectly that reforming the rule will reduce the crime rate. The fact, however, is that advocates for reform do not claim that any such change is a panacea for crime rate reduction. Any thoughtful consideration of contemporary crime must recognize, unfortunately, that there is no single panacea. On the other hand, advocates for reform do point out that the rule operates to free known murderers, robbers, drug traffickers and other violent and non-violent offenders and that a rule of evidence which has such a result without a reasonable purpose to support it is intolerable.

These heavy costs extracted from society by the rule have not gone unnoticed by the Supreme court. In Stone v. Powell, 428 U.S. 465, 490 (1976), the Court stated that the rule "deflects the truthfinding process and often frees the guilty." The Court has noted that its "cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truthfinding functions of the judge and jury." United States v. Payner, 447 U.S. 727, 734 (1980). The Court's recognition of the price exacted by the rule now causes it to answer the question of whether the rule should be applied in a particular context "by weighing the utility of the exclusionary rule against the costs of extending it..." Stone v. Powell, supra at 489.

The Rule and its Development

In tracing the development of the rule it is important at the outset to recall the specific words of the Fourth Amendment upon which the rule is based: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

It is apparent that the "exclusionary rule" itself is not articulated in the Fourth Amendment or, for that matter, in any part of the constitution, the Bill of Rights, or the federal criminal code. The exclusionary rule is, rather, a judicially

declared rule of law created in 1914, when the United States Supreme Court held in Weeks v. United States, 232 U.S. 383, that evidence obtained in violation of the Fourth Amendment is inadmissible in federal criminal prosecutions.

This doctrine was criticized by many commentators from the start, but the rule became firmly implanted in the federal criminal justice system. The states, however, were divided in their opinion of the rule. In the three decades following Weeks, sixteen states adopted the rule while thirty-one states refused to accept it.

It was not until 1949 that the Supreme court was squarely confronted with the question of whether the exclusionary rule should be applied to state criminal prosecutions. In Wolf v. Colorado, 338 U.S. 25 (1949), the court held that although the guarantees of the Fourth Amendment applied to the states through the due process clause of the Fourteenth Amendment, the Fourteenth Amendment did not forbid the admission of evidence obtained by an unreasonable search and seizure. Later, in Mapp v. Ohio, 367 U.S. 643 (1961), the Court reversed its decision in Wolf and held that because the Fourth Amendment right of privacy was enforceable against the states through the Fourteenth Amendment, "it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

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, supra, 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. In consistently focusing on the deterrence rationale in defining and limiting the application of the rule, the Court has all but

ignored the judicial integrity ground. At any rate, to the extent that notions of "judicial integrity" are still a basis for the rule's retention, the Supreme Court in Peltier, supra, 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.

Although the Court recognizes deterrence as the rule's paramount purpose, it has not limited the rule only to those situations in which the law enforcement officer's conduct is susceptible to being deterred. For example, courts continue to suppress evidence seized by law enforcement officers during searches conducted pursuant to duly authorized warrants obtained in good faith but later found defective by an appellate court. Such was the situation in United States v. Alberto Antonio Leon (9th Cir. Mar. 4, 1983). In that recent case, an informant advised police officers that he had seen two named persons selling drugs from their residence five months before. On the basis of that tip, the police conducted a one-month surveillance of the two people and their residence. The surveillance eventually expanded to cover two other residences and other persons with whom the two earlier identified people had been associating, the circumstances strongly suggesting that all persons and residences were involved in narcotics trafficking. After consulting with three assistant district attorneys, the police obtained warrants from a state court judge for the search of the residences and various automobiles belonging to the suspects. The searches produced narcotics and narcotics paraphernalia.

The defendants were charged with various drug violations but a district judge ruled that the search warrants were defective because the informant's information was probably stale. Much of the evidence obtained by the search was suppressed. The Ninth Circuit affirmed over the objection of Justice Kennedy, who observed in his dissenting opinion that the affidavit in support of the warrants "sets forth the details of a police investigation conducted with care, diligence, and good-faith."

United States v. Shorter, 600 F.2d 585 (6th Cir. 1979), is another example of the exclusionary rule being applied where an authorized search warrant is invalidated by a second judge or court. In that case, local police and agents of the Federal Bureau of Investigation (FBI) arrested a suspected Ohio bank robber at his home. After the arrest, the FBI agent telephoned a federal magistrate and stated his grounds for a search warrant which was then issued by the magistrate as permitted by law. The subsequent search produced incriminating evidence, including bait bills and a firearm. The trial judge ruled the search lawful, but the conviction was reversed on appeal. The appellate court decided that although the officer had in fact been placed under an oath by the magistrate which incorporated all the testimony already provided in the course of reciting the grounds for the warrant, the failure of the magistrate to require the oath at the beginning of the telephone conversation violated the law because the applicable Federal Rule requires that the oath be obtained "immediately."

These cases involved disagreements between judges about judicial conduct -- there is no police misconduct involved. The police were carrying out their duties as society expects them to do: the officers provided their information fully and honestly to the court and proceeded to carry out the orders of the court once the warrants were issued. Suppression of evidence in instances such as these does not serve the purpose of the exclusionary rule, the deterrence of police misconduct. In fact, it only serves to damage both a community's perception of justice and the morale of law enforcement officers who have followed the rules only to have the evidence suppressed on the premise that they have violated the Constitution. Proper police conduct is thereupon falsely labeled as illegal.

The deterrent purpose of the exclusionary rule also is not served when courts apply the rule to situations where the appellate court cases are not at all clear, where the law is thoroughly confused or even in situations where the cases are in flat contradiction. Police often are confronted with the

question of whether to conduct a warrantless search in the field when the circumstances they are facing are not covered by existing case law.

For example, the rule was applied in precisely this type of situation in Robbins v. California, ___ U.S. ___, 101 S. Ct. 2842 (1981). In that case, the Court excluded evidence of a substantial quantity of marihuana found in a car trunk in a decision largely based 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. On the very same day, the Court decided another case, New York v. Belton, ___ U.S. ___, 101 S. Ct. 2860 which was remarkably similar factually. In both cases, police officers lawfully stopped a car, smelled burnt marihuana, discovered marihuana in the passenger compartment of the car, and lawfully arrested the occupants. Thereafter, in Robbins, the officer found two packages wrapped in green opaque paper in the recessed rear compartment of the car, opened them without a warrant, and found 30 pounds of marihuana. In Belton, the officer found a jacket in the passenger compartment, unzipped the pocket without a warrant, and found a quantity of cocaine.

Both cases required an analysis of the "automobile exception" cases, such as Chadwick, which pertain to the validity of warrantless searches of cars and their contents. When the Court announced its decisions in Belton and Robbins, three justices opined that both searches were legal; three justices opined that both were illegal; and three justice controlled the ultimate decision that Robbins was illegal and Belton was legal. When Robbins was finally decided, 14 judges had reviewed the search. Seven found it valid and seven invalid.

Moreover, the decisions hardly clarified the law of search and seizure in this area. As stated by Justice Brennan in his dissent in Belton:

> "The Court does not give the police any 'bright line' answers to these questions. More important, because the Court's new rule abandons the justifica-

tions underlying Chimel, it offers no guidance to the police officer seeking to work out these answers for himself."

It was not surprising, therefore, that the whole field of law involved in these cases was again before the United States Supreme Court less than a year later in United States v. Ross, ___ U.S. ___, 102 S. Ct. 2157 1982). In that case, which involved the search of a brown paper bag containing heroin found in a car's truck, the Court repudiated the holding in Robbins and held that the "automobile exception" to the Fourth Amendment allows police who have lawfully stopped a vehicle which they reasonably believe to contain contraband to conduct a warrantless search of any part of it, including all containers and packages, in which the contraband may be concealed.

Thus, the rule of law with respect to container searches in automobiles has apparently been finally made clear. Meanwhile, however, the defendant in Robbins who possessed thirty pounds of marihuana, went free because the police at the time of the search did not apply the law as it would be applied at the moment the Supreme Court considered the Robbins case. It is probably a small consolation for the police in that situation that their view of the law was ultimately borne out in a subsequent case. To say that the suppression of reliable, trustworthy, evidence in such a case helps to prevent police "misconduct" is absurd.

The consequence of applying the exclusionary rule in the cases discussed above is two-fold. First, the purpose of the exclusionary rule is not served when the officers believe, in good faith, that they are performing a lawful search. When law enforcement officers obtain a warrant in good faith or when they make a reasonable, good faith attempt to predict the decisions that future courts will make, there exists no logical basis for excluding the evidence they have gathered. Applying the rule in these cases fails to further in any degree the rule's deterrent purpose, since conduct reasonably engaged in, in good faith, is by definition not susceptible to being deterred by the imposition of after-the-fact evidentiary sanctions.

Second, application of the exclusionary rule when the police have acted reasonably and in good faith results in attaching a false label to proper police conduct. This adversely affects the criminal justice system by fostering the public perception that police are engaged in lawless, improper conduct when that is simply not the case. The Supreme Court recognized these effects in Stone v. Powell, 428 U.S. 465 (1976), in which it stated:

> The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and the administration of justice.

The unjustified acquittals of guilty defendants due to application of the exclusionary rule has resulted in a growing concern by our citizens that our system of justice is lacking in sense and fairness. Unfortunately, it seems unlikely that any of these conceptions by the public will change as long as the exclusionary rule remains in its present form and courts continue to expand its application to situations where law enforcement conduct has been manifestly reasonable.

Proposed Legislation Modification

The specific action we suggest in the area of legislative limitation of the rule, as contrasted to legislative abolition of the rule, is based upon a recent significant opinion on the rule rendered by the Fifth Circuit. In United States v. Williams, 622 F.2d 830 (5th Cir. 1980), the Fifth Circuit, after an exhaustive analysis of the relevant Supreme Court decisions, announced a construction of the exclusionary rule that would allow admission at trial of evidence seized during a search undertaken in a reasonable and good faith belief on the part of a federal officer that his conduct was lawful. A majority of the 24 judges of that court, sitting en banc, concurred in an opinion that concluded as follows (Id. at 846-847):

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the

court so finds it shall not apply the exclusionary rule to the evidence.

The reasonable good faith rule announced by the Fifth Circuit is the same rule urged by the Attorney General's Task Force on Violent Crime. If implemented, we believe that this restatement of the exclusionary rule would go a long way towards insuring that the rule would be applied only in those situations in which police misconduct logically can be deterred. Law enforcement officers will no longer be penalized for their reasonable, good faith efforts to execute the law. On the other hand, courts would continue to exclude evidence obtained as a result of searches or seizures which were performed in an unreasonable manner or in bad faith, such as by deliberately misrepresenting the facts used to obtain a warrant. Thus, the penalty of exclusion will only be imposed when officers engage in the type of conduct the exclusionary rule was designed to deter -- clear, unreasonable violations of our very important Fourth Amendment rights.

It should be noted that the reasonable, good faith rule requires more than an assessment of an officer's subjective state of mind and will not, as is sometimes argued, place a premium on police ignorance. In fact, the rule requires a showing that the officer's good faith belief is grounded in an objective reasonableness. As the Williams court explained, the officer's belief in the lawfulness of his action must be "based upon articulable premises sufficient to cause a reasonable and reasonably trained officer to believe he was acting lawfully." Accordingly, an arrest or search that clearly violated the Fourth Amendment under prior court decisions would not be excepted from the rule simply because a police officer was unaware of the pertinent case law. Thus, there would remain a strong incentive for law enforcement officers to keep abreast of the latest developments in the law.

Constitutionality of the Proposed Modification

In conclusion, I would like to emphasize that the Department of Justice is satisfied that our proposal is fully constitutional. It is very similar to that already adopted in the Williams case, an extensive decision based on a thorough analysis of relevant

Supreme Court cases. Moreover, 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 in this area. 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, as mentioned above, our proposal is fully consistent with the principle of judicial integrity as well as with that of deterrence.

TITLE IV - FORFEITURE

Title IV of our 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, now 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. Also, the overcrowding of civil dockets may require a substantial delay before these civil forfeiture cases may be heard. 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, which permits the consolidation of forfeiture issues with the trial of the criminal offense.

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 only two statutes: the Racketeer Influenced and Corrupt Organization or "RICO" statute[1/] and the Continuing Criminal Enterprise or "CCE" statute,[2/] a specialized drug offense 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 IV is designed to address these problems, and is based with minor modifications on the forfeiture provisions of title VI of the Senate-passed comprehensive drug enforcement and violent crime bill of the last Congress, S. 2572.[3/] Substantially similar forfeiture legislation, S. 948, is now also before the Judiciary Committee.

The forfeiture provisions of our bill are divided into four parts. The first, Part A, amends the criminal forfeiture provisions of the RICO statute. One of the most important of the RICO amendments would make the proceeds of racketeering activity

---

1/ 18 U.S.C. 1960 et seq.

2/ 21 U.S.C. 848.

3/ This title of S. 2572 was, with certain amendments, based on S. 2320, the forfeiture bill prepared by the Administration which was approved by the Senate Judiciary Committee. S. Rept. No. 97-520, 97th Cong., 1st Sess. (1982).

specifically subject to an order of criminal forfeiture. While it has been our position that the scope of the current criminal forfeiture language of the RICO statute encompasses this type of property, certain appellate courts have not agreed, and this issue is currently pending review by the Supreme Court.4/ In our view, the utility of criminal forfeiture as a means of combatting racketeering would be seriously limited if we were unable to reach racketeering profits, and this amendment is therefore essential to the RICO forfeiture scheme.

Clarifying the scope of property subject to forfeiture goes only part of the way towards making the RICO forfeiture statute more effective. We must also address the serious problem of defendants defeating criminal forfeiture actions by removing, concealing, or transferring forfeitable assets prior to conviction. To counteract this problem, our RICO forfeiture amendments strengthen the government's ability to obtain restraining or protective orders to preserve forfeitable assets until trial and would permit, under limited circumstances, the issuance of such orders prior to indictment -- an authority lacking under current law. They also provide clear authority to void transfers a defendant has undertaken in an attempt to defeat the government's opportunity for forfeiture. Finally, where a defendant has succeeded in removing his forfeitable assets from the reach of the government, our bill would permit the court to order him to forfeit substitute assets of equal value. We believe these amendments are essential to an effective criminal forfeiture statute. In criminal forfeiture, custody of forfeitable assets remains with the defendant until conviction. Therefore, we must have strong authority to prevent improper pre-conviction transfers and to negate the benefits of such transfers when they occur.

Part B of Title IV of the Administration's bill makes several amendments to the Comprehensive Drug Abuse Prevention and

---

4/ Russello v. United States (No. 82-472, cert. granted Jan. 10, 1982).

Control Act of 1970.5/ The most significant of these amendments is the creation of a new criminal forfeiture statute that would be applicable in all major drug prosecutions. Presently, the sole drug offense to which criminal forfeiture applies is the specialized Continuing Criminal Enterprise statute.6/ The scope of property subject to criminal forfeiture under this new provision would be essentially the same as that now subject to civil forfeiture under the drug laws, namely, the proceeds of drug offenses and property used in the commission of these crimes. While there will continue to be cases where the use of civil forfeiture will be either necessary or preferable, the option of proceeding with a criminal forfeiture action should allow greater efficiency in our drug forfeiture efforts by reducing the need to pursue parallel civil forfeiture actions and criminal prosecutions. The new criminal forfeiture statute for drug-related assets tracks the RICO criminal forfeiture provisions as amended in Part A of this Title. Thus, this new statute incorporates important safeguards to protect against the greatest flaw of current criminal forfeiture statutes, the opportunities they present for defendants to utterly avoid the forfeiture sanction by removing, concealing, or transferring their assets before conviction can be obtained.

Another important aspect of Part B of our forfeiture proposal is an amendment of the current civil forfeiture provisions of the drug laws to permit the forfeiture of real property used in the commission of drug felonies. This new authority would permit the forfeiture of buildings used as "stash" houses and illicit drug laboratories, and would also permit the forfeiture of land used to cultivate drugs, a problem, particularly with respect to the domestic cultivation of marihuana, that is of growing concern to federal drug enforcement authorities. The civil forfeiture provisions of our drug laws are also amended in Part B to include a provision for the stay of civil forfeiture proceedings pending the disposition of a related criminal case. Without such stays, the civil forfeiture proceeding can be

5/ 21 U.S.C. 801 et.seq.

6/ 21 U.S.C. 848.

manipulated to obtain premature, and otherwise impermissibly broad, discovery of matters that will arise in the government's prosecution of an associated criminal offense.

Through the amendments set out in Part B of our forfeiture proposal, we should be able to improve significantly our efforts to attack the crucial economic aspects of the lucrative illicit drug trade. Increased efforts in this area have obvious benefits. However, we also must recognize that pursuing forfeiture can prove to be an expensive proposition for the United States. Indeed, in certain cases, the expenses associated with forfeiture can exceed the amount that we ultimately realize upon the sale of forfeited assets. In our view, it would be particularly appropriate to make the net profits from drug forfeitures available to defray the costs incurred by the government in obtaining forfeitures. Therefore, Part C of this title establishes a trial four-year program under which amounts realized by the United Stated from the forfeiture of drug profits and other drug-related assets would be placed in a special fund from which the Congress could appropriate moneys specifically for the purpose of paying expenses that arise in civil and criminal forfeiture actions under the drug laws. Among the purposes for which these funds could be used is the payment of rewards for information or assistance leading to a forfeiture. The availability of substantial rewards is essential if we are to obtain significant forfeiture in the secretive and violent setting of drug trafficking.

The final group of forfeiture amendments, which make up Part D of Title IV, are amendments to the Tariff Act of 1930. These provisions govern the seizure and forfeiture of property under the customs laws, and are also applicable to seizures and forfeitures of drug-related property under 21 U.S.C. 881. The most important of these amendments would expand the use of efficient administrative forfeiture proceedings in cases in which no party comes forward to contest a civil forfeiture action. Under current law, administrative forfeiture is available only in those uncontested cases which involve property valued at $10,000

or less; all other cases must be the subject of judicial proceedings. Because of this current low valuation ceiling on administrative forfeitures, judicial proceedings are required in a significant number of forfeiture cases, even though there is no party in opposition to the forfeiture. In these cases, the overcrowding of court dockets often means a delay of more than one year before the case may be heard, and during this period of delay the property is subject to deterioration and the costs to the government in maintaining and safeguarding the property escalate. To address these problems, the Tariff Act is amended in our bill to permit the use of more efficient administrative forfeiture proceedings in uncontested cases involving any conveyances used to transport illicit drugs and any other property of a value of up to $100,000.

Also included in these Tariff Act amendments are two changes in current law that will enhance cooperation between federal law enforcement agencies and their State and local counterparts. First, new authority is created whereby property forfeited by the United States may be directly transferred to State or local agencies which have assisted in developing the case that led to the forfeiture. Second, the authority for discontinuance of federal forfeitures in favor of State or local forfeiture proceedings is clarified.

Finally, the Tariff Act amendments provide for a trial funding mechanism for meeting the expenses of customs forfeitures which parallels that established for drug-related forfeitures under Part C of this Title. In essence, this provision places the moneys realized from forfeitures under the customs laws in a special fund from which appropriations may be made to cover the costs associated with the seizure, forfeiture, and ultimate disposition of assets.

For the purposes of our testimony today, we have only touched on the more important of the forfeiture amendments of Title IV of the Administration's bill. However, in this title of the bill, we have attempted to achieve a comprehensive improvement of our forfeiture laws. Thus, our proposal not only

corrects the most disturbing limitations of current law, but also addresses numerous ambiguities and provides needed guidance in procedural matters, guidance which is particularly lacking in current criminal forfeiture statutes. Forfeiture can be a vital element in our efforts to combat racketeering and drug trafficking. But to achieve this goal, our forfeiture laws must be strengthened as provided in Title IV of our bill.

TITLE V - The Insanity Defense

Title V of the bill deals with the insanity defense and with related procedural matters that apply in the federal criminal justice system. The subject is an important one. Although the insanity defense is raised in comparatively few federal cases and is successful in even fewer, the defense raises fundamental issues of criminal responsibility which the Congress should address. Moreover, the insanity defense is often asserted in cases of considerable notoriety which influence, far beyond their numbers, the public's perception of the fairness and efficiency of the criminal justice process.

It requires little reflection to understand why the public is so concerned about the defense. When it is raised following a crime involving a prominent defendant or victim, in which there is absolutely no question whether the defendant committed the acts constituting the offense -- indeed we may well have been able to see him do it several times over on television news reports -- and yet the highly publicized trial that follows focuses not on those acts so much as on the defendant's mental and emotional history, most lawyers and laymen alike would agree that the focus of the judicial process has become grossly distorted.

In spite of these problems with the defense and its importance, it is ironic, as the Attorney General pointed out last July when he testified before the Committee, that neither the

Congress nor the Supreme Court has yet played a major role in its development. Its evolution in England and in this country over several centuries has been haphazard and confusing. As the Committee knows from its work over the past decade or more on the criminal code revision bills, Congress has never enacted legislation defining the insanity defense. Likewise, the Supreme Court has generally left development of the defense to the various federal courts of appeals. As a result, the federal circuits do not even at present apply a wholly uniform standard. In recent years, however, all of the federal circuits have adopted, with some variations, the formulation proposed by the American Law Institute's Model Penal Code which provides that 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 [criminality] [wrongfulness] of his conduct or to conform to the requirements of the law."

As a result, in a trial involving the insanity defense, the defendant's commission of the acts in question is commonly conceded or at least not seriously contested. Instead the trial centers around the issue of insanity and the key participants are highly paid psychiatrists who offer conflicting opinions on the defendant's sanity. Unfortunately for the jury and for society, the terms used in any statement of the defense -- for example the term "paranoid schizophrenia" -- are often not defined and the experts themselves disagree on their meaning. In addition, the experts often do not agree on the extent to which behavior patterns or mental disorders that have been labeled "schizophrenia," "inadequate personality," and "abnormal personality" actually cause or impel a person to act in a certain way. For example, a December, 1982, statement by the American Psychiatric Association on the insanity defense noted that "[t]he line between an irresistible impulse, and an impulse not resisted is probably no sharper than that between twilight and dusk."

Since the experts themselves are in disagreement about both the meaning of the terms used to define the defendant's mental state and the effect of a particular state on the defendant's

actions -- but still freely allowed to state their opinion to the jury on the ultimate question of the defendant's sanity -- it is small wonder that trials involving an insanity defense are arduous, expensive, and worst of all, thoroughly confusing to the jury. Indeed the disagreement of the experts is so basic that it makes rational deliberation by the jury virtually impossible. Thus, it is not surprising that the jury's decision can be strongly influenced by the procedural question of which side must carry the burden of proof on the question of insanity. In this regard, we can vividly recall that several of the jurors in the Hinckley case publicly stated afterwards that they were strongly influenced by the fact that the government had the burden of proof.

Thus, Title V has been drafted to reflect three changes in the insanity defense in the federal system that would restrain it within fair and reasonable boundaries and make it more comprehensible to the jury. First, the defense would be limited to those cases in which the defendant, as a result of mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts, and it is made explicit that mental disease or defect does not otherwise constitute a defense. Second, opinion evidence on the question whether the defendant had the mental state or condition to constitute either an element of the crime or a defense is prohibited; and third, the defendant would be required to carry the burden of proof of his insanity by clear and convincing evidence.

Limiting the defense to those cases in which a mental disease or defect renders the defendant unable to appreciate the nature and quality or wrongfulness of his acts would abolish the volitional portion of the two-pronged ALI-Model Penal Code test for insanity quoted earlier. We have concluded that elimination of the volitional portion of the test is appropriate since mental health professionals themselves have come to recognize that it is very difficult if not impossible to determine whether a particular individual lacked the ability to conform his conduct to the

requirements of the law because he was suffering from a mental disease or defect. There is, in short, a much stronger agreement among psychiatrists about their ability to ascertain whether as a result of mental illness a defendant had an understanding of his acts than about whether he had the capacity to heed the law's strictures.

Opinion evidence on the ultimate question of whether the defendant had the mental state or condition to constitute an element of the offense or a defense would be proscribed in our proposal by an amendment to Rule 704 of the Federal Rules of Evidence. We believe that such a provision is critical in overcoming the abuses of the insanity defense as it is presently employed in the federal system. In many insanity defense trials, prosecution and defense psychiatrists agree on the nature and extent of the defendant's mental disorder. What they disagree about is the probable relationship between his disorder and his ability to control his conduct or even to appreciate its wrongfulness. In our view, expert opinion testimony on whether the defendant could appreciate the nature and quality or wrongfulness of his acts and on his motive, intent, or other mental state should be disallowed. As recognized by many psychiatrists themselves, there is no basis for believing that psychiatry is competent to determine such matters as they existed on a previous occasion as opposed to simply describing the person's mental disorder or defect. We believe that the question of the connection between any mental disease or defect and the defendant's inability to understand his acts is the type of fact question that ought to be left to the trier of fact unhindered by "expert" opinion in an area where no consensus of such opinion exists.

Our proposal also shifts to the defendant the burden of proving his insanity by clear and convincing evidence. Such a shift does not present a constitutional issue. The present rule followed in the federal courts which places the burden of proving sanity on the prosecution stems from the Nineteenth Century case of Davis v. United States, 160 U.S. 469. The rule has been held to establish "no constitutional doctrine, but only the rule to be

followed in federal courts." Leland v. Oregon, 343 U.S. 790, 797 (1952). Leland, which sustained the constitutionality of an Oregon statute shifting the burden of persuasion on insanity to the defendant beyond a reasonable doubt, was reaffirmed by the Supreme Court in Patterson v. New York, 432 U.S. 197 (1977), a case dealing with the constitutionality generally of the concept of affirmative defenses in which the burden of persuasion is placed on the defendant. Although Patterson did not deal with the insanity defense, it noted specifically that under Leland "once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence, including evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by the defendant by a preponderance of the evidence." Patterson, p. 206. As recently stated by the Sixth Circuit: "Patterson makes it clear that so long as a jury is instructed that the state has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. The state may properly place the burden of proving affirmative defenses such as ... insanity upon the defendant." Krzeminski v. Perini, 614 F.2d 121, 123 (6th Cir. 1980). A little over half of the states now place the burden of persuasion on the defendant.

Our proposal would require the defendant to prove his insanity by clear and convincing evidence, a higher standard of proof than a mere preponderance of the evidence. In our view, it is important to assure that only those defendants who clearly satisfy the elements of an insanity defense are exonerated from what otherwise would be culpable criminal behavior. It is therefore appropriate to require the defendant to demonstrate his insanity by something more than a bare preponderance of the evidence.

Moreover, what our proposal does not do is worthy of special emphasis. While Title V would shift the burden of proof on the insanity defense to the defendant, it does not relieve the government of the burden of proving each and every element of the offense, including any statutorily prescribed mental element such as willfulness or malice, beyond a reasonable doubt.

In sum, we believe that our proposal for a legislative limitation of the insanity defense is reasonable, workable, and fair. It continues the privilege of the defendant to raise the defense of insanity, while restoring the right of society, through the jury, to evaluate all the evidence and determine whether any mental disease or defect that the defendant is able to show was the cause of the crime. In short, the jury will determine whether the defendant committed the crime because he could not understand what he was doing or could not appreciate the wrongfulness of his conduct due to a mental disease or defect, or whether he had such an understanding or appreciation but decided to do it anyway.

Beyond the reforms of the insanity defense itself which we have just described, Title V contains a number of provisions for the commitment to a mental hospital for treatment of persons at various stages in the criminal justice process who are so disturbed as to present a danger to the community. These provisions are familar to the Committee since they are virtually identical to those contained in recent criminal code revision bills such as S. 1630 in the last Congress and generally arouse little or no controversy. Of paramount importance is the establishment for the first time of a civil commitment procedure for defendants who, for one reason or another, are charged with a crime but not convicted. 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 them to institute commitment proceedings. Of course there is no requirement 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. In short, federal prosecutors must at present hope that the state officials will come to their rescue and take up what began as a federal responsibility.

Accordingly, we strongly urge the Committee to include all of these comprehensive procedural reforms as an integral part of the reform of the insanity defense.

TITLE VI -- Reform of Federal Intervention in State Proceedings

Title VI of the bill responds to the serious problem of habeas corpus abuse. The overly broad availability of collateral proceedings in the federal courts has been a growing source of concern in recent years to legal writers, state judges and attorneys general, and federal judges. Indeed, a majority of the Justices of the Supreme Court have strongly criticized the current operation of federal habeas corpus and have called for basic limitations on its scope and availability. 1/ The generally recognized shortcomings of the current system include the affront to the state courts involved in unnecessary re-adjudication of their decisions by the lower federal courts; the impossibility of ever conclusively ending the litigation of a criminal case on account of the open-ended availability of federal habeas corpus; the waste of federal and state resources involved in litigating the frivolous and redundant petitions of state and federal prisoners; and the virtual nullification of

---

1/ See Rose v. Lundy, 455 U.S. 509, 546-47 (1982) (Stevens, J., dissenting); Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (concurring opinion of Powell, J., joined by Burger, C.J., and Rehnquist, J.); Burger, 1981 Year-End Report on the Judiciary 21; O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 William & Mary L. Rev. 801, 814-15 (1981); Justice Lewis Powell, Address Before the A.B.A. Division of Judicial Administration, Aug. 9, 1982. See also Schneckloth v. Bustamonte, 412 U.S. 218, 249 (1973) (Blackmun, J., concurring); Engle v. Isaac, 456 U.S. 107, 126-28 (1982).

state capital punishment laws that has resulted from delayed and repetitive habeas corpus applications in capital cases.

Title VI incorporates a variety of reforms responding to these abuses. The proposals in the Title originated as S. 2216 of the 97th Congress, which was the subject of hearings before the Senate Judiciary Committee in April of 1982. The proposals were later re-introduced in the 97th Congress by Senator Thurmond as S. 2838 with certain clarifying amendments resulting from the hearings. The proposals of Title VI of this bill are the same as those of S. 2838. The intended interpretation and justification of the proposed reforms have been fully set out in prior statements of the Administration and the bills' sponsors. 2/ In brief, the major reforms of Title VI are as follows:

First, Title VI would establish a time limit on habeas corpus applications. The need for such a reform was cogently expressed in a recent statement of Justice Powell:

> Another cause of overload of the federal system is 28 U.S.C. §2254, conferring federal habeas corpus jurisdiction to review state court criminal convictions. There is no statute of limitations, and no finality of federal review of state convictions. Thus, repetitive recourse is commonplace. I know of no other system of justice structured in a way that assures no end to the litigation of a criminal conviction. Our practice in this respect is viewed with disbelief by lawyers and judges in other countries. Nor does the Constitution require this sort of redundancy. 3/

Title VI would correct this situation by enacting a one-year time limit on habeas corpus applications, normally

---

2/ See 128 Cong. Rec. S11851-59 (daily ed. Sept. 21, 1982) (statement of Senator Thurmond concerning S. 2838); 129 Cong. Rec. S3147-48 (daily ed. March 16, 1983) (section-by-section analysis of Title VI of S.829); The Habeas Corpus Reform Act of 1982: Hearing on S.2216 Before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 16-107 (1982) (Administration statements and testimony concerning S.2216). See also William French Smith, "Proposals for Habeas Corpus Reform," in P. McGuigan & R. Rader, eds., Criminal Justice Reform: A Blueprint (Free Congress Research and Education Foundation 1983).

3/ Justice Lewis Powell, Address Before the A.B.A. Division of Judicial Administration, Aug. 9, 1982.

running from exhaustion of state remedies. The proposed limitation rule may be compared to various other limits presently imposed on the review or re-opening of criminal judgments in the federal courts, such as the normal 90 day limit on state prisoners' applications for direct review in the Supreme Court. It would provide ample time for state defendants to seek federal review of their convictions following the conclusion of state proceedings. It would, however, create a means for control of the current abuses of repetitive filing and the filing of petitions years or even decades after the normal termination of a criminal case.

A second reform of Title VI addresses the problem of claims that were not properly raised in state proceedings. It is particularly disruptive of orderly procedures in criminal adjudication if a prisoner who failed to take advantage of a fair opportunity to raise a claim in state proceedings is later allowed to raise it in a habeas corpus proceeding, with the potential for unsettling a criminal conviction long after it should be regarded as final. Title VI would establish a general rule barring the assertion in federal habeas corpus proceedings of a claim that was not properly raised before the state courts, so long as the state provided an opportunity to raise the claim that satisfied the requirements of federal law.

The main practical import of the proposed rule is for cases in which attorney error or misjudgment is advanced as the reason why a claim was not raised in the state courts, resulting in its forfeiture under state rules of procedure. A procedural default of this sort would be excused in a subsequent habeas corpus proceeding if the attorney's actions amounted to constitutionally ineffective assistance of counsel, since in such a case the default would be the result of the state's failure, in violation of the Sixth Amendment to the Constitution, to afford

the defendant effective assistance of counsel. 4/ But minor or technical errors or misjudgments -- which even the most able attorney will sometimes engage in, given the pressures and complexity of criminal adjudication -- would not excuse a procedural default. As Justice O'Connor stated for the Supreme Court in Engle v. Isaac:

> We have long recognized . . . that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. 5/

The approach of Title VI is consistent with the clearest interpretations of the current rules by the federal courts of appeals. 6/ The establishment of this interpretation on a uniform basis will avoid many years of additional litigation that would be required to resolve the existing uncertainties in this area through caselaw development.

A third major reform of Title VI is affording finality to full and fair state adjudications of a petitioner's claims. Justice O'Connor has observed:

> If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a full and fair adjudication has been given in the state court. 7/

4/ See Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) ("The right to counsel prevents the state from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance.").

5/ 456 U.S. 107, 134 (1982).

6/ See Indiviglio v. United States, 612 F.2d 624, 631 (2d Cir. 1979): "Without some showing that counsel's mistakes were so egregious as to amount to a Sixth Amendment violation, a mere allegation of error by counsel is insufficient to establish 'cause' to excuse a procedural default."

7/ O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 William and Mary Law Review 801, 814-15 (1981).

To be full and fair in the intended sense the state adjudication must satisfy a number of specific requirements which are fully set out in the legislative history of the proposal. 8/ The state court determination must be reasonable, and must be arrived at by procedures consistent with applicable federal law. This standard would preserve federal re-adjudication in cases presenting demonstrated deficiencies in the state process. It would, however, avoid the excesses of the current standard of review under which an independent determination of all claims is required even where there is nothing to suggest that their consideration by the state courts was in any way the deficient.

The proposed standard is similar to that applied by the Supreme Court in habeas corpus proceedings prior to the unexplained substitution of the current rules of mandatory re-adjudication in Brown v. Allen. 9/ It may also be compared to standards of review currently employed in various other areas of federal law. One example is the "good faith" standard applicable to judicial review of state executive action in § 1983 suits, under which the disposition similarly depends on the reasonableness of the state official's views concerning the requirements of federal law. The effect of the new standard of review proposed in Title VI should be a relatively quick and easy disposition in federal habeas corpus proceedings of most claims that have previously been determined by the state courts.

8/ See 128 Cong. Rec. S11852, S11855-57 (daily ed. Sept. 21, 1982); The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 16-17, 41-42, 89-101 (1982); 129 Cong. Rec. S3147-48 (March 16, 1983).

9/ 344 U.S. 443 (1953). See Ex Parte Hawk, 321 U.S. 114, 118 (1944): "Where the state courts have considered and adjudicated the merits of . . . [a petitioner's] . . . contentions . . . a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated . . . . But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy . . . or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . a federal court should entertain his petition for habeas corpus, else he would be remediless."

Title VI of the bill would also maintain the general conformity of the standards for collateral proceedings involving state prisoners and federal prisoners by creating a time limit for federal prisoners' collateral attacks and clarifying the rules governing excuse of procedural defaults in such proceedings. The collateral attacks of federal prisoners on their convictions present many of the same problems and involve many of the same abuses as habeas corpus applications by state prisoners. Imposing reasonable constraints on such attacks is accordingly an equally appropriate reform. As Justice O'Connor observed for the Supreme Court in United States v. Frady:

> [T]he Federal Government, no less than the States, has an interest in the finality of its criminal judgments. In addition, a federal prisoner . . . unlike his state counterparts, has already had an opportunity to present his federal claims in federal trial and appellate forums . . . . [W]e see no basis for affording federal prisoners a preferred status when they seek post-conviction relief. 10/

Finally, Title VI would institute reforms recommended by Judge Henry Friendly 11/ and Professor David Shapiro 12/ in the procedure on appeal in collateral proceedings and the operation of the exhaustion requirement. These reforms will improve the efficiency of habeas corpus proceedings and reduce the litigating burdens presently associated with them.

10/ 456 U.S. 152, 166 (1982).

11/ See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 144 n.9 (1970) (access to appeal in collateral proceedings).

12/ Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 358-59 (1973) (exhaustion of state remedies should not be prerequisite to denial of claims on the merits).

TITLE VII -- Drug Enforcement Amendments

PART A - Drug Penalties

Title VII of the bill, which contains drug enforcement amendments, is divided into two parts. Part A provides 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 or distribution, another important factor is the amount of the drug involved. Without the inclusion of this factor, penalties for trafficking in especially large quantities of extremely dangerous drugs are often inadequate. Thus, under current law the penalty for trafficking in 500 grams of heroin is the same as that provided for an offense involving 10 grams. This title amends 21 U.S.C. 841 and 960 to provide for more severe penalties than are currently available for major trafficking offenses.

The second problem 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 five years' imprisonment and a $15,000 fine. The same penalty is applicable in the case of a violation involving a Schedule III substance. This penalty structure is at odds with the fact that non-narcotic Schedule I and II controlled substances include such extremely dangerous drugs as PCP, LSD, methamphetamines, and methaqualone, and federal prosecutions involving these drugs typically involve huge amounts of illicit income and sophisticated organizations. Title VII would correct these penalty problems in the areas of both drug trafficking and importation/exportation offenses.

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 of 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 addresses 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.

The major areas that the Diversion Control Amendments address are the following.

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. We 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 our 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

---

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.

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 --

---

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).

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 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

---

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

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

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 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.

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.

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 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 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 type of legislation maintain, deterrence is the object of such personal suits, that which is deterred is competent government. Effective action in all 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 on similar proposals 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 an 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 have not 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 damage claims which would