

Originally Processed With FOIA(s):
2025-0498-S

FOIA Number:
2025-0498-S

FOIA MARKER

**This is not a textual record. This is used as an
administrative marker by the George Bush Presidential
Library Staff.**

Record Group/Collection: George H.W. Bush Presidential Records
Collection/Office of Origin: Chief of Staff, White House Office of
Series: Findlay, D. Cameron, Files
Subseries:

OA/ID Number: 05831
Folder ID Number: 05831-001

Folder Title:
[Memoranda, Correspondence, and Policy Papers] [1]

Stack:	Row:	Section:	Shelf:	Position:
G	15	22	6	

Document Originally
Attached to
Following Page

3/23/92

Please file for Cam Findlay :
Crime Bill

*file
crime
bill*

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET**

February 6, 1992

LEGISLATIVE REFERRAL MEMORANDUM

**LRM #D-692
DRAFT #763**

TO: Legislative Liaison Officer:

EDUCATION - John Kristy - 401-2670 - 207
HHS - Frances White - 245-7760 - 328
LABOR - Robert A. Shapiro - 523-8201 - 330
TREASURY - Richard S. Carro - 566-8523 - 228
AUSC - Robert Feidler - 633-6040 - 245
ONDCP - Frank Kalder - 467-9870 - 257

FROM: JAMES J. JUKES (for) *Jim*
Assistant Director for Legislative Reference

OMB CONTACT: Douglas STEIGER (395-3454)

SUBJECT: JUSTICE Draft Bill Criminal Law Amendments

DEADLINE: February 11, 1992

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

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
Boyden Gray
Marianne McGettigan
Ken Schwartz
Cora Beebe
Jim Duke
Jim Simpson
Barry White
Nelson Lund

TO: Douglas STEIGER
Office of Management and Budget
Fax Number: 395-3109
Phone Number: 395-3454

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No objection

_____ No comment

_____ See proposed edits on pages _____

_____ Other: _____



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 6, 1992

Honorable Richard G. Darman
Director
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Darman:

Enclosed are copies of various proposed criminal law amendments, which we propose to transmit to Congress. We may be submitting additional proposals for inclusion in this package at a later date. The Department would appreciate having clearance of this proposal by February 13, 1992. Please furnish this office with a copy of any legislative referral memorandum transmitted in connection with this report.

I have reviewed this draft legislation in light of section 2 of Executive Order 12778 and certify for the Department of Justice that, where applicable, the legislation meets the standards provided in Sections 2(a) and 2(b)(1) of that order.

Please advise this office as to the relationship of the proposed communication to the program of the President.

Sincerely,

Nicholas P. Wise
Deputy Assistant Attorney General

Enclosure

Miscellaneous Crime Provisions

- 1. Mandatory Penalties for Large Scale Unlicensed Gun Trafficking ✓
- 2. Mandatory Penalty for Knowing Transfer of a Firearm for the Purpose of Committing a Felony When Machine Gun is Used ✓
- 3. Mandatory Penalty for Reckless Discharge of Automatic/Semiautomatic Weapons ✓
- 4. Mandatory Penalty for Offenses Involving Machineguns, etc ✓
- 5. Definition of Semiautomatic Firearm ✓
- 6. Expansion/Clarification of Firearms Forfeiture ✓
- 7. Technical correction to "engaged in the business."
- 8. Prohibited Participation in Criminal Street Gangs
- 9. Increased Penalties for Gang Crime
- 10. Revision of Juvenile Delinquency Procedures
- 11. Death Penalty for Murders in D.C [option 1]
- 12. Death Penalty for Murders in D.C. and in the Course of Federal Offenses [option 2]
- 13. Mandatory Life Imprisonment for First Degree Murder in DC
- 14. Penalty Increase for Schedule III Controlled Substances
- 15. Penalty Increase for Schedule IV Controlled Substances
- 16. Conforming Schedule III/IV Amendments
- 17. Mandatory Minimums/Crack Houses
- 18. Increased Mandatory Minimums/Drug Trafficking Near Schools
- 19. Increased Guideline Sentences/Steroids
- 20. Cocaine Bricks
- 21. General Conspiracy Penalty
- 22. Creation of a General Attempt Offense

3. Pretrial Detention Amendments
4. Automatic Waiver of Right to be Present At Trial
5. RICO Enhancements
6. Civil Rights of Institutionalized Person Act Amendments

**SEC. MANDATORY PENALTIES FOR LARGE-SCALE UNLICENSED GUN
TRAFFICKING WITH ENHANCEMENT FOR SEMIAUTOMATIC FIREARMS, MACHINE-
GUNS, SHORTENED RIFLES AND SHOTGUNS AND DESTRUCTIVE DEVICES**

Subsection 924(a) of title 18 is amended --

(1) in paragraph 924(a)(1) by striking "paragraph (2) or (3)" and inserting "paragraphs (2), (3), (5), (6), (7) and (8)";
and

(2) by adding new paragraphs (5), (6), (7) and (8) as follows:

"(5) In the case of a person who violates subsection (a)(1) or (a)(6) of section 922, if any firearm involved is a machinegun, short-barreled shotgun, short-barreled rifle, or semiautomatic firearm such person shall be sentenced to imprisonment for five years and may be fined under the provisions of this title, or both. A term of imprisonment imposed under this paragraph shall run consecutively to any other term of imprisonment imposed.

"(6) In the case of a person who violates subsection (a)(1) or (a)(6) of section 922, if the violation involves ten or more, but less than twenty, firearms such person shall be sentenced to imprisonment for not less than five nor more than ten years, and if one or more of the firearms is a short-barreled rifle, short-barreled shotgun, machinegun, destructive device or semiautomatic firearm, such person shall be sentenced to imprisonment for not less than ten nor more than twenty years, and may be fined under the provisions of this title, or both. A term of

imprisonment imposed under this paragraph shall run consecutively to any other term of imprisonment imposed.

"(7) In the case of a person who violates subsection (a)(1) or (a)(6) of section 922, if the violation involves twenty or more, but less than fifty, firearms such person shall be sentenced to imprisonment for not less than ten nor more than twenty years, and if one or more of the firearms is a short-barreled rifle, short-barreled shotgun, machinegun, destructive device or semiautomatic firearm, such person shall be sentenced to imprisonment for not less than twenty nor more than thirty years, and may be fined under the provisions of this title, or both. A term of imprisonment imposed under this paragraph shall run consecutively to any other term of imprisonment imposed.

"(8) In the case of a person who violates subsection (a)(1) or (a)(6) of section 922, if the violation involves fifty or more firearms such person shall be sentenced to imprisonment for not less than twenty years, and if one or more of the firearms is a short-barreled rifle, short-barreled shotgun, machinegun, destructive device or semiautomatic firearm, such person shall be sentenced to imprisonment for not less than thirty years, and may be fined under the provisions of this title, or both. A term of imprisonment imposed under this paragraph shall run consecutively to any other term of imprisonment imposed."

EXPLANATION

This section makes a series of changes in 18 U.S.C. 924(a) to provide for mandatory penalties for large-scale firearms trafficking and in situations where particularly dangerous weapons are involved. At present, subsection 924(a) consists of four paragraphs setting out penalties for the various firearms offenses in sections 922 and 929. The terms of imprisonment are for a maximum of either five or ten years and there are no statutory mandatory penalties. Mandatory penalties are appropriate for certain firearms offenses when committed in circumstances indicating trafficking in large quantities of weapons or in weapons typically used by violent criminals and terrorists. Four such penalties are set out.

First, new paragraph 924(a)(5) would provide for a mandatory sentence of five years' imprisonment for violations of 18 U.S.C. 922(a)(1), dealing in firearms without a license, or of 18 U.S.C. 922(a)(6), making a false statement to a licensed dealer in connection with the acquisition of a firearm, if any firearm involved is a machinegun, short-barreled rifle, short-barreled shotgun, or semiautomatic firearm. The current penalty for one of these offenses is a maximum of five years. (Although under 18 U.S.C. 922(o) it is illegal to possess or transfer a machinegun, that section does not apply to a machinegun lawfully possessed on the date that subsection was enacted in 1986. Such weapons may be sold to firearms licensees who, in turn, may sell them to the public, provided they are registered to the new owner. Moreover, firearms dealers occasionally have for sale short-barreled rifles

or shotguns that were either registered during an amnesty period shortly after the enactment of the 1968 Gun Control Act or lawfully made and registered to the maker subsequent to the 1968 Act.)

Second, new paragraph 924(a)(6) would provide for mandatory sentences for violations of 18 U.S.C. 922(a)(1) and 922(a)(6) -- false statements and unlicensed dealing -- when more than ten but fewer than twenty firearms are involved. The sentence would be between five and ten years' imprisonment. If one or more of the firearms involved were a short-barreled rifle, short-barreled shotgun, machinegun, semiautomatic firearm, or destructive device the mandatory penalty would be between ten and twenty years.

Paragraphs 922(a)(7) and (8) continue this enhancement scheme for unlicensed dealing and false statement offenses when larger quantities of weapons are involved. Paragraph 922(a)(7) provides for a prison term of between 10 and 20 years if between 20 and 49 weapons were involved. If one or more of these weapons were a short-barreled rifle, short-barreled shotgun, machinegun, semiautomatic firearm, or destructive device, the mandatory prison term would be between 20 and 30 years.

Under paragraph 922(a)(8), false statement and unlicensed dealing offenses would be punished by a mandatory term of at least 20 years if 50 or more firearms were involved and by a mandatory term of not less than 30 years if one or more of them were a short-barreled rifle, short-barreled shotgun, machinegun, semiautomatic firearm, or destructive device.

**SEC. MANDATORY PENALTY FOR KNOWING TRANSFER OF A FIREARM
FOR PURPOSE OF COMMITTING A FELONY WITH ENHANCEMENT FOR
SEMIAUTOMATIC FIREARMS, MACHINEGUNS, SHORTENED RIFLES AND
SHOTGUNS, AND DESTRUCTIVE DEVICES**

Subsection 924(b) of title 18 is amended by striking "shall be fined not more than \$10,000, or imprisoned not more than ten years, or both" and inserting "shall be sentenced to imprisonment for not less than five nor more than ten years, and may be fined under the provisions of this title, or both, and if the firearm is a short-barreled rifle, short-barrelled shotgun, machinegun, destructive device or semiautomatic firearm shall be sentenced to imprisonment for ten years, and may be fined under the provisions of this title, or both. A term of imprisonment imposed under this subsection shall run consecutively to any other term of imprisonment imposed.".

EXPLANATION

This section amends 18 U.S.C. 924(b) which makes it an offense to ship, transport, or receive a firearm or ammunition in interstate or foreign commerce with intent to commit a felony with the firearm, or with the knowledge or reasonable cause to believe that another person is to commit such a crime with the weapon. The present punishment may extend to ten years' imprisonment, although there is no statutory mandatory prison term, even if particularly dangerous weapons are involved.

When machineguns, sawed-off shotguns or rifles, destructive devices (such as bombs or grenades), or semiautomatic firearms are moved or received in commerce to be used in a felony, mandatory punishment is deserved. This section provides for a mandatory term of ten years, thus assuring that anyone who commits such an offense will serve substantial prison time.

**SEC. MANDATORY PENALTY FOR RECKLESSLY DISCHARGING
AUTOMATIC AND SEMIAUTOMATIC FIREARMS**

Section 924 of title 18, United States Code, is amended by adding at the end thereof the following new subsection:

"(m) Whoever discharges a machinegun or semiautomatic firearm with reckless disregard for the safety of another if --

(1) the discharge occurs within the special maritime and territorial jurisdiction of the United States; or

(2) the machinegun or semiautomatic firearm has, at any time, moved in interstate or foreign commerce,
shall be imprisoned for five years and may be fined under the provisions of this title, or both."

EXPLANATION

This provision would make it an offense recklessly to discharge a machinegun or semiautomatic firearm either in the special maritime and territorial jurisdiction or if the weapon had at any time moved in interstate or foreign commerce. A mandatory five-year prison sentence would apply. The proposal is drawn from 18 U.S.C. 922(q), which currently punishes the reckless discharge of any firearm within a school zone. This amendment would reach only automatic and semiautomatic weapons and reflects the fact that recklessly discharging such weapons, because of their inherent dangerousness, poses a threat to human safety that substantially exceeds the threat posed by conventional firearms.

**SEC. MANDATORY PENALTY FOR OFFENSES INVOLVING
MACHINEGUNS, SEMIAUTOMATIC FIREARMS, SHORT-BARRELED RIFLES AND
SHOTGUNS, AND DESTRUCTIVE DEVICES**

Subsection 924(a)(2) of title 18 is amended by adding at the end the following:

"In a case of a person who violates subsection (g), (h), (i) or (j) of section 922 involving a short-barreled rifle, short-barreled shotgun, machinegun, destructive device or semiautomatic firearm, such person shall be sentenced to imprisonment for not less than five nor more than ten years, except that this mandatory penalty shall not apply if --

(A) the violation is of subsection (g) or (h) of section 922; and

(B) the defendant proves by a preponderance of the evidence at sentencing that the possession, receipt, shipment, or transportation of the firearm was for a lawful sporting purpose.

A mandatory term of imprisonment imposed under this paragraph shall run consecutively to any other term of imprisonment imposed."

EXPLANATION

This section amends the penalty provision in 18 U.S.C. 924(a)(2) to provide for mandatory terms of imprisonment of between five and ten years for certain offenses involving machineguns, destructive devices, short-barreled rifles or shotguns, or semiautomatic firearms. Like section 924(e) on which it is patterned, it is an enhanced penalty provision.

Presently, subsection 922(a)(2) provides for prison terms of up to ten years for violations of several subsections of section 922 including 922(g), which makes it an offense for convicted felons and certain other persons such as drug addicts to receive or possess firearms; 922(h), which makes it an offense for a person employed by a person under a firearms disability to receive or possess a firearm in the course of his employment; 922(i), which makes it an offense to transport or ship a firearm in interstate or foreign commerce, knowing it was stolen; and 922(j), which makes it an offense to receive, or dispose of a stolen firearm which has moved in interstate or foreign commerce. However, for none of these offenses is any prison term mandated by statute.

This section provides for a mandatory prison term when it is demonstrated at the sentencing hearing that one of these offenses involves a machinegun, sawed-off shotgun or rifle, destructive device, or semiautomatic firearm. The potential for harm caused by these weapons is such that a mandatory term is justified. For

example, a convicted felon with a machinegun or semiautomatic weapon poses a greater threat than one armed only with some other type of weapon. Similarly, the knowing transportation or "fencing" of a stolen machinegun, semiautomatic weapon, destructive device (such as a bomb or grenade) or short-barreled rifle or shotgun, presents such a high likelihood of further criminal conduct, particularly violent criminal conduct, that mandatory prison terms are warranted.

However, an exception to the application of the new mandatory penalty provision is created when the violation is of subsection (g) or (h) of section 922 (which involve possession by prohibited classes of persons) if the defendant proves during the sentencing process that his possession was for a lawful sporting purpose. In such a case, the current ten-year maximum penalty would apply, but without the requirement of a mandatory five year time. The burden of persuasion is placed on the defendant since he or she is in the best position to prove that the firearm was possessed for a sporting purpose. For the government to show that the possession was not for a lawful sporting purpose, -- i.e. to prove a negative -- would be all but impossible in most instances.

SEC. DEFINITION OF SEMIAUTOMATIC FIREARM.

Section 921(a) of title 18, United States Code, is amended by adding at the end thereof the following:

"(26) the term 'semiautomatic firearm' means any repeating firearm which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge.".

EXPLANATION

This section defines the term "semiautomatic firearm" for purposes of chapter 44 of title 18. Several other sections of this bill provide for enhanced or mandatory penalties when semiautomatic firearms are involved in crimes. The definition is the same one that both Houses of Congress adopted in the first session of the current Congress in their respective comprehensive crime bills.

SEC. EXPANSION AND CLARIFICATION OF FIREARMS FORFEITURE

(a) Subsection 924(d)(1) of title 18, United States Code, is amended by striking "Any firearm or ammunition involved" and all that follows through "where such intent is demonstrated by clear and convincing evidence," and inserting the following:

"Any firearm or ammunition --

"(A) involved or used in any knowing violation of subsection 924(a)(3);

"(B) involved or used in any violation of this chapter or any rule or regulation promulgated thereunder for which the authorized maximum punishment may exceed one year's imprisonment punishment;

"(C) involved or used in violation of any provision other than one set out in this chapter which may be prosecuted in a court of the United States; or

"(D) intended to be used in any violation of any provision of this chapter, or of any other provision which may be prosecuted in a court of the United States, for which the authorized maximum punishment may exceed one year's imprisonment punishment, where such intent is demonstrated by clear and convincing evidence,".

(b) Paragraph (3) of subsection 924(d) of title 18, United States Code, is repealed.

(c) Subsection 924(d)(2)(C) is amended by striking "or as intended to be used in any offense referred to in paragraph (3) of this subsection," and inserting ", or intended to be used as provided in paragraph (1)(D),".

(d) Subsection 924(d)(1) is amended by striking the sentence beginning with the word "Provided,"

(e) Section 3665 of title 18 is amended by inserting ",for any felony violation of the Controlled Substances Act or the Controlled Substances Import and Export Act," following "foreign commerce".

EXPLANATION

This section expands the forfeiture authority for firearms involved or intended for use in federal crimes to authorize the civil forfeiture of firearms used or intended for use in all federal felonies. While firearms used in most federal crimes can be forfeited under current law, there are some gaps which this section would close.

Presently, 18 U.S.C. 924(d)(1) authorizes the civil forfeiture of (1) any firearm or ammunition involved or used in any "knowing" violation of certain specified offenses under chapter 44 of title 18, including any "knowing" violation of subsection 924(a)(3), a provision which makes firearms licensees who knowingly make false statements in their books and records subject to a misdemeanor penalty; (2) any firearm or ammunition involved in any "willful" violation of any other provision in chapter 44 or any rule or regulation promulgated thereunder; (3) any firearm or ammunition involved in any violation of "any other criminal law of the United States"; and (4) any firearm or ammunition intended to be used in violation of any of the federal laws specified in subsection 924(d)(3). Those offenses are crimes of violence, drug offenses punishable under the Controlled Substances Act or the Controlled Substances Import and Export Act, and several specified firearms offenses.

Subsection (a) of the new section revises subsection 924(d)(1) so that it would authorize the forfeiture of any firearm or ammunition that falls into any one of four categories. The first, a new 924(d)(1)(A), is any firearm or ammunition

involved or used in a knowing violation of subsection 924(a)(3), the provision that applies to firearms licensees who knowingly make false entries in their books and records and merely carries forward current law.

The second, proposed 924(d)(1)(B), is any firearm or ammunition involved in any felony violation of chapter 44 of title 18, the chapter that sets out the firearms offenses. The only misdemeanor violations of chapter 44 are the aforementioned subsection 924(a)(3) pertaining to dealers records and (for purposes other than the authorized five year term of imprisonment) a violation of 18 U.S.C. 922(q), possession of a firearm in a school zone. The new section would not authorize forfeiture of a firearm involved in either of these two offenses but would make it clear that firearms involved in all felony violations of the chapter are subject to forfeiture. The new 924(d)(1)(B) thus serves to clarify current law which confusingly authorizes forfeiture for "knowing" violations of some provisions in chapter 44 and for "willful" violations of others.

The third, proposed 924(d)(1)(C), is any firearm or ammunition involved in or used in any federal crime, felony or misdemeanor, other than one in chapter 44 of title 18. This merely carries forward current law.

The fourth, proposed 924(d)(1)(D), is any firearm or ammunition intended to be used in any felony violation of chapter 44 or any felony violation of any other federal statute. This represents an expansion of current law. As stated, present law

only authorizes the forfeiture of firearms intended to be used in certain specified felony violations of chapter 44, crimes of violence, and drug trafficking crimes. For example, under current law firearms intended to be transferred from a nonlicensee to another nonlicensee who lives in another State in violation of section 922(a)(5) can only be forfeited if a "pattern" of such activity can be shown. As another example, a firearm intended to be used by a person engaged in transferring a large quantity of counterfeit bills would not currently be subject to forfeiture because this offense does not fall within the definition of a crime of violence, but it would be forfeitable under the instant proposal.

Subsections (b) and (c) of the section merely make conforming changes necessitated by the revision of subsection 924(d)(1).

Subsection (d) of the section makes another amendment to 924(d)(1) to eliminate a provision that can unjustifiably work to prevent firearms forfeitures in certain situations. Section 924(d)(1) currently contains a proviso clause that blocks civil forfeiture in cases where the person from whom the firearm was seized is either tried and acquitted or charged with a criminal offense but the charges against him are dismissed prior to trial.

These impediments to forfeiture -- which are unique among federal forfeiture statutes -- are unjustified. Because the burden of proof for conviction is greater than that required for civil forfeiture, it is settled that there is no constitutional

bar to civil forfeiture following an acquittal. E.g., United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). Nor are there any sound policy reasons to prohibit civil forfeiture after a dismissal or acquittal of criminal charges. An acquittal or dismissal can occur for any number of reasons, totally unrelated to the defendant's factual guilt or innocence. For example, a dismissal or acquittal can be necessitated after a trial begins because a key witness disappears, even in situations where it is likely the defendant or an accomplice has caused the disappearance. As another example, a dismissal or acquittal can take place when the court excludes evidence as having been illegally seized even though it is highly probative of the defendant's guilt and even though law enforcement officers believed in good faith that the search or seizure was completely lawful. While the exclusionary rule has been held not applicable in federal civil proceedings, see United States v. Janis, 428 U.S. 433 (1976), the proviso clause in section 924(d)(1) in effect imposes a special exclusionary rule for civil forfeiture proceedings involving firearms.

Subsection (d) of the proposed section of the bill would rectify this situation by repealing the present proviso clause.

Subsection (e) of this provision revises 18 U.S.C. 3665 to allow firearms found in the possession of a person arrested for a felony drug offense to be retained by the government at the time of the person's conviction. Presently, section 3665 provides that a judgment of conviction for transporting a stolen motor

vehicle in interstate commerce, for committing a felony crime of violence, or for committing a felony "perpetrated in whole or in part by the use of firearms" may include an order that any firearms and ammunition found in the defendant's possession or control at the time of his arrest are confiscated. The statute further provides that the court may direct the delivery of the firearms to the law enforcement agency which apprehended the person. Subsection (e) would add felony drug trafficking crimes to the ambit of the section and allow firearms found in the defendant's possession at the time of his arrest for such a crime to be ordered confiscated and delivered to the law enforcement agency that arrested the person.

SEC. TECHNICAL CORRECTION OF THE TERM "ENGAGED IN THE BUSINESS."

Section 921(a)(21)(C) of title 18, United States Code, is amended by striking "purchase" and inserting "acquisition", and by striking "purchases" and inserting "acquisitions".

EXPLANATION

This section makes a technical change in the definition of the term "engaged in the business" of dealing in firearms to close a loophole which has made unlicensed dealing cases against those who regularly supply firearms to terrorists and other criminals needlessly difficult. Since 1986, the Gun Control Act has defined the term "engaged in the business," as applied to a dealer as "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms." (See 18 U.S.C. 921(a)(21)(C), emphasis added.)

Unlicensed dealing in firearms, for example selling them to criminals out of the trunk of a person's car, is a violation of 18 U.S.C. 922(a)(1)(A). The current definition has rendered unlicensed dealing cases more difficult by requiring proof that the person was at least attempting to make a profit and that the firearms the person had for sale were purchased. It is not uncommon for guns involved in unlicensed dealing cases to be stolen or acquired by barter, for example in exchange for drugs. While arguably, guns acquired by barter could be considered "purchased" this is not clear. This section would resolve that ambiguity and, more important, would make dealing in stolen firearms by nonlicensees subject to the unlicensed dealing proscription. The present definition of the term "engaged in the business" illogically prevents such a prosecution.

**SEC. PROHIBITED PARTICIPATION IN CRIMINAL STREET GANGS AND
GANG CRIME**

Title 18, United States Code, is amended by adding a new chapter 94, as follows:

**"CHAPTER 94 -- PROHIBITED PARTICIPATION IN CRIMINAL STREET GANGS
AND GANG CRIME**

"§ 1930. Crimes in furtherance of gangs

"(a) The Congress makes the following findings:

"(1) Criminal street gangs have become increasingly prevalent and entrenched in our society in the last several decades. In many areas of the country, these gangs exert considerable control over other members of their community, particularly through the use of violence and drugs. Criminal street gangs have also become more national in scope, extending their influence beyond the urban areas from which they originated.

"(2) The major activities of criminal street gangs are crimes of violence and the distribution and use of illegal drugs. It is through these activities that criminal street gangs have been able to control or terrorize certain parts of their communities. Thus, criminal street gangs directly affect interstate and foreign commerce, even when their particular activities, viewed in isolation, appear to be purely intrastate in character.

"(b) On the basis of the findings stated in subsection (a) the Congress determines that the provisions of this chapter are

necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish criminal law.

"§ 1931. Prohibited Activity

"(a) As used in this chapter --

"(1) "Predicate gang crime" means

"(A) any act or threat, or attempted act or threat, which is chargeable under federal or State law and punishable by imprisonment for more than one year, involving murder, assault, kidnapping, robbery, extortion, burglary, arson, property damage or destruction, obstruction of justice, tampering with or retaliating against a witness, victim, or informant, or the manufacture, importation, receipt, concealment, purchase, sale, possession, or otherwise dealing in a controlled substance or controlled substance analogue (as those terms are defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802);

"(B) any act, punishable by imprisonment of more than one year, which is indictable under any of the following provisions of Title 18, United States Code: Sections 922 and 924 (relating to receipt, possession, and transfer of firearms); Section 1503 (relating to obstruction of justice); Section 1510 (relating to obstruction of criminal investigations); Section 1512 (relating to tampering with a witness, victim, or informant); Section 1513 (relating to retaliating against a witness, victim, or an informant); or

"(C) any act indictable under subsection (b)(5) of this chapter.

"(2) "Criminal street gang" means any organization, or group, of five or more individuals, whether formal or informal, who act in concert, or agree to act in concert, for a period in excess of thirty days, with a purpose that any of those individuals alone, or in any combination, commit or will commit, two or more predicate gang crimes, one of which must occur after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior predicate gang crime.

"(3) "Participate in a criminal street gang" means to act in concert with a criminal street gang with the intent to commit, or that any other individual associated with the criminal street gang will commit, one or more predicate gang crimes.

"(4) "State" means a state of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

"(b) It shall be unlawful --

"(1) to commit, or attempt to commit a predicate gang crime with intent to promote or further the activities of a criminal street gang or for the purpose of gaining entrance to or maintaining or increasing position in such a gang;

"(2) to participate, or attempt to participate, in a criminal street gang, or conspire to do so;

"(3) to command, counsel, persuade, induce, entice, or coerce, any individual to participate in a criminal street gang;

"(4) to employ, use, command, counsel, persuade, induce, entice, or coerce any individual to commit, cause to commit, or facilitate the commission of, a predicate gang crime, with intent to promote the activities of a criminal street gang or for the purpose of gaining entrance to or maintaining or increasing position in such a gang.

"(5) to use any communication facility, as defined in section 403(b) of the Controlled Substances Act (21 U.S.C. 843(b)), in causing or facilitating the commission, or attempted commission, of a predicate gang crime with intent to promote or further the activities of a criminal street gang or for the purpose of gaining entrance to or maintaining or increasing position in such a gang. Each separate use of a communication facility shall be a separate offense under this subsection.

"§ 1932. Penalties

"(a) Any person who violates section 1931(b)(1) or (2) shall be fined in accordance with this title and sentenced to imprisonment for not more than twenty years, or up to life if the violation is based on a predicate gang crime for which the maximum penalty includes life imprisonment, or both, and if any person commits such a violation after one or more prior convictions for a predicate gang crime, that is not part of the instant violation, such person shall be fined in accordance with

C this title and sentenced to a term of imprisonment which may not be less than ten years and not more than life imprisonment, or both.

"(b) Any person who violates section 1931(b)(3) or (b)(4) shall be fined in accordance with this title and sentenced to imprisonment which may not be less than five years, but not more than ten years, and if the individual who is the subject of the act was less than eighteen years of age, such person shall be imprisoned for ten years. A term of imprisonment under this subsection shall run consecutively to any other term of imprisonment, including that imposed for any other violation of this chapter.

("(c) Any person who violates section 1931(b)(5) shall be fined in accordance with this title and sentenced to a term of imprisonment of not more than five years, or both.

"(d) In addition to the other penalties set forth in this section --

"(1) any person who violates section 1931(b)(1) or (2), one of whose predicate gang crimes involves murder or conspiracy to commit murder which results in the taking of a life, and who commits, counsels, commands, induces, procures, or causes that murder, shall be sentenced to a mandatory term of life imprisonment without release, or may be sentenced to death;

("(2) any person who violates section 1931(b)(1) or (2), one of whose predicate gang crimes involves attempted murder or

conspiracy to commit murder, shall be sentenced to term of imprisonment of not less than twenty years or more than life;

"(3) any person who violates section 1931(b)(1) or (2), and who at the time of the offense occupied a position of organizer, supervisor, or other position of management in that street gang shall be sentenced to a term of imprisonment which shall not be less than fifteen years or more than life. For purposes of this paragraph, if it is shown that the defendant counseled, commanded, induced, or procured five or more individuals to participate in a street gang, such showing shall constitute a rebuttable presumption that the defendant occupied a position of organizer, supervisor, or other position of management in such gang.

"(e) Whoever violates section 1931(b)(1) or (2) shall, in addition to any other penalty and irrespective of any provision of State law, forfeit to the United States --

"(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation; and

"(2) any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation.

The provisions of section 413(b), (c), and (e) through (p) of the Controlled Substances Act (21 U.S.C. 853(b), (c), and (e) through (p)) shall apply to a forfeiture under this section."

EXPLANATION

This section is designed to provide a new and more effective means of combatting the problem of crimes committed by street gangs. Although the RICO statutes (18 U.S.C. 1961 et seq.) may sometimes be employed successfully against criminal street gangs, RICO is not suited to all such gangs. For one thing, RICO requires the commission of multiple episodes of predicate crimes by an enterprise, and, in some circuits, has been interpreted to require that the defendant rather than another member of the enterprise have engaged in the offenses. Moreover, RICO does not include all the crimes, such as burglary, which are typically committed by street gangs.

Under the present proposal, a street gang is defined as a group of five or more individuals who act in concert or agree to act in concert for more than thirty days, with the purpose that any of those individuals, alone or in combination, will engage in two or more predicate gang crimes. Thus, under this proposal, mere membership by a defendant in a gang, even one whose other members have a criminal intent, is not an offense. The defendant must be shown to have an intent that some individuals in the gang -- although not necessarily the defendant -- will engage in three or more predicate gang crimes and at least one such crime must be committed. The term "predicate gang crime" is, in turn, defined to include felonious State or federal controlled substance offenses, various State and federal felony crimes of violence, and certain federal firearms and obstruction of justice offenses -- crimes typical of the criminal street gangs currently

responsible for spreading fear and terror throughout America's cities and towns.

Federal jurisdiction over the offense is based upon Congress' power to regulate interstate and foreign commerce and is supported by findings that the activities of criminal street gangs, in aggregate, clearly have a major and adverse effect upon such commerce. See Perez v. United States, 402 U.S. 146 (1970).

The basic penalty for a violation is set at up to twenty years' imprisonment (as in RICO), but increased penalties are provided when death results or for persons who occupy a position of organizer, supervisor, or manager of a gang. Lesser penalties are afforded for persons who coerce or persuade others to participate in a criminal street gang, or to commit a predicate gang crime, or to use a communication facility such as the telephone to facilitate the commission of a predicate gang crime with intent to promote the activities of a criminal street gang. In addition, criminal forfeiture is provided.

SEC. INCREASED PENALTIES FOR GANG CRIME

The United States Sentencing Commission is directed at the earliest opportunity to amend its guidelines pursuant to section 994 of title 28, United States Code, to increase by at least four levels the base offense level for any federal felony committed for the purpose of gaining entrance to, or maintaining or increasing position in, a criminal street gang. For purposes of this section, "criminal street gang" means any organization, or group, of five or more individuals, whether formal or informal, who act in concert, or agree to act in concert, for a period in excess of thirty days, with the intent that any of those individuals alone, or in any combination, commit or will commit, two or more acts punishable under State or federal law by imprisonment for more than one year.

EXPLANATION

This section requires the United States Sentencing Commission to raise the applicable guideline sentence for felonies committed to further the activities of criminal street gangs, or as a means of gaining entrance to or increasing or maintaining status in, such gangs. Criminal street gangs clearly pose a major threat to society. Therefore, offenses committed to further the activities of such gangs, or by members or persons seeking membership in, such gangs, are deserving of greater punishment than the same crimes committed by individuals outside the gang context.

This amendment directs the United States Sentencing Commission at its earliest opportunity to amend its guidelines to provide an increased sentence for any felony which is shown at sentencing to have been committed for the purpose of furthering the activities of a street gang or to gain admission or maintain or enhance status within it.

SEC. REVISION OF FEDERAL JUVENILE DELINQUENCY PROCEDURES

Section 5032 of Title 18, United States Code, is amended to read as follows:

§ 5032. Delinquency proceeding in district court; transfer for criminal prosecution

(a) Except as otherwise provided in this chapter, a juvenile alleged to have committed an act of juvenile delinquency shall be surrendered to the appropriate state legal authorities. For purposes of this subsection, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(b) If an alleged juvenile delinquent is not surrendered to the authorities of a State pursuant to this section, any proceedings against him shall be initiated by the filing of an information in an appropriate district court of the United States. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise.

(c) A juvenile alleged to have committed an act of juvenile delinquency shall not be proceeded against in any court of the United States unless--

(1) a juvenile is alleged to have committed an act of juvenile delinquency within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months; or

(2) the Attorney General, after investigation, certifies to the appropriate district court of the United States that---

(A) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency; or

(B) the State does not have available programs and services adequate for the needs of juveniles; or

(C) the offense charged is a crime of violence that is a felony or a felony offense (or a conspiracy or attempt to commit an offense) described in section 401 or 404 of the Controlled Substance Act (21 U.S.C. 841, 844 or 846), section 1002(a), 1003, 1005, 1009, 1010(b)(1), (2), (3), of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 955, 959, 960(b)(1), (2), (3), or 953), or section 924(b), (g), or (h) of this title, and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

(d) Following the filing of the information as provided in subsection (b), proceedings against a juvenile shall be transferred for criminal prosecution as an adult, when---

(1) the juvenile makes a request to be proceeded against as an adult, in writing upon advice of counsel; or

(2) upon the filing of a motion to transfer of the Attorney General, when the juvenile is alleged to have committed an act after his sixteenth birthday which, if committed by an adult, would be---

(A) an offense set forth in subsection (c)(2)(C), and

(B) the juvenile has previously been found to have committed an act which, if committed by an adult, would have been (i) one of the offenses set forth in subsection (c)(2)(C) or (ii) an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed; or

(3) upon the filing of a motion to transfer of the Attorney General, when---

(A) the juvenile is alleged to have committed an act after his fifteenth birthday which if committed by an adult would be a crime of violence or an offense set forth in subsection (c)(2)(C), and

(B) the district court finds, after a hearing, that such transfer would be in the interest of justice. Subject to rebuttal by the juvenile, it shall be presumed that transfer under this subsection would be in the interest of justice in any case--

(i) in which a juvenile is alleged to have committed an act which if committed by an adult would

be a felony crime of violence for which a maximum term of imprisonment of ten years or more is authorized; or

(ii) that involves the use or threatened use of a firearm, as defined in section 921 of this title.

(e) In assessing whether a transfer would be in the interest of justice, evidence of the following factors may be considered and findings, with regard to each factor considered, shall be made in the record---

(1) age and social background of the juvenile;

(2) nature of the alleged offense;

(3) extent and nature of the juvenile's prior delinquency record;

(4) juvenile's present intellectual development and psychological maturity;

(5) nature of past treatment efforts and the juvenile's response to such treatment, and

(6) the availability of programs designed to treat the juvenile's behavioral problems.

(f) Denial of a Motion to Transfer made under this chapter shall be deemed a final decision for the purposes of section 1291 of title 28.

(g) Reasonable notice of the transfer hearing shall be given to the juvenile, his parents, guardian, or custodian and to his counsel. The juvenile shall be assisted by counsel during the transfer hearing, and at every other critical stage of the proceedings. Statements made by a juvenile in connection with a

transfer hearing shall not be admissible at subsequent criminal prosecutions.

(h) Once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency, subsequent criminal prosecution or juvenile proceedings based upon such alleged act of delinquency shall be barred.

(i) Whenever a juvenile transferred to district court under this section is not convicted of the crime upon which the transfer was based or another crime which would have warranted transfer had the juvenile been initially charged with that crime, further proceedings concerning the juvenile shall be conducted pursuant to the provisions of this chapter.

(j) A juvenile shall not be transferred to adult prosecution nor shall a hearing be held under section 5037 (disposition after a finding of juvenile delinquency) until any prior juvenile court records of such juvenile have been received by the court or the clerk of the juvenile court has certified in writing that the juvenile has no prior record, or that the juvenile's record is unavailable and why it is unavailable.

(k) Whenever a juvenile is adjudged delinquent pursuant to the provisions of this chapter, the specific acts which the juvenile has been found to have committed shall be described as part of the official record of the proceedings and part of the juvenile's official record.

EXPLANATION

C This amendment is intended to clarify the present statute by simplifying language and creating subsections. It is also intended to meet current law enforcement needs by adding to the offenses which may be handled in federal court and those which may be the basis of transfer for adult prosecution. The procedures for transferring a juvenile for adult prosecution have also been streamlined and rendered more practical.

Subsection (c)(2)(C) expands the current list of offenses which may be tried in federal court where there is a substantial federal interest to justify the exercise of federal jurisdiction. Subsections (d)(2)(A) and (d)(2)(B) incorporate by reference this expanded list of offenses as a basis for transfer for adult prosecution.

C The statute currently lists crimes of violence which are felonies and certain enumerated drug offenses as those which may be handled in federal court on the basis of a substantial federal interest. This amendment adds conspiracies and attempts to commit the enumerated drug offenses, which are not now covered, to correct a troublesome anomaly in the present statute. Possession of a more than five grams of a mixture or substance which contains cocaine base or "crack" has also been added, as have virtually all serious federal firearms offenses and four obstruction of justice offenses. The addition of these offenses as bases for federal jurisdiction and as bases for transfer for adult prosecution reflect the current involvement of juveniles in serious criminal activity.

(

Subsection (d)(2)(B) has been redrafted to make it clear that the prior offense which is the predicate for a mandatory transfer may be either an adult conviction or a juvenile adjudication.

Subsection (d)(3)(B) creates a presumption in favor of transfer for adult treatment for felony crimes of violence which have either a maximum term of imprisonment of ten years or more or involve the use or threatened use of a firearm. Under the present statute, in determining whether transfer for adult prosecution is in the interest of justice, a district court must weigh a number of factors, including the nature of the offense, the age, background, and maturity of the juvenile, and the juvenile's response to any previous treatment efforts. See 18 U.S.C. § 5032 (fifth undesignated paragraph). The central inquiry is whether there is a reasonable prospect of rehabilitation by treatment in the juvenile system before the juvenile's twenty-first birthday. See, e.g., United States v. E.K., 471 F. Supp. 924, 931 (D.Ore. 1979); Sen. Rep. No. 93-1011, 93d Cong. 2d Sess., reprinted in [1974] U.S. Code Cong. & Admin. News 5320. In making this determination, some district courts have given insufficient weight to the nature of the offense, particularly where violent crimes are involved. Shifting the presumption for such crimes will serve as a corrective to such problems.

Subsection (e) grants additional flexibility to the judge in the evidence to be considered in assessing whether a transfer is

in the interest of justice and reflects the fact that evidence on all of the factors listed is not always available.

Subsection (f) provides for appeal by the government of adverse transfer decisions. Since findings in favor of transfer to adult status are immediately appealable by the juvenile, fairness supports making it clear that the government is entitled to the same opportunity.

Subsection (j) clarifies the provision governing the obtaining of prior juvenile records to make it clear that they are required only at the point where they are needed, rather than at the commencement of the proceeding.

DEATH PENALTY FOR MURDERS IN THE DISTRICT OF COLUMBIA
[Option #1: Coverage of Murders in D.C. only]

SEC. _____. Title 18 of the United States Code is amended --

(a) by adding the following new section at the end of chapter 51:

"§ 1118. Capital punishment for murders in the District of Columbia

"(a) OFFENSE. -- It is an offense to cause the death of a person intentionally, knowingly, or through recklessness manifesting extreme indifference to human life, or to cause the death of a person through the intentional infliction of serious bodily injury.

"(b) FEDERAL JURISDICTION. -- There is federal jurisdiction over an offense described in this section if the conduct resulting in death occurs in the District of Columbia.

"(c) PENALTY. -- An offense described in this section is a Class A felony. A sentence of death may be imposed for an offense described in this section as provided in subsections (d)-(1).

"(d) MITIGATING FACTORS. -- In determining whether to recommend a sentence of death, the jury shall consider whether any aspect of the defendant's character, background, or record or any circumstance of the offense that the defendant may proffer as a mitigating factor exists, including the following factors:

"(1) MENTAL CAPACITY. -- The defendant's mental capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired.

"(2) DURESS. -- The defendant was under unusual and substantial duress.

"(3) PARTICIPATION IN OFFENSE MINOR. -- The defendant is punishable as a principal (pursuant to section 2 of this title) in the offense, which was committed by another, but the defendant's participation was relatively minor.

"(e) AGGRAVATING FACTORS. -- In determining whether to recommend a sentence of death, the jury shall consider any aggravating factor for which notice has been provided under subsection (f), including the following factors --

"(1) KILLING IN FURTHERANCE OF DRUG TRAFFICKING. -- The defendant engaged in the conduct resulting in death in the course of or in furtherance of drug trafficking activity.

"(2) KILLING IN THE COURSE OF OTHER SERIOUS VIOLENT CRIMES. -- The defendant engaged in the conduct resulting in death in the course of committing or attempting to commit an offense involving robbery, burglary, sexual abuse, kidnaping, or arson.

"(3) MULTIPLE KILLINGS OR ENDANGERMENT OF OTHERS. -- The defendant committed more than one offense under this section, or in committing the offense knowingly created a grave risk of death to one or more persons in addition to the victim of the offense.

"(4) INVOLVEMENT OF FIREARM. -- During and in relation to the commission of the offense, the defendant used or possessed a firearm as defined in section 921 of this title.

"(5) PREVIOUS CONVICTION OF VIOLENT FELONY. -- The defendant has previously been convicted of an offense punishable by a term of imprisonment of more than one year that involved the use or attempted or threatened use of force against a person or that involved sexual abuse.

"(6) KILLING WHILE INCARCERATED OR UNDER SUPERVISION. -- The defendant at the time of the offense was confined in or had escaped from a jail, prison, or other correctional or detention facility, was on pre-trial release, or was on probation, parole, supervised release, or other post-conviction conditional release.

"(7) HEINOUS, CRUEL OR DEPRAVED MANNER OF COMMISSION. -- The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

"(8) PROCUREMENT OF THE OFFENSE BY PAYMENT. -- The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

"(9) COMMISSION OF THE OFFENSE FOR PECUNIARY GAIN. -- The defendant committed the offense as consideration for receiving, or in the expectation of receiving or obtaining, anything of pecuniary value.

"(10) SUBSTANTIAL PLANNING AND PREMEDITATION. -- The defendant committed the offense after substantial planning and premeditation.

"(11) VULNERABILITY OF VICTIM. -- The victim was particularly vulnerable due to old age, youth, or infirmity.

"(12) KILLING OF PUBLIC SERVANT. -- The defendant

committed the offense against a public servant --

"(i) while such public servant was engaged in the performance of his or her official duties;

"(ii) because of the performance of such public servant's official duties; or

"(iii) because of such public servant's status as a public servant.

"(13) KILLING TO INTERFERE WITH OR RETALIATE AGAINST WITNESS. -- The defendant committed the offense in order to prevent or inhibit any person from testifying or providing information concerning an offense, or to retaliate against any person for testifying or providing such information.

"(f) NOTICE OF INTENT TO SEEK DEATH PENALTY. -- If the government intends to seek the death penalty for an offense under this section, the attorney for the government shall file with the court and serve on the defendant a notice of such intent. The notice shall be provided a reasonable time before the trial or acceptance of a guilty plea, or at such later time as the court may permit for good cause. The notice shall set forth the aggravating factor or factors set forth in subsection (e) and any other aggravating factor or factors that the government will seek to prove as the basis for the death penalty. The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

"(g) JUDGE AND JURY AT CAPITAL SENTENCING HEARING. -- A hearing to determine whether the death penalty will be imposed for an offense under this section shall be conducted by the judge who presided at trial or accepted a guilty plea, or by another judge if that judge is not available. The hearing shall be conducted before the jury that determined the defendant's guilt if that jury is available. A new jury shall be impaneled for the purpose of the hearing if the defendant pleaded guilty, the trial of guilt was conducted without a jury, the jury that determined the defendant's guilt was discharged for good cause, or reconsideration of the sentence is necessary after the initial imposition of a sentence of death. A jury impaneled under this subsection shall have twelve members unless the parties stipulate to a lesser number at any time before the conclusion of the hearing with the approval of the judge. Upon motion of the defendant, with the approval of the attorney for the government, the hearing shall be carried out before the judge without a jury. If there is no jury, references to "the jury" in this section, where applicable, shall be understood as referring to the judge.

"(h) PROOF OF MITIGATING AND AGGRAVATING FACTORS. -- No presentence report shall be prepared if a capital sentencing hearing is held under this section. Any information relevant to the existence of mitigating factors, or to the existence of aggravating factors for which notice has been provided under subsection (f), may be presented by either the government or the defendant, regardless of its admissibility under the rules governing the admission of evidence at criminal trials, except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The information presented may include trial transcripts and exhibits. The attorney for the government and for the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in that case of imposing a sentence of death. The attorney for the government shall open the argument, the defendant shall be permitted to reply, and the government shall then be permitted to reply in rebuttal.

"(i) FINDINGS OF AGGRAVATING AND MITIGATING FACTORS. -- The jury shall return special findings identifying any aggravating factor or factors for which notice has been provided under subsection (f) and which the jury unanimously determines have been established by the government beyond a reasonable doubt. A mitigating factor is established if the defendant has proven its existence by a preponderance of the evidence, and any member of the jury who finds the existence of such a factor may regard it as established for purposes of this section regardless of the number of jurors who concur that the factor has been established.

"(j) FINDING CONCERNING A SENTENCE OF DEATH. -- If the jury specially finds under subsection (i) that one or more aggravating factors set forth in subsection (e) exist, and the jury further finds unanimously that there are no mitigating factors or that the aggravating factor or factors specially found under subsection (i) outweigh any mitigating factors, then the jury shall recommend a sentence of death. In any other case, the jury shall not recommend a sentence of death. The jury shall be instructed that it must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factors in its decision, and should make such a recommendation as the information warrants.

"(k) SPECIAL PRECAUTION TO ASSURE AGAINST DISCRIMINATION. -- In a hearing held before a jury, the court, before the return of a finding under subsection (j), shall instruct the jury that, in considering whether to recommend a sentence of death, it shall not consider the race, color, religion, national origin, or sex

of the defendant or any victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for such a crime regardless of the race, color, religion, national origin, or sex of the defendant or any victim. The jury, upon the return of a finding under subsection (j), shall also return to the court a certificate, signed by each juror, that the race, color, religion, national origin, or sex of the defendant or any victim did not affect the juror's individual decision and that the individual juror would have recommended the same sentence for such a crime regardless of the race, color, religion, national origin, or sex of the defendant or any victim.

"(1) IMPOSITION OF A SENTENCE OF DEATH. -- Upon a recommendation under subsection (j) that a sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law.

"(m) REVIEW OF A SENTENCE OF DEATH. --

"(1) The defendant may appeal a sentence of death under this section by filing a notice of appeal of the sentence within the time provided for filing a notice of appeal of the judgment of conviction. An appeal of a sentence under this subsection may be consolidated with an appeal of the judgment of conviction and shall have priority over all non-capital matters in the court of appeals.

"(2) The court of appeals shall review the entire record in the case including the evidence submitted at trial and information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under subsection (i). The court of appeals shall uphold the sentence if it determines that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, that the evidence and information support the special findings under subsection (i), and that the proceedings were otherwise free of prejudicial error that was properly preserved for review.

"(3) In any other case, the court of appeals shall remand the case for reconsideration of the sentence or imposition of another authorized sentence as appropriate, except that the court shall not reverse a sentence of death on the ground that an aggravating factor was invalid or was not supported by the evidence and information if at least one aggravating factor described in subsection (e) remains which was found to exist and the court, on the basis of the evidence submitted at trial and the information submitted at the sentencing hearing, finds that the remaining aggravating factor or factors which were found to exist outweigh any

mitigating factors. The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

"(n) IMPLEMENTATION OF SENTENCE OF DEATH. -- A person sentenced to death under this section shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States Marshal. The Marshal shall supervise implementation of the sentence in the manner prescribed by the law of a State designated by the court. The Marshal may use State or local facilities, may use the services of an appropriate State or local official or of a person such an official employs, and shall pay the costs thereof in an amount approved by the Attorney General.

"(o) SPECIAL BAR TO EXECUTION. -- A sentence of death shall not be carried out upon a woman while she is pregnant.

"(p) CONSCIENTIOUS OBJECTION TO PARTICIPATION IN EXECUTION. -- No employee of any State department of corrections, the United States Marshals Service, or the Federal Bureau of Prisons, and no person providing services to that department, service, or bureau under contract shall be required, as a condition of that employment or contractual obligation, to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term 'participate in any execution' includes personal preparation of the condemned individual and the apparatus used for the execution, and supervision of the activities of other personnel in carrying out such activities.

"(q) APPOINTMENT OF COUNSEL FOR INDIGENT CAPITAL DEFENDANTS. -- A defendant against whom a sentence of death is sought, or on whom a sentence of death has been imposed, under this section, shall be entitled to appointment of counsel from the commencement of trial proceedings until one of the conditions specified in subsection (v) has occurred, if the defendant is or becomes financially unable to obtain adequate representation. Counsel shall be appointed for trial representation as provided in section 3005 of this title, and at least one counsel so appointed shall continue to represent the defendant until the conclusion of direct review of the judgment, unless replaced by the court with other qualified counsel. Except as otherwise provided in this section, the provisions of section 3006A of this title shall apply to appointments under this section.

"(r) REPRESENTATION AFTER FINALITY OF JUDGMENT. -- When a judgment imposing a sentence of death under this section has

become final through affirmance by the Supreme Court on direct review, denial of certiorari by the Supreme Court on direct review, or expiration of the time for seeking direct review in the court of appeals or the Supreme Court, the government shall promptly notify the court that imposed the sentence. The court, within 10 days of receipt of such notice, shall proceed to make a determination whether the defendant is eligible for appointment of counsel for subsequent proceedings. The court shall issue an order appointing one or more counsel to represent the defendant upon a finding that the defendant is financially unable to obtain adequate representation and wishes to have counsel appointed or is unable competently to decide whether to accept or reject appointment of counsel. The court shall issue an order denying appointment of counsel upon a finding that the defendant is financially able to obtain adequate representation or that the defendant rejected appointment of counsel with an understanding of the consequences of that decision. Counsel appointed pursuant to this subsection shall be different from the counsel who represented the defendant at trial and on direct review unless the defendant and counsel request a continuation or renewal of the earlier representation.

"(s) STANDARDS FOR COMPETENCE OF COUNSEL. -- In relation to a defendant who is entitled to appointment of counsel under subsections (q)-(r), at least one counsel appointed for trial representation must have been admitted to the bar for at least 5 years and have at least three years of experience in the trial of felony cases in the Federal district courts. If new counsel is appointed after judgment, at least one counsel so appointed must have been admitted to the bar for at least 5 years and have at least 3 years of experience in the litigation of felony cases in the Federal courts of appeals or the Supreme Court. The court, for good cause, may appoint counsel who does not meet these standards, but whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration of the seriousness of the penalty and the nature of the litigation.

"(t) CLAIMS OF INEFFECTIVENESS OF COUNSEL IN COLLATERAL PROCEEDINGS. -- The ineffectiveness or incompetence of counsel during proceedings on a motion under section 2255 of title 28, United States Code, in a case under this section shall not be a ground for relief from the judgment or sentence in any proceeding. This limitation shall not preclude the appointment of different counsel at any stage of the proceedings.

"(u) TIME FOR COLLATERAL ATTACK ON DEATH SENTENCE. -- A motion under section 2255 of title 28, United States Code, attacking a sentence of death under this section, or the conviction on which it is predicated, must be filed within 90 days of the issuance of the order under subsection (r) appointing or denying the appointment of counsel for such proceedings. The

court in which the motion is filed, for good cause shown, may extend the time for filing for a period not exceeding 60 days. Such a motion shall have priority over all non-capital matters in the district court, and in the court of appeals on review of the district court's decision.

"(v) STAY OF EXECUTION. -- The execution of a sentence of death under this section shall be stayed in the course of direct review of the judgment and during the litigation of an initial motion in the case under section 2255 of title 28, United States Code. The stay shall run continuously following imposition of the sentence and shall expire if --

"(1) the defendant fails to file a motion under section 2255 of title 28, United States Code, within the time specified in subsection (u), or fails to make a timely application for court of appeals review following the denial of such a motion by a district court;

"(2) upon completion of district court and court of appeals review under section 2255 of title 28, United States Code, the Supreme Court disposes of a petition for certiorari in a manner that leaves the capital sentence undisturbed, or the defendant fails to file a timely petition for certiorari; or

"(3) before a district court, in the presence of counsel and after having been advised of the consequences of such a decision, the defendant waives the right to file a motion under section 2255 of title 28, United States Code.

"(w) FINALITY OF THE DECISION ON REVIEW. -- If one of the conditions specified in subsection (v) has occurred, no court thereafter shall have the authority to enter a stay of execution or grant relief in the case unless --

"(1) the basis for the stay and request for relief is a claim not presented in earlier proceedings;

"(2) the failure to raise the claim is the result of governmental action in violation of the Constitution or laws of the United States, the result of the Supreme Court's recognition of a new Federal right that is retroactively applicable, or the result of the fact that the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence in time to present the claim in earlier proceedings; and

"(3) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the determination of guilt on the offense or offenses for which the death penalty was imposed.

"(x) DEFINITIONS. -- For purposes of this section --

"(1) 'State' has the meaning given in section 513 of this title, including the District of Columbia;

"(2) 'Offense', as used in paragraphs (2), (5), and (13) of subsection (e), and in paragraph (5) of this subsection, means an offense under the law of the District of Columbia, another State, or the United States;

"(3) 'Drug trafficking activity' means a drug trafficking crime as defined in section 929(a)(2) of this title, or a pattern or series of acts involving one or more drug trafficking crimes;

"(4) 'Robbery' means obtaining the property of another by force or threat of force;

"(5) 'Burglary' means entering or remaining in a building or structure in violation of the law of the District of Columbia, another State, or the United States, with the intent to commit an offense in the building or structure;

"(6) 'Sexual abuse' means any conduct proscribed by chapter 109A of this title, whether or not the conduct occurs in the special maritime and territorial jurisdiction of the United States;

"(7) 'Arson' means damaging or destroying a building or structure through the use of fire or explosives;

"(8) 'Kidnaping' means seizing, confining, or abducting a person, or transporting a person without his or her consent;

"(9) 'Pre-trial release', 'probation', 'parole', 'supervised release', and 'other post-conviction conditional release', as used in subsection (e)(6), mean any such release, imposed in relation to a charge or conviction for an offense under the law of the District of Columbia, another State, or the United States; and

"(10) 'Public servant' means an employee, agent, officer, or official of the District of Columbia, another State, or the United States, or an employee, agent, officer, or official of a foreign government who is within the scope of section 1116 of this title.

"(y) When an offense is charged under this section, the government may join any charge under the District of Columbia

Code that arises from the same incident."; and

(b) by adding the following at the end of the table of sections for chapter 51:

"1118. Capital punishment for murders in the District of Columbia.".

CAPITAL PUNISHMENT FOR MURDERS IN THE DISTRICT OF COLUMBIA
[Option #1: Coverage of Murders in D.C. only]

This section adds a new section 1118 to the federal criminal code to permit the imposition of the death penalty for aggravated murders in the District of Columbia. The standards and procedures for imposing and carrying out death sentences in this section are generally based on the death penalty provisions of the President's violent crime bill (H.R. 1400 and S. 635), death penalty provisions passed by the House of Representatives (in title XXIII of H.R. 3371 as originally passed), and death penalty provisions passed by the Senate (in title XI of S. 1241). The analysis accompanying the President's violent crime bill -- Cong. Rec. S3214-19, March 13, 1991 -- can be consulted for more detailed discussion of most of the provisions included in this section.

Subsections (a)-(b) of the section define a new federal offense of capital murder in the District of Columbia. The basic definition in subsection (a) -- causing death intentionally, knowingly, or through recklessness manifesting extreme indifference to human life -- is similar to definitions appearing in the Model Penal Code (MPC § 210.2) and various state codes. See, e.g., Ala. Code § 13A-6-2(a)(1)-(2); N.D. Cent. Code § 12.1-16-01(1)(a)-(b). The same basic definition of capital murder appears in the President's violent crime bill (H.R. 1400 and S. 635) and the House crime bill (H.R. 3371), and a substantially similar definition appears in the Senate crime bill (S. 1241).

Subsection (a) also covers deaths resulting from the intentional infliction of serious injury. This is substantially the same as clauses in the definition of capital murder in the President's violent crime bill and both the Senate and House crime bills. There is also support in state law for the inclusion of this category of homicides in capital murders. See Ill. Ann. Stat., ch. 38, § 9-1; N.J. Stat. Ann. § 2C:11-3.

Under subsection (c), murders in violation of proposed section 1118 would be Class A felonies, punishable by up to life imprisonment. The death penalty could also be imposed for murders in this class, subject to the standards and limitations set out in subsections (d)-(1).

Subsection (d) identifies three mitigating factors to be considered in a capital sentencing hearing -- impaired mental capacity of the defendant, duress, and relatively minor participation in the offense. The defendant would also be free to offer, and the jury to consider, any other mitigating factor relating to the defendant's character, background, or record, or the circumstances of the offense.

Subsection (e) identifies the specific types of murders for which the jury in a capital sentencing hearing could consider the death penalty. Under the procedures of the section, a finding of

at least one of the aggravating factors specified in subsection (e) would be a prerequisite to the jury's consideration of capital punishment. These aggravating factors are generally based on the aggravating factors specified in the death penalty provisions of the President's violent crime bill and the House and Senate crime bills, subject to certain modifications and additions reflecting the application of the section to murders in the District of Columbia, and the nature of homicidal offenses and offenders in the District. The aggravating factors under the section are:

(1) committing a murder in the course of or in furtherance of drug trafficking activity;

(2) committing a murder in the course of committing or attempting to commit another serious violent crime -- robbery, burglary, sexual abuse, kidnapping, or arson;

(3) commission of more than one murder by the defendant -- including both commission of murders on two or more occasions and murder of multiple victims in a single incident -- and commission of murder under circumstances creating a grave risk of death to other persons in addition to the victim;

(4) commission of a murder through the use of a firearm, or other use or possession of a firearm in connection with the commission of a murder;

(5) commission of a murder by a person with a previous conviction for a violent felony (including convictions for state and federal offenses as well as District of Columbia offenses);

(6) commission of a murder by a prisoner or person under supervision in the criminal justice system (including confinement or supervision relating to state or federal charges or convictions, as well as confinement or supervision relating to District of Columbia charges or convictions);

(7) committing an especially heinous, cruel, or depraved murder involving torture or serious physical abuse to the victim;

(8) committing a murder by paying or promising to pay another to carry out the killing;

(9) committing a murder for hire or otherwise committing a murder for pecuniary gain;

(10) committing a murder involving substantial planning and premeditation;

(11) committing a murder against a victim who is particularly vulnerable due to old age, youth, or infirmity;

(12) murdering a public servant, such as a police officer, where the killing is related to the victim's performance of his duties or his status as a public servant; and

(13) committing a murder to prevent or inhibit a witness from testifying or providing information, or to retaliate against a witness. (The victim under this factor would not necessarily have to be the witness himself but could, for example, be a member of the witness's family killed to intimidate or retaliate against the witness.)

If the jury found that at least one of the aggravating factors specified in subsection (e) existed, and further found that there were no mitigating factors or that the aggravating factors outweighed any mitigating factors, then the death penalty would be imposed pursuant to subsections (j) and (l). This follows the approach approved by the Supreme Court in Blystone v. Pennsylvania, 110 S.Ct. 1078 (1990), and Boyde v. California, 110 S.Ct. 1190 (1990).

Subsections (f)-(p) set out the general procedures required for conducting a capital sentencing hearing, and for reviewing and carrying out the death penalty in cases in which it is imposed. These procedural provisions, as indicated above, are generally the same as or very similar to the death penalty procedures proposed in the President's violent crime bill and pending death penalty legislation that has been passed by the Houses of Congress.

Under the proposed procedures, the government would give notice of the aggravating factors to be proved as the basis for imposing the death penalty, including both any applicable statutory aggravating factors from subsection (e), and other aggravating factors that the government proposes to show. The aggravating factors for which notice would be provided, and supporting evidence introduced at the capital sentencing hearing, could include factors relating to the effect of the offense on the victim and the victim's family, as approved by the Supreme Court in Payne v. Tennessee, 111 S.Ct. 2597 (1991).

The government would have the burden of establishing aggravating factors by proof beyond a reasonable doubt; the defense could establish mitigating factors by a preponderance of the evidence. Special instructions to the jury and certifications by the jurors would be required to ensure that the decision to impose the death penalty is not affected by bias or invidious considerations. If the jury recommended a sentence of death on the basis of its balancing of the aggravating and mitigating factors in the case, then the court would impose such a sentence.

A sentence of death would be subject to appellate review to ensure that it was not imposed arbitrarily, that the findings of aggravating factors were adequately supported, and that it was not infected by other prejudicial error. Following the approach approved by the Supreme Court in Clemons v. Mississippi, 110 S.Ct. 1441 (1990), an appellate court could uphold a death sentence despite the invalidation of a particular aggravating factor if at least one valid statutory aggravating factor remained and the court concluded that the remaining aggravating factors outweigh any mitigating factors in the case.

If the sentence of death is upheld on review, it would be carried out under the supervision of a U.S. Marshal, in the manner provided for carrying out death sentences by the law of a state designated by the court. The execution of a pregnant woman would not be allowed, and correctional and Marshals Service personnel would not be required to participate in executions if they had conscientious objections to doing so.

Subsections (q)-(w) contain provisions relating to counsel in capital cases and collateral litigation which are based on the recommendations of the Ad Hoc Committee of the Judicial Conference which was appointed by the Chief Justice and headed by former Justice Lewis F. Powell (the "Powell Committee"). Substantially identical provisions for federal capital cases were proposed in the President's violent crime bill, and have been passed at different times by both Houses of Congress -- by the House of Representatives in its crime bill of the current Congress (H.R. 3371), and by the Senate in title XIV of S. 1970 of the 101st Congress. Comparable procedures for state capital cases have also been proposed in the President's bill (subtitle B of title II of S. 635 and H.R. 1400), and have been passed by both Houses of Congress -- by the Senate in subtitle B of title XI of S. 1241 in the current Congress, and by the House of Representatives in title XIII of H.R. 5269 of the 101st Congress. These provisions promote fairness to capital defendants through broadened appointment of counsel, while at the same time providing effective safeguards against the interminable collateral litigation that has thwarted the use of state death penalty laws.

Under the procedures of subsections (q)-(w), indigent capital defendants would be entitled to appointment of experienced counsel at all stages of litigation, including the litigation of a collateral (§ 2255) motion, as well as trial and direct review. Following the conclusion of direct review and appointment of counsel for collateral proceedings, a collateral motion would have to be filed within a specified time period, and would be considered on a priority basis by the courts. Following the final rejection of such a motion by the courts, litigation would normally be at an end and the sentence would be carried out. Further litigation or stays of execution beyond that point

would be limited to extraordinary cases in which the defendant raises a claim that casts doubt on his factual guilt of the offense for which the death penalty was imposed.

Subsection (x) sets out definitions for the section. These are generally definitions of types of criminal conduct and other terms used in the specification of statutory aggravating factors in subsection (e).

Subsection (y) states that charges under the District of Columbia Code arising from the same incident may be joined in a prosecution under this section. This promotes the efficient trial of all related charges in a single forum; affords the jury the option of convicting for lesser included or related offenses; and avoids double jeopardy problems that could arise from separate prosecution of related offenses whose elements or supporting facts overlap with a murder charged under this section.

MURDER IN THE DISTRICT OF COLUMBIA AND IN THE COURSE OF
FEDERAL OFFENSES

[Option #2: Coverage of both D.C. murders and murders in the
course of federal offenses anywhere]

SEC. _____. Title 18 of the United States Code is amended --

(a) by adding the following new section at the end of
chapter 51:

"§ 1118. Murder in the District of Columbia and in the course of
federal offenses

"(a) OFFENSE. -- It is an offense to cause the death of a
person intentionally, knowingly, or through recklessness
manifesting extreme indifference to human life, or to cause the
death of a person through the intentional infliction of serious
bodily injury.

"(b) FEDERAL JURISDICTION. -- There is federal jurisdiction
over an offense described in this section if the conduct
resulting in death occurs in the District of Columbia or in the
course of another offense against the United States.

"(c) PENALTY. -- An offense described in this section is a
Class A felony. A sentence of death may be imposed for an
offense described in this section as provided in subsections (d)-
(1).

"(d) MITIGATING FACTORS. -- In determining whether to
recommend a sentence of death, the jury shall consider whether
any aspect of the defendant's character, background, or record or
any circumstance of the offense that the defendant may proffer as
a mitigating factor exists, including the following factors:

"(1) MENTAL CAPACITY. -- The defendant's mental
capacity to appreciate the wrongfulness of his conduct or to
conform his conduct to the requirements of law was
significantly impaired.

"(2) DURESS. -- The defendant was under unusual and
substantial duress.

"(3) PARTICIPATION IN OFFENSE MINOR. -- The defendant
is punishable as a principal (pursuant to section 2 of this
title) in the offense, which was committed by another, but
the defendant's participation was relatively minor.

"(e) AGGRAVATING FACTORS. -- In determining whether to
recommend a sentence of death, the jury shall consider any
aggravating factor for which notice has been provided under
subsection (f), including the following factors --

"(1) KILLING IN FURTHERANCE OF DRUG TRAFFICKING. -- The

defendant engaged in the conduct resulting in death in the course of or in furtherance of drug trafficking activity.

"(2) KILLING IN THE COURSE OF OTHER SERIOUS VIOLENT CRIMES. -- The defendant engaged in the conduct resulting in death in the course of committing or attempting to commit an offense involving robbery, burglary, sexual abuse, kidnaping, or arson.

"(3) MULTIPLE KILLINGS OR ENDANGERMENT OF OTHERS. -- The defendant committed more than one offense under this section, or in committing the offense knowingly created a grave risk of death to one or more persons in addition to the victim of the offense.

"(4) INVOLVEMENT OF FIREARM. -- During and in relation to the commission of the offense, the defendant used or possessed a firearm as defined in section 921 of this title.

"(5) PREVIOUS CONVICTION OF VIOLENT FELONY. -- The defendant has previously been convicted of an offense punishable by a term of imprisonment of more than one year that involved the use or attempted or threatened use of force against a person or that involved sexual abuse.

"(6) KILLING WHILE INCARCERATED OR UNDER SUPERVISION. -- The defendant at the time of the offense was confined in or had escaped from a jail, prison, or other correctional or detention facility, was on pre-trial release, or was on probation, parole, supervised release, or other post-conviction conditional release.

"(7) HEINOUS, CRUEL OR DEPRAVED MANNER OF COMMISSION. -- The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

"(8) PROCUREMENT OF THE OFFENSE BY PAYMENT. -- The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

"(9) COMMISSION OF THE OFFENSE FOR PECUNIARY GAIN. -- The defendant committed the offense as consideration for receiving, or in the expectation of receiving or obtaining, anything of pecuniary value.

"(10) SUBSTANTIAL PLANNING AND PREMEDITATION. -- The defendant committed the offense after substantial planning and premeditation.

"(11) VULNERABILITY OF VICTIM. -- The victim was particularly vulnerable due to old age, youth, or

infirmity.

"(12) KILLING OF PUBLIC SERVANT. -- The defendant committed the offense against a public servant --

"(i) while such public servant was engaged in the performance of his or her official duties;

"(ii) because of the performance of such public servant's official duties; or

"(iii) because of such public servant's status as a public servant.

"(13) KILLING TO INTERFERE WITH OR RETALIATE AGAINST WITNESS. -- The defendant committed the offense in order to prevent or inhibit any person from testifying or providing information concerning an offense, or to retaliate against any person for testifying or providing such information.

"(f) NOTICE OF INTENT TO SEEK DEATH PENALTY. -- If the government intends to seek the death penalty for an offense under this section, the attorney for the government shall file with the court and serve on the defendant a notice of such intent. The notice shall be provided a reasonable time before the trial or acceptance of a guilty plea, or at such later time as the court may permit for good cause. The notice shall set forth the aggravating factor or factors set forth in subsection (e) and any other aggravating factor or factors that the government will seek to prove as the basis for the death penalty. The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

"(g) JUDGE AND JURY AT CAPITAL SENTENCING HEARING. -- A hearing to determine whether the death penalty will be imposed for an offense under this section shall be conducted by the judge who presided at trial or accepted a guilty plea, or by another judge if that judge is not available. The hearing shall be conducted before the jury that determined the defendant's guilt if that jury is available. A new jury shall be impaneled for the purpose of the hearing if the defendant pleaded guilty, the trial of guilt was conducted without a jury, the jury that determined the defendant's guilt was discharged for good cause, or reconsideration of the sentence is necessary after the initial imposition of a sentence of death. A jury impaneled under this subsection shall have twelve members unless the parties stipulate to a lesser number at any time before the conclusion of the hearing with the approval of the judge. Upon motion of the defendant, with the approval of the attorney for the government, the hearing shall be carried out before the judge without a jury.

If there is no jury, references to "the jury" in this section, where applicable, shall be understood as referring to the judge.

"(h) PROOF OF MITIGATING AND AGGRAVATING FACTORS. -- No presentence report shall be prepared if a capital sentencing hearing is held under this section. Any information relevant to the existence of mitigating factors, or to the existence of aggravating factors for which notice has been provided under subsection (f), may be presented by either the government or the defendant, regardless of its admissibility under the rules governing the admission of evidence at criminal trials, except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The information presented may include trial transcripts and exhibits. The attorney for the government and for the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in that case of imposing a sentence of death. The attorney for the government shall open the argument, the defendant shall be permitted to reply, and the government shall then be permitted to reply in rebuttal.

"(i) FINDINGS OF AGGRAVATING AND MITIGATING FACTORS. -- The jury shall return special findings identifying any aggravating factor or factors for which notice has been provided under subsection (f) and which the jury unanimously determines have been established by the government beyond a reasonable doubt. A mitigating factor is established if the defendant has proven its existence by a preponderance of the evidence, and any member of the jury who finds the existence of such a factor may regard it as established for purposes of this section regardless of the number of jurors who concur that the factor has been established.

"(j) FINDING CONCERNING A SENTENCE OF DEATH. -- If the jury specially finds under subsection (i) that one or more aggravating factors set forth in subsection (e) exist, and the jury further finds unanimously that there are no mitigating factors or that the aggravating factor or factors specially found under subsection (i) outweigh any mitigating factors, then the jury shall recommend a sentence of death. In any other case, the jury shall not recommend a sentence of death. The jury shall be instructed that it must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factors in its decision, and should make such a recommendation as the information warrants.

"(k) SPECIAL PRECAUTION TO ASSURE AGAINST DISCRIMINATION. -- In a hearing held before a jury, the court, before the return

of a finding under subsection (j), shall instruct the jury that, in considering whether to recommend a sentence of death, it shall not consider the race, color, religion, national origin, or sex of the defendant or any victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for such a crime regardless of the race, color, religion, national origin, or sex of the defendant or any victim. The jury, upon the return of a finding under subsection (j), shall also return to the court a certificate, signed by each juror, that the race, color, religion, national origin, or sex of the defendant or any victim did not affect the juror's individual decision and that the individual juror would have recommended the same sentence for such a crime regardless of the race, color, religion, national origin, or sex of the defendant or any victim.

"(1) IMPOSITION OF A SENTENCE OF DEATH. -- Upon a recommendation under subsection (j) that a sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law.

"(m) REVIEW OF A SENTENCE OF DEATH. --

"(1) The defendant may appeal a sentence of death under this section by filing a notice of appeal of the sentence within the time provided for filing a notice of appeal of the judgment of conviction. An appeal of a sentence under this subsection may be consolidated with an appeal of the judgment of conviction and shall have priority over all non-capital matters in the court of appeals.

"(2) The court of appeals shall review the entire record in the case including the evidence submitted at trial and information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under subsection (i). The court of appeals shall uphold the sentence if it determines that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, that the evidence and information support the special findings under subsection (i), and that the proceedings were otherwise free of prejudicial error that was properly preserved for review.

"(3) In any other case, the court of appeals shall remand the case for reconsideration of the sentence or imposition of another authorized sentence as appropriate, except that the court shall not reverse a sentence of death on the ground that an aggravating factor was invalid or was not supported by the evidence and information if at least one aggravating factor described in subsection (e) remains which was found to exist and the court, on the basis of the

evidence submitted at trial and the information submitted at the sentencing hearing, finds that the remaining aggravating factor or factors which were found to exist outweigh any mitigating factors. The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

"(n) IMPLEMENTATION OF SENTENCE OF DEATH. -- A person sentenced to death under this section shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States Marshal. The Marshal shall supervise implementation of the sentence in the manner prescribed by the law of a State designated by the court. The Marshal may use State or local facilities, may use the services of an appropriate State or local official or of a person such an official employs, and shall pay the costs thereof in an amount approved by the Attorney General.

"(o) SPECIAL BAR TO EXECUTION. -- A sentence of death shall not be carried out upon a woman while she is pregnant.

"(p) CONSCIENTIOUS OBJECTION TO PARTICIPATION IN EXECUTION. -- No employee of any State department of corrections, the United States Marshals Service, or the Federal Bureau of Prisons, and no person providing services to that department, service, or bureau under contract shall be required, as a condition of that employment or contractual obligation, to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term 'participate in any execution' includes personal preparation of the condemned individual and the apparatus used for the execution, and supervision of the activities of other personnel in carrying out such activities.

"(q) APPOINTMENT OF COUNSEL FOR INDIGENT CAPITAL DEFENDANTS. -- A defendant against whom a sentence of death is sought, or on whom a sentence of death has been imposed, under this section, shall be entitled to appointment of counsel from the commencement of trial proceedings until one of the conditions specified in subsection (v) has occurred, if the defendant is or becomes financially unable to obtain adequate representation. Counsel shall be appointed for trial representation as provided in section 3005 of this title, and at least one counsel so appointed shall continue to represent the defendant until the conclusion of direct review of the judgment, unless replaced by the court with other qualified counsel. Except as otherwise provided in this section, the provisions of section 3006A of this title shall apply to appointments under this section.

"(r) REPRESENTATION AFTER FINALITY OF JUDGMENT. -- When a judgment imposing a sentence of death under this section has become final through affirmance by the Supreme Court on direct review, denial of certiorari by the Supreme Court on direct review, or expiration of the time for seeking direct review in the court of appeals or the Supreme Court, the government shall promptly notify the court that imposed the sentence. The court, within 10 days of receipt of such notice, shall proceed to make a determination whether the defendant is eligible for appointment of counsel for subsequent proceedings. The court shall issue an order appointing one or more counsel to represent the defendant upon a finding that the defendant is financially unable to obtain adequate representation and wishes to have counsel appointed or is unable competently to decide whether to accept or reject appointment of counsel. The court shall issue an order denying appointment of counsel upon a finding that the defendant is financially able to obtain adequate representation or that the defendant rejected appointment of counsel with an understanding of the consequences of that decision. Counsel appointed pursuant to this subsection shall be different from the counsel who represented the defendant at trial and on direct review unless the defendant and counsel request a continuation or renewal of the earlier representation.

"(s) STANDARDS FOR COMPETENCE OF COUNSEL. -- In relation to a defendant who is entitled to appointment of counsel under subsections (q)-(r), at least one counsel appointed for trial representation must have been admitted to the bar for at least 5 years and have at least three years of experience in the trial of felony cases in the Federal district courts. If new counsel is appointed after judgment, at least one counsel so appointed must have been admitted to the bar for at least 5 years and have at least 3 years of experience in the litigation of felony cases in the Federal courts of appeals or the Supreme Court. The court, for good cause, may appoint counsel who does not meet these standards, but whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration of the seriousness of the penalty and the nature of the litigation.

"(t) CLAIMS OF INEFFECTIVENESS OF COUNSEL IN COLLATERAL PROCEEDINGS. -- The ineffectiveness or incompetence of counsel during proceedings on a motion under section 2255 of title 28, United States Code, in a case under this section shall not be a ground for relief from the judgment or sentence in any proceeding. This limitation shall not preclude the appointment of different counsel at any stage of the proceedings.

"(u) TIME FOR COLLATERAL ATTACK ON DEATH SENTENCE. -- A motion under section 2255 of title 28, United States Code, attacking a sentence of death under this section, or the

conviction on which it is predicated, must be filed within 90 days of the issuance of the order under subsection (r) appointing or denying the appointment of counsel for such proceedings. The court in which the motion is filed, for good cause shown, may extend the time for filing for a period not exceeding 60 days. Such a motion shall have priority over all non-capital matters in the district court, and in the court of appeals on review of the district court's decision.

"(v) STAY OF EXECUTION. -- The execution of a sentence of death under this section shall be stayed in the course of direct review of the judgment and during the litigation of an initial motion in the case under section 2255 of title 28, United States Code. The stay shall run continuously following imposition of the sentence and shall expire if --

"(1) the defendant fails to file a motion under section 2255 of title 28, United States Code, within the time specified in subsection (u), or fails to make a timely application for court of appeals review following the denial of such a motion by a district court;

"(2) upon completion of district court and court of appeals review under section 2255 of title 28, United States Code, the Supreme Court disposes of a petition for certiorari in a manner that leaves the capital sentence undisturbed, or the defendant fails to file a timely petition for certiorari; or

"(3) before a district court, in the presence of counsel and after having been advised of the consequences of such a decision, the defendant waives the right to file a motion under section 2255 of title 28, United States Code.

"(w) FINALITY OF THE DECISION ON REVIEW. -- If one of the conditions specified in subsection (v) has occurred, no court thereafter shall have the authority to enter a stay of execution or grant relief in the case unless --

"(1) the basis for the stay and request for relief is a claim not presented in earlier proceedings;

"(2) the failure to raise the claim is the result of governmental action in violation of the Constitution or laws of the United States, the result of the Supreme Court's recognition of a new Federal right that is retroactively applicable, or the result of the fact that the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence in time to present the claim in earlier proceedings; and

"(3) the facts underlying the claim would be

sufficient, if proven, to undermine the court's confidence in the determination of guilt on the offense or offenses for which the death penalty was imposed.

"(x) DEFINITIONS. -- For purposes of this section --

"(1) 'State' has the meaning given in section 513 of this title, including the District of Columbia;

"(2) 'Offense', as used in paragraphs (2), (5), and (13) of subsection (e), and in paragraph (5) of this subsection, means an offense under the law of the District of Columbia, another State, or the United States;

"(3) 'Drug trafficking activity' means a drug trafficking crime as defined in section 929(a)(2) of this title, or a pattern or series of acts involving one or more drug trafficking crimes;

"(4) 'Robbery' means obtaining the property of another by force or threat of force;

"(5) 'Burglary' means entering or remaining in a building or structure in violation of the law of the District of Columbia, another State, or the United States, with the intent to commit an offense in the building or structure;

"(6) 'Sexual abuse' means any conduct proscribed by chapter 109A of this title, whether or not the conduct occurs in the special maritime and territorial jurisdiction of the United States;

"(7) 'Arson' means damaging or destroying a building or structure through the use of fire or explosives;

"(8) 'Kidnaping' means seizing, confining, or abducting a person, or transporting a person without his or her consent;

"(9) 'Pre-trial release', 'probation', 'parole', 'supervised release', and 'other post-conviction conditional release', as used in subsection (e)(6), mean any such release, imposed in relation to a charge or conviction for an offense under the law of the District of Columbia, another State, or the United States; and

"(10) 'Public servant' means an employee, agent, officer, or official of the District of Columbia, another State, or the United States, or an employee, agent, officer, or official of a foreign government who is within the scope of section 1116 of this title.

"(y) When an offense is charged under this section based on conduct occurring in the District of Columbia, the government may join any charge under the District of Columbia Code that arises from the same incident."; and

(b) by adding the following at the end of the table of sections for chapter 51:

"1118. Murders in the District of Columbia and in the course of federal offenses.".

**MURDERS IN THE DISTRICT OF COLUMBIA AND IN THE COURSE OF OTHER
FEDERAL CRIMES**

[Option #2: Coverage of both D.C. murders and murders in the course of federal offenses anywhere]

This section adds a new section 1118 to the federal criminal code to permit the imposition of the death penalty for aggravated murders in the District of Columbia. The standards and procedures for imposing and carrying out death sentences in this section are generally based on the death penalty provisions of the President's violent crime bill (H.R. 1400 and S. 635), death penalty provisions passed by the House of Representatives (in title XXIII of H.R. 3371 as originally passed), and death penalty provisions passed by the Senate (in title XI of S. 1241). The analysis accompanying the President's violent crime bill -- Cong. Rec. S3214-19, March 13, 1991 -- can be consulted for more detailed discussion of most of the provisions included in this section.

In addition to providing a workable death penalty for the most heinous homicidal offenses occurring in the District of Columbia, proposed 18 U.S.C. 1118 serves a "gap-filling" function in relation to the penalty authorizations for murder in the course of other federal crimes. Under existing law, many provisions defining federal criminal offenses authorize higher, murder-level penalties for cases where the offender kills the victim. See, e.g., 18 U.S.C. 242 (imprisonment for any term of years or life for civil rights violation resulting in death); 18 U.S.C. 1716 (imprisonment for life or death penalty for mailing dangerous articles where death results). Under other provisions, however, there is no adequate enhancement of the authorized penalty for such cases.

For example, 18 U.S.C. 2114 defines an offense of robbing federal property from a person having custody or control of such property. The normal maximum penalty for the offense is ten years of imprisonment, and up to twenty-five years is authorized in case the offender wounds the victim or endangers his life with a dangerous weapon -- but no penalty above twenty-five years is authorized for cases where the offender actually murders the victim. Many other federal statutes similarly provide maxima which may be adequate for the ordinary case, but fail to provide an appropriate sentencing range for cases involving murder of the victim. The provision proposed in this section will ensure that adequate penalties are more consistently available for murders in the course of federal offenses.

Subsections (a)-(b) of the section define a new federal murder offense applicable to conduct occurring in the District of Columbia or in the course of other federal crimes. The basic definition in subsection (a) -- causing death intentionally, knowingly, or through recklessness manifesting extreme indifference to human life -- is similar to definitions appearing in the Model Penal Code (MPC § 210.2) and various state codes.

See, e.g., Ala. Code § 13A-6-2(a)(1)-(2); N.D. Cent. Code § 12.1-16-01(1)(a)-(b). The same basic definition is used in defining the class of potentially capital murders in the President's violent crime bill (H.R. 1400 and S. 635) and the House crime bill (H.R. 3371), and a substantially similar definition appears in the Senate crime bill (S. 1241).

Subsection (a) also covers deaths resulting from the intentional infliction of serious injury. This is substantially the same as clauses in the definition of capital murder in the President's violent crime bill and both the Senate and House crime bills. There is also support in state law for the inclusion of this category of homicides in capital murders. See Ill. Ann. Stat., ch. 38, § 9-1; N.J. Stat. Ann. § 2C:11-3.

Under subsection (c), murders in violation of proposed section 1118 would be Class A felonies, punishable by up to life imprisonment. The death penalty could also be imposed for murders in this class, subject to the standards and limitations set out in subsections (d)-(1).

Subsection (d) identifies three mitigating factors to be considered in a capital sentencing hearing -- impaired mental capacity of the defendant, duress, and relatively minor participation in the offense. The defendant would also be free to offer, and the jury to consider, any other mitigating factor relating to the defendant's character, background, or record, or the circumstances of the offense.

Subsection (e) identifies the specific types of murders for which the jury in a capital sentencing hearing could consider the death penalty. Under the procedures of the section, a finding of at least one of the aggravating factors specified in subsection (e) would be a prerequisite to the jury's consideration of capital punishment. These aggravating factors are generally based on the aggravating factors specified in the death penalty provisions of the President's violent crime bill and the House and Senate crime bills, subject to certain modifications and additions reflecting the application of the section to murders in the District of Columbia, and the nature of homicidal offenses and offenders in the District. The aggravating factors under the section are:

(1) committing a murder in the course of or in furtherance of drug trafficking activity;

(2) committing a murder in the course of committing or attempting to commit another serious violent crime -- robbery, burglary, sexual abuse, kidnaping, or arson;

(3) commission of more than one murder by the defendant -- including both commission of murders on two or more occasions and

(murder of multiple victims in a single incident -- and commission of murder under circumstances creating a grave risk of death to other persons in addition to the victim;

(4) commission of a murder through the use of a firearm, or other use or possession of a firearm in connection with the commission of a murder;

(5) commission of a murder by a person with a previous conviction for a violent felony (including convictions for state and federal offenses as well as District of Columbia offenses);

(6) commission of a murder by a prisoner or person under supervision in the criminal justice system (including confinement or supervision relating to state or federal charges or convictions, as well as confinement or supervision relating to District of Columbia charges or convictions);

(7) committing an especially heinous, cruel, or depraved murder involving torture or serious physical abuse to the victim;

(8) committing a murder by paying or promising to pay another to carry out the killing;

(9) committing a murder for hire or otherwise committing a murder for pecuniary gain;

(10) committing a murder involving substantial planning and premeditation;

(11) committing a murder against a victim who is particularly vulnerable due to old age, youth, or infirmity;

(12) murdering a public servant, such as a police officer, where the killing is related to the victim's performance of his duties or his status as a public servant; and

(13) committing a murder to prevent or inhibit a witness from testifying or providing information, or to retaliate against a witness. (The victim under this factor would not necessarily have to be the witness himself but could, for example, be a member of the witness's family killed to intimidate or retaliate against the witness.)

(If the jury found that at least one of the aggravating factors specified in subsection (e) existed, and further found that there were no mitigating factors or that the aggravating factors outweighed any mitigating factors, then the death penalty would be imposed pursuant to subsections (j) and (l). This follows the approach approved by the Supreme Court in Blystone v. Pennsylvania, 110 S.Ct. 1078 (1990), and Boyde v. California, 110 S.Ct. 1190 (1990).

Subsections (f)-(p) set out the general procedures required for conducting a capital sentencing hearing, and for reviewing and carrying out the death penalty in cases in which it is imposed. These procedural provisions, as indicated above, are generally the same as or very similar to the death penalty procedures proposed in the President's violent crime bill and pending death penalty legislation that has been passed by the Houses of Congress.

Under the proposed procedures, the government would give notice of the aggravating factors to be proved as the basis for imposing the death penalty, including both any applicable statutory aggravating factors from subsection (e), and other aggravating factors that the government proposes to show. The aggravating factors for which notice would be provided, and supporting evidence introduced at the capital sentencing hearing, could include factors relating to the effect of the offense on the victim and the victim's family, as approved by the Supreme Court in Payne v. Tennessee, 111 S.Ct. 2597 (1991).

The government would have the burden of establishing aggravating factors by proof beyond a reasonable doubt; the defense could establish mitigating factors by a preponderance of the evidence. Special instructions to the jury and certifications by the jurors would be required to ensure that the decision to impose the death penalty is not affected by bias or invidious considerations. If the jury recommended a sentence of death on the basis of its balancing of the aggravating and mitigating factors in the case, then the court would impose such a sentence.

A sentence of death would be subject to appellate review to ensure that it was not imposed arbitrarily, that the findings of aggravating factors were adequately supported, and that it was not infected by other prejudicial error. Following the approach approved by the Supreme Court in Clemons v. Mississippi, 110 S.Ct. 1441 (1990), an appellate court could uphold a death sentence despite the invalidation of a particular aggravating factor if at least one valid statutory aggravating factor remained and the court concluded that the remaining aggravating factors outweigh any mitigating factors in the case.

If the sentence of death is upheld on review, it would be carried out under the supervision of a U.S. Marshal, in the manner provided for carrying out death sentences by the law of a state designated by the court. The execution of a pregnant woman would not be allowed, and correctional and Marshals Service personnel would not be required to participate in executions if they had conscientious objections to doing so.

Subsections (q)-(w) contain provisions relating to counsel

in capital cases and collateral litigation which are based on the recommendations of the Ad Hoc Committee of the Judicial Conference which was appointed by the Chief Justice and headed by former Justice Lewis F. Powell (the "Powell Committee"). Substantially identical provisions for federal capital cases were proposed in the President's violent crime bill, and have been passed at different times by both Houses of Congress -- by the House of Representatives in its crime bill of the current Congress (H.R. 3371), and by the Senate in title XIV of S. 1970 of the 101st Congress. Comparable procedures for state capital cases have also been proposed in the President's bill (subtitle B of title II of S. 635 and H.R. 1400), and have been passed by both Houses of Congress -- by the Senate in subtitle B of title XI of S. 1241 in the current Congress, and by the House of Representatives in title XIII of H.R. 5269 of the 101st Congress. These provisions promote fairness to capital defendants through broadened appointment of counsel, while at the same time providing effective safeguards against the interminable collateral litigation that has thwarted the use of state death penalty laws.

Under the procedures of subsections (q)-(w), indigent capital defendants would be entitled to appointment of experienced counsel at all stages of litigation, including the litigation of a collateral (§ 2255) motion, as well as trial and direct review. Following the conclusion of direct review and appointment of counsel for collateral proceedings, a collateral motion would have to be filed within a specified time period, and would be considered on a priority basis by the courts. Following the final rejection of such a motion by the courts, litigation would normally be at an end and the sentence would be carried out. Further litigation or stays of execution beyond that point would be limited to extraordinary cases in which the defendant raises a claim that casts doubt on his factual guilt of the offense for which the death penalty was imposed.

Subsection (x) sets out definitions for the section. These are generally definitions of types of criminal conduct and other terms used in the specification of statutory aggravating factors in subsection (e).

Subsection (y) states that charges under the District of Columbia Code arising from the same incident may be joined in a prosecution under this section for a murder committed in the District. This promotes the efficient trial of all related charges in a single forum; affords the jury the option of convicting for lesser included or related offenses; and avoids double jeopardy problems that could arise from separate prosecution of related offenses whose elements or supporting facts overlap with a murder charged under this section.

SEC. _____. LIFE IMPRISONMENT FOR FIRST DEGREE MURDER IN THE DISTRICT OF COLUMBIA. -- Section 2404 of title 22 of the District of Columbia Code is amended by striking subsection (b), striking "(c)" and inserting in lieu thereof "(b)", and amending subsection (a) to read as follows:

"(a) Notwithstanding any other provision of law, the punishment for murder in the first degree shall be life imprisonment without the possibility of parole, and a person so sentenced shall be confined in a penal facility for his natural life."

MANDATORY LIFE IMPRISONMENT FOR FIRST DEGREE MURDERS IN THE
DISTRICT OF COLUMBIA

Under section _____ of this bill, the death penalty could be imposed for the most aggravated crimes of murder committed in the District of Columbia. This section contains a complementary amendment that changes the penalty provision for murder under the District of Columbia Code to provide for life imprisonment for first degree murders as defined in that Code. This ensures an appropriate penalty for cases in the District which involve aggravated murders, but in which the government does not seek or the jury does not impose a capital sentence. The current penalty provision in D.C. Code § 22-2404 purports to require "life imprisonment" for first degree murder, but negates this requirement by making an offender sentenced to such a "life term" eligible for parole after a specified number of years.

Under existing federal law, first degree murder in the special maritime and territorial jurisdiction of the United States is a capital crime, but if the death penalty is not imposed, the murderer must be sentenced to life imprisonment -- without any possibility of parole or other release. See 18 U.S.C. 1111. The change in the D.C. Code proposed in this section would conform the penalty requirement for first degree murders in the District of Columbia to the judgment Congress has made concerning the appropriate penalty for such crimes in other geographic areas subject to the jurisdiction of the federal government.

SEC. 1. PENALTY INCREASE FOR OFFENSES INVOLVING SCHEDULE III SUBSTANCES.

(a) Section 401(b)(1)(D) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(D)) is amended --

(1) by striking "less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of";

(2) by striking "paragraphs (4) and" and inserting "paragraph";

(3) by striking "5" and inserting "10"; and

(4) by striking "10" and inserting "20".

(b) Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended --

(1) by redesignating paragraph (4) as paragraph (5);
and

(2) by inserting the following new paragraph:

"(4) In the case of a violation under subsection (a) of this section involving a controlled substance in schedule III, the person committing such violation shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this subsection, or for a felony under any other

provision of this title or title II or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment."

SEC. 2. PENALTY INCREASE FOR OFFENSES INVOLVING SCHEDULE IV SUBSTANCES.

(a) Section 401(b)(2) of the Controlled Substances Act (21 U.S.C. 841(b)(2)) is amended --

(1) by inserting "less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms or hashish, or one kilogram of hashish oil or in the case of" after "In the case of";

(2) by striking "3" and inserting "5"; and

(3) by striking "6" and inserting "10".

(b) Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended in paragraph (5) as redesignated herein --

(1) by striking "III, IV," and inserting "IV"; and

(2) by striking the last sentence and inserting the following:

"If any person commits such a violation involving a controlled substance in schedule IV after one or more prior convictions for an offense punishable under this subsection, or for a felony under any other provision of this title or title II or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph for an offense involving a controlled substance in schedule IV shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment."

SEC. 3. CONFORMING AMENDMENTS FOR SCHEDULE III AND IV PENALTY CHANGES.

(a) Section 401(b) of the Controlled Substances Act (21 U.S.C. 841(b)) is amended --

(1) in paragraph (1)(C) by striking "(A), (B), and (D)" and inserting "(A) and (B) and paragraph (2)"; and

(2) in paragraph (4) by striking "(1)(D)" and inserting "(2)".

(b) Section 1010(b)(3) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(3)) is amended by striking "(4)" and inserting "(5)".

SEC. 4. MANDATORY MINIMUM PRISON TERM FOR "CRACK HOUSE" VIOLATIONS. Section 416(b) of the Controlled Substances Act (21 U.S.C. 856(b)) is amended --

(a) by redesignating the existing matter as paragraph (2) and by inserting "(2)" after "(a)"; and

(b) by adding the following paragraph:

"(1) Any person who violates subsection (a)(1) of this section shall be sentenced to a term of imprisonment which may not be less than one year and not more than 20 years and a fine of not more than \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph."

SEC. 5. INCREASED MANDATORY MINIMUM TERM OF IMPRISONMENT FOR DRUG TRAFFICKING NEAR A SCHOOL. Section 419 of the Controlled Substances Act (21 U.S.C. 860) is amended --

(a) in subsection (a) by striking "one year" and inserting "five years"; and

(b) in subsection (b) --

(1) by striking "by the greater of (A) a term of imprisonment" through "for a first offense" and inserting "by a term of imprisonment of not less than ten years or more than life"; and

(2) by striking "three years" the second place it appears and inserting "ten years.".

SEC. 6. INCREASED GUIDELINE SENTENCES FOR ANABOLIC STEROIDS. Section 994 of title 28, United States Code, is amended by adding the following:

"(y) The Commission shall amend the guidelines to increase the offense levels applicable to the unlawful trafficking of anabolic steroids and insure that these offense levels are at least two levels higher than the offense levels for equivalent dosage units of other controlled substances listed under schedule III pursuant to the Controlled Substances Act.".

EXPLANATION

Sections 1 and 2 increase the penalties under the Controlled Substances Act and the Controlled Substances Import and Export Act for violations involving controlled substances in schedules III and IV. The amendment increases the maximum prison term for violations involving schedule III substances from five to ten years for a first offense and from ten to twenty years for a second or subsequent drug offense. In the case of schedule IV substances, the amendment increases the maximum prison term from three to five years for a first offense and from six to ten years for a second or subsequent drug offense. (Import and export violations involving schedule IV substances are currently subject to a maximum prison term of five years whether a first or subsequent offense.) The amendments also conform the penalty structure for fines and supervised release involving schedule III and IV violations under the Controlled Substances Import and Export Act with the penalty structure for these violations under in the Controlled Substances Act.

These amendments are needed because the abuse of controlled substances has become an increasing peril to the safety of many persons. Many serious drugs of abuse are included in the schedules affected, including codeine and anabolic steroids. Under the Controlled Substances Act a substance is subject to scheduling under schedules III or IV only if its abuse may lead to a specified level of physical or psychological dependence or if it is an anabolic steroids. 21 U.S.C. §§812(a)(3) and (4) and

Schedule III(e) and 802(41). Without appropriate penalties, deterrence of violations involving these substances cannot be achieved.

The current penalty scheme suffers from a lack of proportionality in its treatment of violations involving schedule III and IV substances, as compared to violations involving schedule I and II substances. Amendments to the drug laws enacted in 1986 resulted in maximum penalties of 20 years' imprisonment for violations involving schedule I and II substances and mandatory five and ten-year penalties and even higher maximum terms of imprisonment for violations involving specified quantities of certain schedule I and II substances. However, the penalties for schedule III and IV violations were not amended. With maximum penalties of only five years' imprisonment for schedule III substances and three years for schedule IV substances, the gap between the penalties for schedule I and II violations and schedule III and IV is too great. Violations involving drugs in these schedules are too serious for treatment under penalties deemed appropriate in the years before drug abuse became the widespread problem it is today.

In order to retain current five-year maximum term of imprisonment for violations involving less than 50 kilograms of marihuana, 10 kilograms of hashish, and one kilogram of hashish oil, the penalties relating to these substances are included in

the provision relating to schedule IV substances, 21 U.S.C. §841(b)(2) and 960(b)(5).

Section 3 provides conforming amendments to address the movement of provisions relating to the quantities of marihuana and hashish listed above.

Section 4 adds a mandatory minimum term of one year of imprisonment for the offense of knowingly opening or maintaining a place for the purpose of illegally manufacturing, distributing, or using a controlled substance, 21 U.S.C. §856(a)(1). Current law also makes it unlawful to manage or control a building or room and knowingly and intentionally to rent or make it available for the unlawful manufacture, storage, distribution, or use of a controlled substance, 21 U.S.C. §856(a)(2). The current penalty for both of these offenses is a maximum term of imprisonment of 20 years or a fine.

A person who violates subsection (a)(1) of 21 U.S.C. §856 -- i.e., one who knowingly opens or maintains a drug manufacturing or distribution location -- is generally more involved in criminal activity than one who violates subsection (a)(2) -- i.e., one who controls the building and allows drug activity to occur. The former is often a necessary link in the drug distribution network. A mandatory minimum one-year sentence would assure appropriate punishment of such an offender and prevent the possibility of downward departures under the sentencing guidelines to minimal sentences.

Section 5 increases the mandatory term of imprisonment for unlawfully distributing controlled substances at or within one thousand feet of a school, college, university, playground, or youth center. Current law provides a mandatory term of imprisonment of one year for a first offense and three years for a second offense. 21 U.S.C. §860. The current mandatory penalties are too low to recognize the seriousness of drug distribution at or near a school or other location populated by young people. Penalties must be sufficient so that parents can entrust their children to schools and similar facilities under circumstances that strongly discourage drug dealers from preying upon their innocence or freedom from direct parental supervision. The penalty for drug trafficking near a school should be brought into line with the current five-year mandatory penalty (which applies regardless of location) for trafficking in specified quantities of heroin, cocaine and other controlled substances, 21 U.S.C. §841(b) (1) (B).

Section 6 directs the United States Sentencing Commission to provide higher sentences in the sentencing guidelines applicable to the unlawful trafficking of anabolic steroids. Despite the fact that Congress recently made anabolic steroids schedule III substances under the Controlled Substances Act, the sentencing guidelines establish inadequate penalties for their unlawful distribution. For example, distributing 4,500 vials of injectable steroids would produce a sentencing range of just 10 to 16 months of imprisonment for a first offender, and just 6 to

12 months if such an offender accepted responsibility for his or her offense. United States Sentencing Commission, Guidelines Manual, §§2D1.1, 3E1.1, and Sentencing Table, Chapter 5, Part A (Nov. 1991).

Anabolic steroids are serious drugs of abuse that can produce harmful side effects. These drugs are often produced in clandestine laboratories where production conditions do not meet appropriate health standards. Moreover, traffickers in anabolic steroids are becoming more sophisticated and more directly connected with violence than in prior years. The sentences for trafficking in anabolic steroids should be increased to recognize these dangers.

The amendment provides that the Commission shall establish offense levels that are at least two levels higher for anabolic steroids than for equivalent dosage units of other schedule III substances. The amendment does not direct that the offense level for anabolic steroids be greater than the offense level for an equal weight of other schedule III substances because the Commission has not used weight as a measure of the seriousness of anabolic steroid trafficking offenses. The current guidelines applicable to anabolic steroids are based on units consisting of either 10 cc vials of injectable steroids or fifty tablets, regardless of concentration of the actual anabolic steroid. United States Sentencing Commission, Guidelines Manual, §2D1.1 (Nov. 1991).

SEC. COCAINE BRICKS. Section 401 of the Controlled Substances Act (21 U.S.C. 841) is amended by adding a new paragraph (h) as follows:

"(h) For purposes of this subchapter, subchapter II of this chapter, and the Sentencing Guidelines, the term "cocaine brick" means an individually wrapped package of a mixture or substance containing a detectable amount of cocaine, whose weight, including packaging, is at least 1050 grams and not more than 1350 grams. In determining the relevant quantity of a mixture or substance containing a detectable amount of cocaine for sentencing purposes, pursuant to this subchapter, subchapter II of this chapter, and the Sentencing Guidelines, a cocaine brick is the equivalent of a kilogram of a mixture or substance containing a detectable amount of cocaine. For purposes of this subsection "Sentencing Guidelines" means the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code."

EXPLANATION

This amendment will simplify, without sacrificing fairness, the process of computing the appropriate sentence for those defendants who are convicted of offenses involving large quantities of cocaine. Cocaine normally comes in individual packages which are known as "cocaine bricks" or "kilos" because they typically contain one kilogram plus or minus a few grams of a compressed white cocaine mixture. Such packages are intended to contain a kilogram of the cocaine mixture, and individuals criminally involved in the chain of distribution treat them as a kilogram. The sentencing guidelines are designed to set the appropriate offense level, for drug offenses, based primarily upon the quantity of controlled substance with which a defendant is culpably involved.

Even when imported in multi-ton quantities, cocaine, in virtually every case, consists of bricks of approximately one kilogram of compressed white powder in a plastic bag which is taped and sometimes coated with a variety of other materials to make the brick waterproof during transit. This packaging usually adds from about 50 grams to over 300 grams to the total weight of the wrapped package. The bricks are normally sold still wrapped in the original packaging, partly to show buyers that they were just imported and not further diluted. The bricks are usually tested by taking a core sample from a representative number of bricks to show that each contains cocaine.

Currently, in order to prepare for trial or sentencing, it is often necessary to open multiple package of cocaine to satisfy

(objections concerning the exact amount of the mixture in each package. The opening of such packages jeopardizes the health of DEA chemists because of the inevitable inhalation of cocaine, is time consuming, creates potential integrity problems, and is almost impossible to accomplish without spilling some of the contents. Needless litigation frequently ensues over the exact amount of cocaine involved, notwithstanding that the defendant intended to deal in a weight in kilograms equal to the number of bricks involved. It is not uncommon for a chemist to be called to a sentencing hearing or to be requested to reopen and weigh evidence for sentencing.

(This amendment will not result in including the weight of the package in the calculation, but rather will allow the sentencing court to accurately identify the weight of exhibits containing multiple kilogram-sized packages without requiring the opening of an unreasonable number of such package (e.g., in order to sentence a defendant at level 42 under the Federal Sentencing Guidelines, it must be shown that the offense involved at least 1500 kilograms of cocaine, which would be 1500 bricks).

SEC. GENERAL CONSPIRACY PENALTY. Section 371 of title 18,
United States Code, is amended --

(a) by striking in the first paragraph "either to
commit any offense against the United States, or" and by striking
the second paragraph; and

(b) by adding the following new paragraph:

"If two or more persons conspire to commit any offense
against the United States, and one or more of such persons do any
act to effect the object of the conspiracy, each shall be subject
to the same penalties as those prescribed for the most serious
offense the commission of which was the object of the conspiracy,
except that the penalty of death shall not be imposed.".

EXPLANATION

This section, in accordance with recent statutory trends, would amend the general conspiracy statute so that the maximum penalty would be the same as the most serious offense which was the object of the conspiracy. Presently, under 18 U.S.C. 371, the maximum penalty for conspiring to commit a federal felony is five years. As a result, the penalty for conspiracy is often considerably less (or even greater) than that for the substantive offense which is its object. This grading level is inadequate since it fails to distinguish between those conspiracies whose objectives are serious and those whose objectives are not as serious.

Accordingly, the amendment provides that the maximum penalty for conspiracy to commit an offense against the United States shall be identical to the maximum penalty for the most serious crime that was the object of the conspiracy (except that the death penalty may not be imposed).¹ This penalty scheme is similar to that recommended by the National Commission on Reform of Federal Criminal Laws in 1971, is similar to that contained in many modern State penal codes, and is consistent with the recent trend in federal statutes. For example, Congress recently provided that the maximum penalty for drug conspiracies shall be the same as that prescribed for the object offense, 21 U.S.C. 846. And other pending proposals would increase the conspiracy

¹ The separate offense in 18 U.S.C. 371 of conspiring to defraud the United States or any agency thereof, punishable by five years' imprisonment, is retained.

penalties for firearms and money laundering offenses to the same level as those provided for the substantive offenses.

The Supreme Court has long recognized that conspiracy "presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be fully attained and decreases the probability that the individuals involved will depart from their path of criminality." Callanan v. United States, 364 U.S. 587, 593 (1961). See also United States v. Feola, 420 U.S. 671, 693-694 (1975). It is therefore fitting, and long overdue, that the penalty for a conspiracy be made commensurate with that for the most serious offense which was its objective.

SEC. CREATION OF A GENERAL ATTEMPT OFFENSE. Chapter 19 of title 18, United States Code, is amended --

(a) in the chapter heading by striking "CONSPIRACY" and inserting "INCHOATE OFFENSES";

(b) by adding the following new section:

"§374. Attempt to commit offense

"(a) Whoever attempts to commit an offense against the United States that is described in this title or in title 21 or 31 of the United States Code shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the attempt, except that the penalty of death shall not be imposed.

"(b) It is not a defense to a prosecution under this section that it was factually or legally impossible for the actor to commit the offense, if the crime could have been committed had the circumstances been as the actor believed them to be.

"(c) This section shall not apply to another offense consisting of conspiracy, attempt, or solicitation; and

(c) in the chapter analysis, by adding at the end the following: "374. Attempt to commit offense."

EXPLANATION

This section would create a general attempt offense applicable to titles 18, 21, and 31 of the United States Code. These titles contain virtually all the most serious offenses against the United States, including crimes of violence and those involving drugs or money laundering.

Currently, coverage of attempt offenses is spotty and inconsistent. For example, it is an offense to attempt to rob a bank, but not to attempt to rob a post office; it is an offense to attempt to steal mail, but not to attempt to steal from a bank. In order to remedy this inconsistency and provide uniform coverage for attempts, this section would create an attempt offense of general applicability throughout titles 18, 21, and 31. A general attempt offense was recommended by the National Commission on Reform of Federal Criminal Laws in 1971, and is a feature of almost every modern State penal code.

No effort is made to define "attempt". As at present, this issue is left to case law which, while not entirely settled, generally requires proof of intent to commit a crime, coupled with conduct constituting a "substantial step" toward that end. E.g., United States v. Still, 850 F.2d 607 (9th Cir. 1988), cert. denied, 489 U.S. 1060 (1989). The maximum penalty is set at the same level as the crime which was the object of the attempt. This is consistent with existing statutes that include attempts (e.g. 18 U.S.C. 2113(a), 21 U.S.C. 846).

This section further provides that impossibility is not a defense. This is in accord with the recommendation of the Model

Penal Code as well as the National Commission on Reform of Federal Criminal Laws. See also United States v. Roman, 356 F. Supp. 434 (S.D.N.Y.), aff'd, 484 F.2d 1271 (2d Cir. 1973), cert. denied, 415 U.S. 978 (1974) (upholding a conviction for attempting to sell heroin to government agents, although prior to the sale the government had removed the heroin and substituted soap powder); but see United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), applying the impossibility doctrine.

Finally, the proposal exempts certain offenses from its application. The exempted classes of crimes consist of other inchoate offenses (e.g. one cannot attempt to conspire or solicit).

SEC. PRETRIAL DETENTION AMENDMENTS. Chapter 207 of title 18, United States Code, is amended --

(1) in section 3142(d), by striking "probation or parole" and inserting "probation, supervised release, or parole";

(2) in section 3142(e), by inserting "an offense that is a crime of violence punishable by a maximum term of imprisonment of ten years or more," before "or an offense under section 924(c) of title 18";

(3) in section 3156(a) --

(a) by striking "and" at the end of paragraph (3);

(b) by striking "or" at the end of subparagraph (4)(A) and by striking the period at the end of subparagraph 4(B) and inserting a semicolon; and

(c) by adding at the end of paragraph (a)(4) the following new subparagraphs:

"(C) an offense that is a violation of section 922(g) of this title; or

"(D) a felony under chapter 109A (Sexual Abuse) of this title;" and

(4) in section 3156(a), by adding at the end the following new paragraph:

"(5) the term 'State' means a State of the United States, the District of Columbia, and any commonwealth, possession, or territory of the United States."

EXPLANATION

Section makes four amendments to the pretrial detention statutes. The first amendment adds "supervised release" to section 3142(d), relating to temporary detention. Currently, persons who commit an offense while they are on federal or State probation or parole, and who the court finds may flee or pose a danger to the community, are to be held for up to ten days to permit the appropriate authority to determine if their release status should be revoked. The amendment would permit the same temporary detention for persons who commit an offense while on supervised release.

The second amendment is the most substantive of the four proposed. It would expand the categories of offenses for which a rebuttable presumption of detention arises to include crimes of violence for which a maximum term of imprisonment of ten years or more is authorized. This would include such offenses as bank and postal robbery, attempted murder, and Hobbs Act robbery or extortion. Currently, the rebuttable presumption of detainability arises only for controlled substances offenses that carry a maximum prison term of at least ten years, and for violations of 18 U.S.C. 924(c) (punishing the use of a firearm to commit a crime of violence or a serious drug offense). It seems equally justified and appropriate to create a rebuttable presumption of dangerousness for individuals charged with serious crimes of violence, i.e., those punishable by at least ten years' incarceration.

The third amendment would expand the definition of "crime of violence" for purposes of the pretrial detention statutes to include offenses that are violations of 18 U.S.C. 922(g), i.e., receipt of firearms by prohibited classes of persons such as convicted felons, fugitives, and illegal aliens. This has the effect of permitting consideration of pretrial detention for individuals charged with these crimes. No presumption of dangerousness would attach, but the government would be enabled (as it is not today) to prove that a convicted felon found in unlawful possession of a firearm was a danger to the community such that no condition of release would adequately assure its safety. This amendment also would add felony violations of chapter 109A (Sexual Abuse) as pretrial detention predicates. This would have the effect of allowing consideration of pretrial detention on dangerousness grounds for defendants charged, e.g., with committing a sexual act with a minor under twelve years of age, even if no force or threat was used.

The fourth amendment is quasi-technical and clarifying. It would define the term "State" for purposes of the pretrial detention laws to include the District of Columbia and the several commonwealths, territories, and possessions of the United States. The pretrial detention statutes use the term "State" in a variety of places, all of which make it appropriate to include the territories and the District of Columbia. For example, 18 U.S.C. 3142(e) and (f) described the classes of defendants eligible for pretrial detention as including those who have been (inter alia) convicted of a "State" offense comparable to one of

the enumerated types of federal offense, and 18 U.S.C. 3142(d) allows temporary detention for persons who commit certain federal offenses while on release pending trial or after conviction for a "State" felony. See also 18 U.S.C. 3148 and 3150. It clearly makes sense for these provisions to apply when the underlying conviction was in a court of one of the territories (e.g. Guam) to the same extent as if it had been in a court of one of the fifty States. Accordingly, the amendment would so provide.

**SEC. AUTOMATIC WAIVER OF RIGHT TO BE PRESENT AT TRIAL AND
SENTENCING IF DEFENDANT ON PRETRIAL RELEASE FAILS TO APPEAR.**

Subsection 3142(h)(2) of title 18, United States Code, is amended by striking "and" at the end of subparagraph (B), striking the period at the end of subparagraph (C) and inserting "; and", and adding a new subparagraph (D) as follows:

"(D) the fact that if the person knowingly fails to appear for any subsequent proceeding, such proceeding will proceed without the person, and the failure to appear shall constitute a waiver of the person's right to be present at such proceeding, notwithstanding any other law."

EXPLANATION

This section provides that a person on pretrial release shall be deemed to have automatically waived his right to be present at any future proceeding, such as arraignment, trial, or sentencing, if the person does not voluntarily appear for any of these proceedings. Rule 43 of the Federal Rules of Criminal Procedure mandates that the defendant be present at the time of arraignment, entry of the plea, trial, and sentencing, although once a trial has begun with the defendant present it may continue and a verdict may be returned if the defendant voluntarily absents himself. However, under current law, if a person is granted pretrial release under section 3142 and absents himself before trial has even begun, he cannot be tried. This new section would amend section 3142(h) by stating that a release order must inform the person that any failure to appear will be an automatic waiver of his rights under Rule 43 and thereby make it less advantageous for person charged with a crime to flee prior to trial.

SEC. RICO AND 18 U.S.C. 1959 ENHANCEMENTS

(a) CLARIFICATION OF LACK OF REQUIREMENT THAT ENTERPRISE HAVE AN ECONOMIC PURPOSE. (1) Section 1961(4) of title 18 United States Code, is amended by inserting ", without any requirement of economic motivation or purpose," after "includes"; and

(2) Section 1959(b)(2) of title 18, United States Code, is amended by inserting ", without any requirement of economic motivation or purpose," after "includes".

(b) ELIMINATION OF REQUIREMENT OF NON-IDENTITY OF DEFENDANT AND ENTERPRISE. Section 1962(c) of title 18, United States Code, is amended by inserting "for any enterprise engaged in, or" after "It shall be unlawful".

(c) CLARIFICATION OF AGREEMENT ELEMENT OF RICO CONSPIRACY. Section 1962(d) of title 18, United States Code, is amended by adding at the end the following: "For purposes of this subsection, it is not necessary to establish that the defendant agreed personally to commit any acts of racketeering activity."

(d) INCREASED PENALTY FOR RICO VIOLATIONS. Section 1963(a) of title 18, United States Code, is amended by striking "20" and inserting "30".

(e) EXPANSION OF 18 U.S.C. 1959 TO COVER COMMISSION OF ALL VIOLENT CRIMES IN AID OF RACKETEERING ACTIVITY AND INCREASED PENALTIES. Section 1959 of title 18, United States Code, is amended--

(1) in subsection (a) by inserting "or commits or" before "threatens to commit a crime of violence";

(2) in paragraph (a)(4) by inserting "committing any other crime of violence or for" before "threatening to commit a crime of violence", and by striking "five" and inserting "ten";

(3) in paragraph (a)(5) by striking "ten" and inserting "twenty"; and

(4) in paragraph (a)(6) by striking "or" before "assault resulting in serious bodily injury,", by inserting "or any other crime of violence" after those same words, and by striking "three" and inserting "ten".

EXPLANATION

The Second Circuit has ruled that, for purposes of a RICO prosecution, either the enterprise or the pattern of racketeering activity must have some economic or financial purpose. See United States v. Bagaric, 706 F.2d 42 (2d Cir.), cert. denied, 464 U.S. 840 (1983); United States v. Ivic, 700 F.2d 51 (2d Cir. 1983). Both of these cases involved activity by nationalistic terrorist groups. Although most racketeering activity, even by terrorists, involves some degree of financial motivation, there are cases where RICO is the appropriate charge, even though the group is motivated solely by political goals, racial hatred, or some other non-economic motive. Thus, for example, it may be appropriate to use RICO to charge members of a violent street gang or of a neo-Nazi gang who commit acts directed against social or political enemies with no view to economic gain. Part (a) of the amendment makes it clear that such prosecutions are not precluded because of the lack of economic motivation. A similar amendment is provided for 18 U.S.C. § 1959, which includes a definition of "enterprise" closely based on that in the RICO statute.

Part (b) of the amendment is intended to overcome the decisions by most courts of appeals holding that the "person" who violates section 1962(c) cannot be identical with the "enterprise" whose affairs are conducted through a pattern of racketeering activity. See e.g., Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990); Saporito v. Combustion Engineering, Inc., 843 F.2d 666 (3d Cir. 1988); Schofield v.

First Commodity Corp. 793 F.2d 28 (1st Cir. 1986); Bennett v. United States Trust Co., 770 F.2d 308 (2d Cir. 1985). One circuit has held that the enterprise can conduct its own affairs through racketeering activity. United States v. Hartely, 678 F.2d 961 (11th Cir. 1982), cert. denied 459 U.S. 1170 (1983).

The rationale for the majority rule generally is that a person cannot "associate with" itself. However, the rule elevates semantics over substance; in many instances, particularly where a corporation is totally controlled by individuals who cause it to commit racketeering activity, it is quite appropriate to charge the corporation as a defendant under section 1962(c). The entity should not be insulated from criminal or civil liability because of a narrow construction of the term "associated with." Under this amendment, when a corporation can be proved to have conducted its own affairs, or the affairs of an association in fact of which it is a member, through a pattern of racketeering activity, the corporation can be charged as a defendant under Section 1962(c).

Part (c) of this amendment is intended to overcome decisions in a minority of circuits (the First and Second) that require proof that a RICO conspiracy defendant agreed personally to commit at least two acts of racketeering activity. United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.) cert. denied, 469 U.S. 831 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981); 460 U.S. 1011 (1981). Virtually all other circuits have held that it is sufficient to show that the defendant joined the conspiracy and agreed that two or more racketeering acts

would be committed by some conspirators on behalf of the enterprise. See e.g., United States v. Pryba, 900 F.2d 748 (4th Cir. 1990); United States v. Traititz, 871 F.2d 368, 395-96 (3d Cir.), cert. denied, 110 S. Ct. 78 (1989); United States v. Neapolitan, 791 F.2d 489, 491-98 (7th Cir. 1986), cert. denied, 479 U.S. 1101 (1987); United States v. Joseph, 781 F.2d 549, 554-55 (6th Cir. 1986); United States v. Tille, 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Carter, 721 F.2d 1514, 1528-31 (11th Cir.), cert. denied, 469 U.S. 819 (1984).

There is no reason to require an agreement to personally commit racketeering acts for RICO conspiracy, when standard conspiracy law does not contain such a requirement. It should be sufficient to show that the defendant joined the overall conspiracy and agreed to the commission of a pattern of racketeering activity by others on behalf of the conspiracy. This amendment resolves this conflict in the circuits.

Part (d) of this amendment increases the maximum statutory penalty from twenty to thirty years for a RICO violation not involving a predicate act bearing a life sentence. This is appropriate in light of the fact that several of the predicate offenses that constitute "racketeering activity" themselves carry more than twenty-year (but less than life) maximum sentences, e.g. 18 U.S.C. 1344 (bank fraud) and 21 U.S.C. 841(b)(1)(B) (large scale drug trafficking).

The amendments to 18 U.S.C. § 1959 broaden that law to cover the commission of any crime of violence. Currently, the statute

reaches threats to commit any violent crime but only the actual commission of certain substantive violent offenses. This anomaly would be corrected by this amendment. In addition, the amendments make it clear that attempting or conspiring to commit any crime of violence is covered. Finally, the amendments raise the maximum period of imprisonment for all violations of the statute to at least ten years.

All of these changes reflect the growing problem of violent acts committed by persons associated with organized crime groups, street gangs, and other violent groups. Enlarging the statute's coverage and raising the penalties further the overall Congressional intent to enact strong measures to combat such violence.

A BILL

To reform the operation of the Civil Rights of Institutionalized Persons Act as it relates to exhaustion of grievance procedures for State and local prisons and jails.

1 *Be it enacted by the Senate and House of Representatives of*
2 *the United States of America in Congress assembled, That this Act*
3 *may be cited as the "Prisoners' Grievance Procedures Act."*

4 Sec. 2. AMENDMENT TO SECTION 7 OF THE CIVIL RIGHTS OF
5 INSTITUTIONALIZED PERSONS ACT.

6 Section 7 of the Civil Rights of Institutionalized Persons Act
7 is amended to read as follows:

8 "(a) In any action brought pursuant to section 1979 of
9 the Revised Statutes of the United States (42 U.S.C. § 1983)
10 by a person accused or convicted of a crime or juvenile
11 delinquency who is confined in any jail, prison, or other
12 institution, the court shall continue such case until all
13 prisoner grievance procedures and State administrative and
14 judicial remedies are exhausted.

15 "(b) Upon the request of a State or local corrections
16 agency, the Attorney General shall provide the agency with
17 technical advice and assistance in establishing or improving
18 administrative remedies for inmate grievances."
19

Section-by-Section Analysis

Section 2(a) amends section 7 of the Civil Rights of Institutionalized Persons Act ("CRIPA"), which provides for a 90-day stay of section 1983 actions pending exhaustion of "plain, speedy, and effective" administrative remedies and sets minimum standards for these remedies. These minimum standards have caused a great deal of consternation among state officials, particularly because prisons and jails are required to permit inmates to have an advisory role in the formulation, implementation, and operation of the grievance system.

Section 7 has not achieved its purpose of improving grievance procedures. Because the price it imposes has been too high, few states have availed themselves of the opportunity provided by that section. It has also been a source of some discontent that the Bureau of Prisons is not bound by these standards and does not comply with them. Hence, calls for modification of section 7 have come, inter alia, from the Federal Courts Study Committee, the Administrative Office of the U.S. Courts, and the Department of Justice in the Attorney General's prison crowding report.

Section 2(a) effects these changes by eliminating the minimum standards requirement and requiring an automatic stay for exhaustion of all State administrative remedies. Unlike the current section 7, section 2(a) makes the stay of the § 1983 action automatic upon the filing of the complaint. The automatic stay protects the plaintiff's § 1983 claim from being barred due to the statute of limitations. After the exhaustion of all prison grievance procedures and State administrative and judicial remedies, the plaintiff may pursue the § 1983 upon a motion to dissolve the stay.

Consistent with principles of federalism, the new subsection 7(b) provides that upon the request of a state or local corrections agency, the Attorney General shall provide the agency with technical advice and assistance in establishing such remedies for inmate grievances.

Document Originally
Attached to
Following Page

3/23/92

Please file for Cam Findlay :

Executive Compensation

THE WHITE HOUSE
WASHINGTON

February 12, 1992

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: D. CAMERON FINDLAY

SUBJECT: SEC ACTIONS ON EXECUTIVE COMPENSATION

Tomorrow Chairman Richard Breeden ~~of the SEC~~ will announce at a press conference three initiatives aimed at increasing management's accountability to shareholders regarding executive compensation. The SEC believes the initiatives are good policy (because they enhance management's accountability to shareholders), good politics (given the widely held outrage about high executive salaries, and good legislative strategy (because two bills in Congress would impose much greater restrictions on executive pay). The Vice-President and the Competitiveness Council strongly support these actions. Secretary Brady has expressed the concern that the Business Roundtable, among others, will oppose the SEC's actions.

The three initiatives are as follows:

- o A statement that in the future the SEC will rule that shareholder proposals regarding executive compensation can no longer be excluded from proxy ballots for nonbinding shareholder votes.
- o A notice that the SEC intends to look at ways to better present information in proxy statements on executive compensation.
- o A 120-day study by SEC staff on how to value stock options for purposes of disclosure in proxy statements.

Note that the three SEC initiatives do not interfere in the market by regulating executive salaries, as some have suggested. Rather, they seek to enhance the quality of information available to a company's shareholders -- the owners of publicly held businesses -- so that they can exert control over management's salaries through corporate governance.

Henson Moore and I believe there are three options for White House reaction to the SEC's actions:

- o The White House could simply not comment formally. This might be difficult given the prominence of the issue, but the excuse could be that the SEC is an independent agency not subject to Presidential control.

- o The White House could issue a supportive statement including the comment that some executive salaries are excessive. This would be politically popular but might not be viewed as consistent with the Administration's free-market philosophy.
- o The White House could issue a statement generally applauding the SEC's action because it increases managers' and directors' accountability to shareholders. I've attached a possible draft statement as a basis of discussion.

Attachments

STATEMENT ON SEC ACTIONS REGARDING EXECUTIVE COMPENSATION

The Administration believes strongly that government should not interfere in the free marketplace to regulate the level of compensation of workers, including the pay of corporate directors and management. The actions that the SEC has taken today reaffirm that the government should not regulate directors' and executives' compensation. They recognize that the owners of businesses -- in the case of publicly held businesses, the shareholders -- should have adequate information and an opportunity to express their views on how much to pay all of their employees.

Executive Pay— An Embarrassment To Free Marketers

WSJ 1-10-92 P9A8

By towing Chrysler's Lee Iacocca (a.k.a. the \$4.65 million-a-year man) to Tokyo, Commerce Secretary—er, President—Bush has put executive pay on the table for the 1992 campaign.

Democratic front-runner Bill Clinton is already firing away at "self-serving CEOs," while liberal pundits pile on. Even the Sniper of Albany, Mario Cuomo, rose from his foxhole to take a few cheap shots. So naturally all good free-marketeers should rise in response to defend the right of CEOs to earn whatever... hold on a minute.

Grab that jerking knee. There are good reasons other than class envy for disliking the runaway salaries of many chief executives. Vice President Dan Quayle may even try to make it a Republican issue (more below).

For one thing, the pay numbers are outrageous enough to make even a capitalist blush. Steven Ross, the Time Warner boss, raked in \$74.8 million in bonuses in 1990 (on top of his \$3.3 million salary), even as Time magazine discards employees. Good work if you can get it. General Motors' former chairman, Roger Smith, receives a \$1.2 million annual pension—presumably his reward for a decade of losing market share.

The averages aren't much more reassuring than the horror stories. A survey by Graef Crystal, the walking encyclopedia of executive pay, shows that, in the mid-1970s, CEOs earned about 34 times the pay of the average working stiff; by the late 1980s they earned an eye-popping 108 times that average.

Windfalls might be justified when companies do well; Bill Gates of wealth-creat-

Potomac Watch

By Paul A. Gigot

ing Microsoft deserves his billion in stock. But the trouble is the bonuses keep coming even for CEOs in sinking companies (Chrysler).

The sole pleasure from Mr. Bush's disastrous Japan trip has been seeing the American CEOs embarrassed by the comparatively modest incomes of the Japanese. Honda's CEO makes less than \$400,000 and great cars. Americans are learning that Japan's hierarchical society has produced a more egalitarian corporation than radically egalitarian America; somehow this has to influence corporate esprit, worker morale, and thus performance.

Liberals like to attribute all this to "greed," lower taxes and (who else!) Ronald Reagan. And it's never wise to discount greed in human affairs. But truly free markets have a way of disciplining greed when it doesn't mesh with results. The real

problem is that the "market" in CEO pay doesn't work. Says Mr. Crystal: "A true market is one that allocates resources efficiently. There is no market in corporate pay."

Compare, he says, CEOs to baseball players. He cites a study by a Securities and Exchange Commission economist showing that 75% of the salary differences in baseball can be explained by differences in performance—home runs, earned run average and the like. But his own survey of 459 CEOs could explain only about 20% of their salary disparities by comparing performance (company size and total return to shareholders). "The other 80% is anyone's guess," he says.

In short, the year Chrysler makes a car as well as Roger Clemens throws a fastball is the year Mr. Iacocca will deserve to make \$4.65 million.

The reason for this market failure goes beyond the fact that CEOs choose, and are cosy with, their boards of directors. The more fundamental problem is the lack of CEO accountability to their shareholders (owners).

The 1980s may have started as the decade of the takeover, but they ended as the decade of entrenched management. The Delaware Chancery court has ruled that directors aren't obliged to accept bids for their shares (another Time Warner contribution). And the pillorying of both junk bonds and Michael Milken didn't make it easier to finance takeovers. Many CEOs are increasingly accountable only to themselves.

What to do? The quick and dirty solution is to slap a limit on CEO salaries. It's especially tempting to do this for companies which demand government trade protection—machine tool and car makers—but want to go on fat and flush in the executive suits. The latter idea was floated (though rejected) during the latest debate over machine-tool protection in the Bush Administration. But pay limits, which are really price controls, never work.

More promising reforms may be emerging from SEC Chairman Richard Breeden. Earlier this year he proposed "a shareholder bill of rights" that would loosen proxy rules to make it easier to mount shareholder challenges.

This idea sank out of sight, though, following the predictable howl from the plutocrats at the Business Roundtable. The Brady Treasury, which sometimes acts as if it represents only the Business Roundtable, was also wary.

But the proposal may now be getting a new life thanks to Vice President Quayle. His staff is working with Mr. Breeden to come up with ideas for greater corporate accountability. "The vice president is very interested in this and believes that CEOs, like everyone else, should be accountable in our capitalist system, and that means rewarded for good performance and punished for failure," says an administration source familiar with the discussions.

Such a proposal would also be good politics. President Bush needs a populist economic agenda to rebut Democratic charges that he is indifferent to the middle class. Identifying Mr. Bush with such overpaid whiners as Mr. Iacocca is crazy. Standing up for millions of shareholders and workers to make Mr. Iacocca more accountable makes more sense.

COMPENSATION OF SENIOR EXECUTIVES AND DIRECTORS

The SEC is planning to announce tomorrow a series of steps relating to the issue of executive compensation. These steps are all being taken within existing law, and they do not involve any need for new legislation. Each step is also designed to improve market mechanisms rather than involving government regulation of private-sector compensation decisions.

I. SHAREHOLDER VOTING

Under existing federal law, a shareholder of a public corporation has a right to submit one proposal for inclusion in the company's proxy statement each year. In 1991, more than 204 shareholder proposals (up from 82 in 1986) on "social" issues ranging from animal rights to anti-smoking to investment in South Africa were included in proxy statements. In addition, 294 proposals (up from 55 in 1986) relating to corporate governance topics like poison pills, golden parachutes, and confidential or cumulative voting were included in proxy statements. The law requires that proposals be included unless they are clearly excludable under the governing SEC proxy rules.

Executive compensation is ultimately "paid" by the shareholders of any corporation, as the holders of the residual equity value of the enterprise. However, the SEC historically has allowed corporations to exclude from their proxy statement shareholder proposals relating to any aspect of compensation, including the compensation of senior executives and directors. This has been on the basis that compensation was a matter of day-to-day "ordinary business."

At the same time, under existing rules if an issue is deemed to be a significant "policy" issue, that issue may not be excluded from the proxy. The SEC performs the role of "referee" in ruling on whether specific proposals are includable or excludable. However, disappointed shareholders can and do seek judicial review of the SEC's position, and the courts have not hesitated to order proposals included over the objection of the SEC.

In response to the skyrocketing growth of executive compensation, particularly in instances where the company itself has recorded mediocre or deteriorating performance, shareholders have increasingly sought to place proposals "on the ballot" regarding executive compensation. In 1986 there were 35 shareholder proposals on compensation and benefits submitted, compared with 110 such proposals in 1990. Given the level of current public concern with this matter, it would be virtually impossible to conclude that the issue has not become an issue of

"policy" (i.e. includable), rather than an issue of "ordinary" business operations (i.e. excludable). In the event of litigation, the SEC believes that a decision to exclude a management compensation proposal would quite possibly be overturned given current public concern with this matter.

A number of bills have been introduced in Congress to address the issue of executive compensation. One bill (H.R.3056) would preclude corporations from deducting any amount of compensation that exceeds twenty times average worker earnings. Another, introduced by Senator Levin (S.1198) would require the SEC to allow shareholder votes on compensation and require the SEC to change generally accepted accounting principles to force companies to expense the value of stock options when they are granted. The Levin bill appears to have strong support, and could well pass in the event no other change is forthcoming.

Fundamentally, shareholders should have the right to expect that compensation packages for senior executives can be justified by management performance, and that the directors should be responsive to the concerns of shareholders as to the general level and direction of compensation packages in light of corporate performance. Though under current law we believe that shareholders have a right to express their views on this issue, irrespective of the law we believe that it is good policy to reduce the government's role in restraining an open debate on such issues within the corporation.

For these reasons, the SEC plans to announce tomorrow that ten pending shareholder proposals must be included in the proxy materials of the affected companies, and that henceforth the SEC will construe advisory proposals concerning senior executive or director compensation to be includable in proxy statements. SUCH VOTES WILL BE ADVISORY ONLY, AND MUST BE WORDED AS SUCH. This is designed to bring a market solution to a market problem, by allowing the affected private sector groups -- management, directors and shareholders -- to resolve the compensation questions in each company on a case-by-case basis without government regulation.

II. COMPENSATION DISCLOSURE

As part of the effort to bring a market-oriented solution to the compensation issue, the SEC also plans to announce that we will propose for public comment revisions to the proxy rules that would clarify and enhance the disclosure of current compensation packages. For example, at present corporations have the option of disclosing non-cash compensation like stock options in narrative descriptions or through a table. The description of CEO compensation in one U.S. automaker's proxy last year ran 14 pages in length. Under the new proposals, the company will be required to set forth in a simple table both cash compensation and the present value of grants of stock or stock options in the year of grant.

In addition to the new summary table, the proposed proxy rules will also require a comparison between changes (up or down) in corporate performance over recent years (probably 3 years) and changes (up or down) in CEO compensation. This is designed to reinforce the link that should exist between pay and performance.

Finally, to help shareholders better understand the rationale for compensation decisions by the board, and to help shareholders decide whether or not to vote to reelect board incumbents, the proposed rules will require the board to set forth the criteria it uses in awarding incentive compensation, and to explain the reasoning for specific compensation awards. At the same time, disclosure will be reduced or eliminated for the terms of broad-based benefit plans, even though executives may receive proportional benefits along with all other employees. This will allow the elimination of long "boilerplate" descriptions of generic health or retirement plans.

The purpose of enhanced disclosure of compensation plans is to enhance the ability of the market to make rational decisions regarding executive compensation. Without reliable information that can be compared from one company to another, it is much more difficult for an efficient market for executive services to function. Here again, as the owners of the company and the people who actually pay the compensation awards, the shareholders should be entitled to clear and accurate information as to decisions of the board.

III. ACCOUNTING

The Levin bill would mandate changes in current GAAP accounting for stock options. The adequacy of current accounting for grants of stock options is problematic. However, the impact of any change in accounting could be enormous (positive or negative), and it could have a particularly heavy impact on small, high risk ventures that may use large grants of options to attract both venture capital and executive talent.

The FASB has been reviewing this issue for many years, without any concrete proposals. In order to help reach a responsible conclusion as to the need for any change and, if so, the nature of any change that would be appropriate, the SEC will ask its Chief Accountant, working with the FASB and the AICPA, to study this issue and report to the Commission within 120 days.

Executive Pay— An Embarrassment To Free Marketers

WSJ 1-10-92 P9A8

By towing Chrysler's Lee Iacocca (a.k.a. the \$4.65 million-a-year man) to Tokyo, Commerce Secretary—er, President—Bush has put executive pay on the table for the 1992 campaign.

Democratic front-runner Bill Clinton is already firing away at "self-serving CEOs," while liberal pundits pile on. Even the Sniper of Albany, Mario Cuomo, rose from his foxhole to take a few cheap shots. So naturally all good free-marketeers should rise in response to defend the right of CEOs to earn whatever... hold on a minute.

Grab that jerking knee. There are good reasons other than class envy for disliking the runaway salaries of many chief executives. Vice President Dan Quayle may even try to make it a Republican issue (more below).

For one thing, the pay numbers are outrageous enough to make even a capitalist blush. Steven Ross, the Time Warner boss, raked in \$74.8 million in bonuses in 1990 (on top of his \$3.3 million salary), even as Time magazine discards employees. Good work if you can get it. General Motors's former chairman, Roger Smith, receives a \$1.2 million annual pension—presumably his reward for a decade of losing market share.

The averages aren't much more reassuring than the horror stories. A survey by Graef Crystal, the walking encyclopedia of executive pay, shows that, in the mid-1970s, CEOs earned about 34 times the pay of the average working stiff; by the late 1980s they earned an eye-popping 103 times that average.

Windfalls might be justified when companies do well; Bill Gates of wealth-creat-

Potomac Watch

By Paul A. Gigot

ing Microsoft deserves his billion in stock. But the trouble is the bonuses keep coming even for CEOs in sinking companies (Chrysler).

The sole pleasure from Mr. Bush's disastrous Japan trip has been seeing the American CEOs embarrassed by the comparatively modest incomes of the Japanese. Honda's CEO makes less than \$400,000 and great cars. Americans are learning that Japan's hierarchical society has produced a more egalitarian corporation than radically egalitarian America; somehow this has to influence corporate esprit, worker morale, and thus performance.

Liberals like to attribute all this to "greed," lower taxes and (who else!) Ronald Reagan. And it's never wise to discount greed in human affairs. But truly free markets have a way of disciplining greed when it doesn't mesh with results. The real

problem is that the "market" in CEO pay doesn't work. Says Mr. Crystal: "A true market is one that allocates resources efficiently. There is no market in corporate pay."

Compare, he says, CEOs to baseball players. He cites a study by a Securities and Exchange Commission economist showing that 75% of the salary differences in baseball can be explained by differences in performance—home runs, earned run average and the like. But his own survey of 459 CEOs could explain only about 20% of their salary disparities by comparing performance (company size and total return to shareholders). "The other 80% is anyone's guess," he says.

In short, the year Chrysler makes a car as well as Roger Clemens throws a fastball is the year Mr. Iacocca will deserve to make \$4.65 million.

The reason for this market failure goes beyond the fact that CEOs choose, and are cosy with, their boards of directors. The more fundamental problem is the lack of CEO accountability to their shareholders (owners).

The 1980s may have started as the decade of the takeover, but they ended as the decade of entrenched management. The Delaware Chancery court has ruled that directors aren't obliged to accept bids for their shares (another Time Warner contribution). And the pillorying of both junk bonds and Michael Milken didn't make it easier to finance takeovers. Many CEOs are increasingly accountable only to themselves.

What to do? The quick and dirty solution is to slap a limit on CEO salaries. It's especially tempting to do this for companies which demand government trade protection—machine tool and car makers—but want to go on fat and flush in the executive suits. The latter idea was floated (though rejected) during the latest debate over machine-tool protection in the Bush Administration. But pay limits, which are really price controls, never work.

More promising reforms may be emerging from SEC Chairman Richard Breeden. Earlier this year he proposed "a shareholder bill of rights" that would loosen proxy rules to make it easier to mount shareholder challenges.

This idea sank out of sight, though, following the predictable howl from the plutocrats at the Business Roundtable. The Brady Treasury, which sometimes acts as if it represents only the Business Roundtable, was also wary.

But the proposal may now be getting a new life thanks to Vice President Quayle. His staff is working with Mr. Breeden to come up with ideas for greater corporate accountability. "The vice president is very interested in this and believes that CEOs, like everyone else, should be accountable in our capitalist system, and that means rewarded for good performance and punished for failure," says an administration source familiar with the discussions.

Such a proposal would also be good politics. President Bush needs a populist economic agenda to rebut Democratic charges that he is indifferent to the middle class. Identifying Mr. Bush with such overpaid whiners as Mr. Iacocca is crazy. Standing up for millions of shareholders and workers to make Mr. Iacocca more ac-

*Cam - Some additional background
on Exec. Compensation,
French*

February 11, 1992

MEMORANDUM FOR INTERESTED PARTIES

SUBJECT: Executive Compensation

"Excessive" executive compensation has attracted a great deal of media attention over the past six months, ranging from serious news articles to a Doonesbury cartoon.

Critics of "excessive" executive compensation have argued that the current shareholder-director relationship does not lead corporations to pay executives based on performance. They have suggested three basic approaches to addressing the perceived problem:

- o mandating limits on compensation;
- o using the "bully pulpit" to encourage pay-for-performance;
- o removing governmental barriers to greater shareholder influence (such as SEC limits on communication between shareholders); and
- o requiring firms to disclose greater and more detailed compensation information to shareholders.

The first approach should be forcefully rejected, since it contradicts our fundamental commitment to the market (and raises the credit card interest rate cap problem). The other approaches, however, may provide the Administration with an opportunity to enhance the market and to align the President with a popular issue.

Despite its popularity, this issue does entail risks. The Business Roundtable vigorously opposes any action. And some experts maintain that no problem exists, since shareholders who do not like a firm's compensation policies can freely sell their stock.

On Thursday, February 13, the SEC is planning to announce new rules on executive compensation that would increase the information that firms provide to their shareholders and would permit shareholders to vote on non-binding proxy resolutions on such issues. Chairman Breeden has asked for White House support on the SEC initiative. The SEC will not be proposing, at this time, to lift the barriers on shareholder communication.

The Administration should now consider its response to the SEC plan. If the Administration generally supports the SEC's efforts, Administration officials may:

- o announce public support when the SEC releases its plan;
or
- o wait-and-see how the public responds to the SEC. If the plan receives widespread applause, the Administration can express approval and take credit for encouraging the SEC.

The SEC Plan

1. Allow non-binding shareholder resolutions on corporate pay.

The SEC has historically not required corporations to include in their proxy statements shareholder resolutions on corporate pay, deeming the subject to be part of the firm's "conduct of ordinary business" ("golden parachutes" are an exception). Breeden proposes to reinterpret the Commission's rules to allow non-binding resolutions on the pay of top managers.

Pro: Shareholders would have a greater opportunity to voice opinions on management pay.

Con: By making resolutions easier, critics say the floodgates may be opened for numerous frivolous resolutions.

2. Require companies to disclose more detailed information on executive compensation in proxy materials.

While corporations already provide information on the salary, stock ownership, and incentive compensation plans of directors and top management, the proxy materials often present this information in a complex and non-uniform manner. The SEC would propose to require clear and uniform disclosure of compensation of top officers and directors.

Pro: Will make it easier for shareholders to determine and compare actual compensation levels.

Con: Could increase paperwork burden on corporations, although magnitude of burden would depend on how rule is written.

3. Require more accurate reporting of stock options in income statements.

Under current accounting rules, stock options are not reported on income statements, and instead flow through the balance sheet as issued shares when they are exercised. This practice minimizes the effect of high corporate compensation on income statements. The SEC would propose or cause the FASB to propose

that the present value of issued options flow through the income statement as an expense (like cash compensation).

Pro: Corporate income statements would more accurately reflect actual compensation.

Con: The FASB has been working for years to determine the best way to accurately account for options. SEC pressure or an SEC directive could be seen as political interference and result in adoption of an imperfect system.

**Summary of Executive Compensation Meeting
Phone Conversation with Richard Breedon and Linda Quinn**

Issue 1: Allow Non-binding Shareholder Resolutions on Corporate Pay

SEC Proposal: The SEC will alter its interpretation of "ordinary business" and allow non-binding shareholder resolutions regarding executive compensation to be included in the proxy statement. The SEC can (and plans to) act unilaterally on this issue. The change would be effective immediately and would effect this year's proxy proposals.

Rationale:

- Executive compensation has become a national issue and therefore falls outside the scope of ordinary business.
- The SEC feels they it is vulnerable to shareholder suits if it does not allow these sorts of proposals.
- The SEC thinks that Congress will act if they do not. Chairman Breedon believes that this announcement will usurp the Levin Bill. Others at the meeting felt that this could actually encourage passage of the Levin Bill (to codify issue and make proposals more permanent).

Concerns

- Treasury representatives were concerned about the number of frivolous resolutions as well as the increase in paperwork that this could cause for companies. These concerns could be somewhat mitigated by the "duplicative" restriction on proposals. In the event that a number of proposals are submitted, the company can select certain proposals and then exclude others on the grounds that they are "duplicative". It is still possible that a single company could have a number of proposals on different executive compensation topics.
- Another issue that was raised was whether this issue violated the moratorium on federal regulations.

Issue 2: Disclosure

SEC Proposal: The SEC will announce that it plans to propose a rulemaking which would eventually be placed out for public comment. The SEC would not actually submit a rulemaking proposal at this time. The rulemaking would have to be formulated within the SEC, then placed out for comment (for 90-120 days).

This rulemaking would include a proposal to disclose options at their fair or present value and would have no effect on a company's income statement. The SEC has not yet decided how options would be accounted for. This proposed change would have no effect on this year's proxy contests. It is likely that the SEC could get this enacted for next year.

The SEC is considering requiring the summary of top executive pay in a tabular format. It would include all compensation awarded in the current year:

cash + bonus + options and SARS.

For proxy purposes, options and SARS would be valued at the time of grant. They would not be updated every year and would not be cumulative. Another table which is already required ("section 16" changes made last year) would include:

Option Grants + Options swapped + reload options + options exercised.

Issue 3: Accounting for Options in the Income Statement

SEC Proposal: The SEC proposes to look at the issue and possibly give the FASB a deadline for determining how to value options for income statement purposes. If the FASB could not meet the deadline then the SEC would propose changes. The SEC is not proposing a rulemaking at this time. According to Linda Quinn they still "do not have a precise way of proceeding".

Before proposing anything, the SEC would like to examine the effect on smaller public companies.

TO: French Hill

FROM: Linda McDonough

Subject: Executive Compensation: 1) Current issues which shareholders are allowed to vote on; 2) Legislative update.

Per your request:

Shareholder resolutions

During the last two proxy seasons, three classes of compensation-related proposals have been found by the Commission staff to transcend ordinary business, and thus have not been excludable under ordinary business:

- 1) Proposals addressing golden parachutes
- 2) Proposals asking a company to disclose more detailed information regarding executive compensation.
- 3) Proposals seeking the creation of a shareholder advisory committee to advise the board of directors on a variety of issues, including compensation.

source: Linda Quinn, May 15, 1991 testimony.

Status of Levin Bill (D-MI)

- o The bill was introduced June 4, 1991 and Levin's subcommittee on Oversight of Government Management held hearings on January 31, 1992.
- o The bill has no co-sponsors.
- o The bill has been referred to the Senate Banking Committee.
- o It has not gone through mark-up.

*State law passes first

→ "non-duplicative rule" -- proponents write company yes or no. ^{If no} Then company have to have a reason to exclude. "No action" letter from SEC (\$1000, 100 shares, held one year)

→ cash, shares held, ^{fair} Value at time of grant
option grants, swaps, exercising,

→ Accounting "indefinite"



U. S. Securities and Exchange Commission
Washington, D. C. 20549 (202) 272-2650

**News
Release**

DRAFT

FOR IMMEDIATE RELEASE

92-12

**STATEMENT BY RICHARD C. BREEDEN
ON EXECUTIVE COMPENSATION ISSUES**

Washington, D.C., February 13, 1992 -- Today, I'm announcing a number of measures that the Securities and Exchange Commission will be taking with regard to the compensation of senior executives.

At the outset, it is important to recognize that the appropriate amount and structure of compensation for corporate employees -- whether on the shop floor or in the executive suite -- is a question that should be resolved in the private marketplace. Market forces, not government regulation, should be used to address instances of abusive conduct.

Under our system, boards of directors are responsible for representing shareholder interests in overseeing management performance. Boards also have the responsibility for determining the level and structure of compensation that is appropriate in light of corporate performance and other factors. Boards that pay too little can expect to lose their best management talent. Boards that pay too much, by contrast, create unnecessary costs that must be absorbed by the shareholders that the boards represent.

In the actions that we are announcing today, the SEC intends to enhance the workings of market forces in two principal ways:

- By giving shareholders information about executive compensation that is easier to understand and more relevant.
- By permitting shareholders to make their views about this compensation known to boards of directors.

I. SHAREHOLDER VOTING

Under existing federal law, a shareholder who owns \$1000 worth or 1% of the stock of a public company has a right to submit one proposal for inclusion in the company's proxy statement. The law requires that proposals be included unless they are clearly excludable under the governing SEC proxy rules.

DRAFT

Executive compensation is ultimately "paid" by the shareholders of any corporation, as the holders of the residual equity value of the enterprise. However, the SEC historically has allowed companies to exclude from their proxy statement shareholder proposals relating to any aspect of compensation, including the compensation of senior executives and directors. This has been on the basis that compensation was a matter of day-to-day "ordinary business."

At the same time, under existing rules if an issue is deemed to be a significant "policy" issue, that issue may not be excluded from the proxy. The SEC performs the role of "referee" in ruling on whether specific proposals are includable or excludable from the proxy statement.

In recent years, shareholders have increasingly sought to place proposals "on the ballot" regarding executive compensation. In 1986 there were 35 shareholder proposals on compensation and benefits submitted to companies, compared with 110 such proposals in 1990. This mirrors a significant growth in the number of shareholder proposals on all topics relating to corporate governance. Perhaps, most importantly, the level of public and shareholder concern over the issue of senior executive compensation has become intense and widespread. Under current law, the existing level of public concern with this question, as a matter of policy with significant economic implications, dictates a reevaluation of whether shareholder proposals on senior executive or director compensation should be included in the proxy statement.

For these reasons, the SEC is announcing that ten pending shareholder proposals must be included in the proxy materials of the affected companies. In addition, henceforth the SEC will construe advisory proposals concerning senior executive or director compensation to be includable in proxy statements. Such votes will be advisory only, and must be worded as such. Hopefully, this decision will bring a market solution to a market problem, by allowing the affected private sector groups -- management, directors and shareholders -- to resolve the compensation questions in each company on a case-by-case basis without government regulation.

II. COMPENSATION DISCLOSURE

As part of the effort to bring a market-oriented solution to the compensation issue, the SEC is also announcing that we will propose for public comment revisions to the proxy rules that would clarify and enhance the disclosure of current compensation packages. Under the new proposals, the company will be required to set forth in a new summary table both cash compensation and the present value of grants of stock or stock options in the year of grant.

DRAFT

In addition to the new summary table, the proposed proxy rules will also require a comparison between changes (up or down) in corporate performance over recent years and changes (up or down) in CEO compensation. This step is designed to help shareholders evaluate the correlation between pay and performance.

Finally, to help shareholders better understand the rationale for compensation decisions by the board, and to help shareholders decide whether or not to vote to reelect board incumbents, the proposed rules will require the board to describe the criteria it uses in awarding incentive compensation, and to explain the reasoning for specific compensation awards. Here again, as the owners of the company and the people who actually pay the compensation awards, the shareholders should be entitled to clear and accurate information as to decisions of the board.

III. ACCOUNTING

The third and final measure is consideration of the adequacy of current accounting rules for grants of stock options. While various issues have been raised regarding current rules, any change in rules could also create new problems, especially for smaller, high risk, developmental stage companies.

In order to help reach a reasoned judgment concerning the need for any change and, if so, the nature of any change that would be appropriate, the SEC will ask its Chief Accountant, working with the FASB and relevant accounting bodies, to study this issue and report to the Commission within 120 days.

###

DRAFT

Document Originally
Attached to
Following Page

3/24/92

Please file for Cam Findlay:

Exon - Florio

FAX TRANSMISSION

McDonnell Douglas
Crystal Square 3

202-456-2883

DATE: 3 / 12 / 92

Page 1 of 22

TO: CAM FINDLAY

FROM: GREG DOLE - MCDONNELL DOUGLAS

SUBJECT: EXON - FLORIO: "CFIUS" PROCESS

PLEASE CALL 703-553-3838 IF YOU HAVE PROBLEMS RECEIVING THIS FAX

CAM,
Thanks for your assistance. Here is the
info you asked for regarding the CFIUS
process.

File:
Exon - Florio

**U.S. REGULATION OF FOREIGN INVESTMENT:
THE IMPACT OF THE EXON-FLORIO AMENDMENT
ON THE ACQUISITION OF U.S. BUSINESSES BY FOREIGN INTERESTS**

INTRODUCTION

Throughout its history, the United States has maintained a policy of largely unrestricted inward investment. In a move reflecting growing concern over an increasing number of foreign takeovers of U.S. companies, Congress broke with this tradition in 1988 and enacted a law granting the President broad new authority to block foreign takeovers that may threaten U.S. national security. This Memorandum will present an overview of the law and proposed implementing regulations, and will examine their application to the acquisition of U.S. businesses by foreign investors.

This legislation was sponsored in the Congress by Senator James Exon (D-Nebraska) and former Representative James Florio (D-New Jersey) (now the Governor of New Jersey), and hence is generally referred to as the "Exon-Florio Amendment" ("Exon-Florio").^{1/} Exon-Florio establishes a framework for evaluating the impact on U.S. national security of acquisitions of U.S. businesses by

^{1/} Exon-Florio was originally enacted on August 23, 1988 as an amendment to the Defense Production Act ("DPA") under section 5021 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 (codified at 50 U.S.C.A. app. § 2170).

foreign interests (including acquisitions through U.S. subsidiaries and transactions entirely between foreign corporations that involve a transfer of control over a U.S. business). The President is authorized to investigate any acquisition that would result in foreign control of a person engaged in interstate commerce in the United States and to block or to order divestiture of any acquisition deemed to pose a threat to the national security.

By an Executive Order issued on December 27, 1988, the President delegated to the interagency Committee on Foreign Investment in the United States ("CFIUS")^{2/} authority to investigate transactions falling under Exon-Florio and to make recommendations to the President. On July 14, 1989, the Treasury Department published in the Federal Register (at 54 Fed. Reg. 29,744) a set of proposed regulations to implement Exon-Florio (the "Proposed Regulations"). The public comment period on the Proposed Regulations expired on September 12, 1989, but Treasury has not yet promulgated final regulations. They are now

^{2/} CFIUS is chaired and staffed by the Treasury Department, and also includes representatives of the Departments of Defense, State, Commerce and Justice, the Office of U.S. Trade Representative, the Office of Management and Budget, and the Council of Economic Advisers.

expected by the end of 1991. Although the Proposed Regulations are not very helpful in defining the range of transactions that might be subjected to review under the statute, Treasury officials have made it clear that the final regulations will not differ significantly in this regard.

Exon-Florio lapsed temporarily on October 20, 1990 when Congress failed to reauthorize the Defense Production Act. In August 1991, Exon-Florio was finally reenacted (retroactive to October 20, 1990), and was made a permanent part of U.S. law (i.e., without any expiration date).^{2/} During the period that Exon-Florio was not legally in effect, the Department of the Treasury invited foreign investors to continue to submit notifications of investment transactions for review pending the reinstatement of Exon-Florio, and many investors followed this informal procedure during the interim period. Treasury has confirmed that these properly notified transactions will not be subject to further review now that Exon-Florio has been renewed.

^{2/} Exon-Florio was reinstated and made a permanent part of U.S. law by section 8 of the Defense Production Act Extension and Amendments of 1991, Pub. L. No. 102-99.

THE STATUTORY AND REGULATORY FRAMEWORK

A. Overview

Exon-Florio establishes a three-stage procedure for reviewing and, if necessary, investigating and taking action with respect to foreign acquisitions. In the first stage, once CFIUS is notified of a proposed, pending or completed acquisition,^{1/} it has 30 days in which to review the transaction and determine whether to commence an investigation. Notification is voluntary. However, if neither of the parties nor any of the CFIUS member agencies notifies CFIUS, the transaction remains subject to challenge under Exon-Florio indefinitely. If proper notification is given and an investigation is not initiated within the 30-day period, the transaction may not thereafter be challenged.

^{1/} Under section 800.401 of the Proposed Regulations, "notice" of a proposed acquisition may be provided to CFIUS only by one or both of the parties to the acquisition, or by one of the CFIUS member agencies on its own initiative. Thus, dissident shareholders, labor unions, competitors or other entities that might oppose an acquisition do not have standing to make an Exon-Florio notification (although there is nothing to prevent any of these persons or entities from attempting to block an acquisition by persuading one of the CFIUS member agencies to make the notification).

If CFIUS decides to investigate,^{2/} the investigation must be completed within an additional 45-day period. At any time during the review or investigation stages, the parties to the transaction may be asked to meet with CFIUS staff and/or to provide additional information. The parties may also request a meeting with CFIUS.

Upon completion of an investigation, CFIUS is required to report its findings to the President and to present a recommendation (or the differing views of its members, if CFIUS is unable to offer a unanimous recommendation). The President then has 15 days in which to announce what action, if any, he decides to take with respect to the transaction. Notification may be withdrawn voluntarily, subject to the consent of CFIUS, at any time before the President announces his decision. This procedure has been used in several instances in which the parties were unable

^{2/} As an informal rule, CFIUS will initiate an investigation at the request of three or more Committee members. However, the Executive Order implementing Exon-Florio provides that if one or more Committee members disagree with a Committee decision not to undertake an investigation, the Chairman must submit a report to the President setting forth the differing views. In practice, CFIUS has operated under a rule of consensus. According to CFIUS staff, no member agency has been denied a request for an investigation under these rules, nor has any member found it necessary to invoke the provision of the Executive Order.

to resolve problems identified by CFIUS prior to the statutory deadline.

The President is authorized to suspend or prohibit the transaction if he determines that (1) there is credible evidence to believe that the foreign acquiror might take action that threatens to impair the national security; and (2) no other provision of law (aside from declaring a national emergency under the International Emergency Economic Powers Act) provides adequate authority to protect the national security. The President also is authorized, in the event he deems it necessary, to direct the Attorney General to seek appropriate relief in federal district courts, including divestment in the case of a completed transaction. The President is not required to resort to judicial process, and presumably would do so only if he wished to invoke the enforcement or supervisory powers of the court. The President's national security findings are not subject to judicial review.

B. Issues of Particular Interest

1. What transactions are covered? The statute applies to virtually any transaction concluded after August 22, 1989 that could result in foreign control of a U.S. business.

The Proposed Regulations broadly define the term "acquisition" to include an acquisition or conversion of securities that results in control of a U.S. business entity, an acquisition of assets that constitute an ongoing U.S. business, and a consolidation or joint venture that results in foreign control of a pre-existing U.S. business.

The statute would apply to an acquisition by a foreign corporation of another foreign corporation that owns a business in the United States. Although jurisdiction would presumably be limited to the proposed transfer of control over the U.S. business, the statute could operate to delay or effectively block transactions between two foreign corporations.

The Proposed Regulations list several categories of transactions that fall outside the scope of Exon-Florio. These include, among others, (a) a "greenfield" investment involving the creation of a new U.S. business; (b) an acquisition of voting securities pursuant to a stock split or pro rata dividend; (c) an acquisition of convertible voting securities if no "control" relationship is established; (d) an acquisition of equipment and other assets (including real estate) that do not constitute an ongoing, sustainable business; (e) an acquisition solely for

investment purposes of less than 10% of the outstanding voting securities of a U.S. business; (f) an acquisition where the parent entity remains the same (such as a merger of U.S. subsidiaries); and (g) an acquisition of securities in the ordinary course of business and solely for investment purposes by a bank, insurance company, pension fund, brokerage company, or similar institution (provided that a significant portion of its business does not consist of acquisitions).

2. What is a "foreign person"? Under the Proposed Regulations, foreign persons subject to Exon-Florio include foreign nationals, foreign companies, foreign governments, and any U.S. entities they own or control. Moreover, the fact that a U.S. business is already controlled by a foreign interest does not remove the subsequent sale of that business from Exon-Florio review.

3. What constitutes "control"? The Proposed Regulations adopt a functional, rather than a quantitative, approach to the question of what constitutes foreign control of a U.S. business. "Control" is defined as the power (actual or potential) to formulate, direct or decide matters affecting the U.S. business, regardless of the percentage of shares

owned or controlled. CFIUS will be most likely to find a control relationship when the foreign person will be in a position to formulate or direct decisions concerning the U.S. entity's sale or transfer of principal assets, the dissolution of its business, the closing and/or relocation of its production or R&D facilities, the termination or nonfulfillment of its contracts, or the amendment of its Articles of Incorporation with regard to any of these matters. CFIUS has resisted suggestions that it adopt a "safe harbor" rule specifying a percentage of ownership (e.g. 25%) below which control would be presumed not to exist.

4. What acquisitions raise national security concerns?

Neither Exon-Florio nor the Proposed Regulations attempt to define "national security." Although the legislative history makes it clear that Congress intended the term to be applied broadly, Congress rejected efforts to broaden its scope to include economic security. In its commentary accompanying the Proposed Regulations, the Treasury Department identified only toys and games, food products, hotel and restaurant services, and legal services as products or services unrelated to national security. Parties who believe that an acquisition in other industry sectors does not affect national security are invited to

consult informally with CFIUS regarding the advisability of filing an Exon-Florio notification. However, parties that decide not to file a notification on the basis of consultations with CFIUS are not formally protected against subsequent investigation. It is unlikely that the final regulations will go further in defining "national security."

5. Should an Exon-Florio notification be filed? If a transaction involves or may involve the acquisition of control over a U.S. business by a foreign person, the next question is whether a "voluntary" notification should be submitted to CFIUS. If an adequate notification is filed and the Government does not investigate or block the transaction within the prescribed time periods, the parties can be assured that no subsequent action will be taken. However, notification may delay an acquisition, since the parties filing an Exon-Florio notification generally will not conclude the transaction until either CFIUS has declined to investigate or, if there is an investigation, a decision has been reached not to block the transaction. The parties might also be hesitant to trigger an investigation that would not otherwise occur, although this risk is generally

negligible since any significant transaction would ordinarily come to the attention of CFIUS.

The decision regarding whether to file a notification requires a careful analysis of the specific transaction, particularly its potential effect on national security. While the applicability of Exon-Florio is relatively clear at both extremes of the national security spectrum, there is a broad range of acquisitions to which its application may be uncertain.

6. What is involved in an Exon-Florio notification? The Proposed Regulations set forth a number of types of information that must be supplied as part of an Exon-Florio notification, including the following:

- o A description of the transaction and the parties;
- o A description of (a) the assets of the U.S. business, (b) its defense and classified contracts, (c) its militarily sensitive technology, and (d) its products and services that are otherwise subject to U.S. export controls;
- o A description of the business(es) of the foreign person and the identity and nationality of its parent company(ies); and
- o A discussion of the foreign person's plans for the U.S. entity.

The Proposed Regulations provide that CFIUS may reject any notification not containing all required information. Parties are required to advise CFIUS of any material change in the information submitted. If a party submitting a notification does not have access to all necessary information (as might be the case in a hostile acquisition), it need provide such information only "to the extent known or reasonably available to it."

7. Will Exon-Florio filings be given confidential treatment? Any information or documentary material furnished to CFIUS under Exon-Florio is exempt from disclosure under the Freedom of Information Act, and may not be made public except to the extent it is relevant to any administrative or judicial action or proceeding. The scope of this exception is unclear in view of the fact that judicial review of the merits of an Exon-Florio decision is precluded and there are no administrative proceedings relevant to the Amendment. Members and committees of Congress are also granted access to Exon-Florio filings, but may not disclose them publicly. Nevertheless, this Congressional exception could conceivably, in some instances, compromise the confidentiality of an Exon-Florio filing, given the intense political interest in some foreign acquisitions.

B. Results To Date

As of September 1991, CFIUS has reviewed approximately 620 proposed transactions under Exon-Florio. Only 13 cases have proceeded to the investigation stage, and in only nine of these cases did CFIUS complete its investigation and submit a recommendation to the President. (The other four notifications were withdrawn during the investigation phase.)

To date, the President has exercised his authority under Exon-Florio to order divestiture of an acquisition in only one case -- the 1989 acquisition of MAMCO, a Seattle-based manufacturer of aerospace components, by the China National Technology Import and Export Corporation. In at least three other cases -- the acquisition of General Ceramics by Tokuyama Soda Ltd. of Japan, the proposed purchase of Monsanto's silicon division by Huels A.G. of Germany, and a bid by Toho Titanium of Japan to purchase Titanium Metals Corporation of America (TIMET) -- the parties agreed to restructure their transactions in order to resolve national security concerns raised by CFIUS. In some cases, CFIUS has conditioned its approval of transactions on the receipt of "assurances" regarding such matters as

continuation of production and research and development in the United States. The record to date clearly reflects the general orientation of the Bush Administration in favor of foreign investment.

D. Practical Implications

Exon-Florio adds a potentially significant impediment to transactions that involve the acquisition of certain U.S. businesses by foreign persons (including their U.S. subsidiaries). Planning for these transactions must include an assessment of the pros and cons of making a voluntary notification, the possibility of a CFIUS investigation and the likelihood that conditions or assurances will be required by CFIUS or that the President will block the transaction. The parties should bear in mind that the Exon-Florio review process will often take the full 30 days, and might take as long as 90 days if an investigation is initiated (or longer if notification is deemed inadequate or the facts change).

Careful planning can reduce the uncertainty created by Exon-Florio. In a friendly transaction involving potential national security issues, the parties generally should (1) consult with CFIUS (if possible, before

definitive arrangements are concluded or public revelations occur), (2) prepare a comprehensive joint Exon-Florio notification, (3) if necessary, propose procedures to ensure that the transition to foreign control will not threaten U.S. national security interests, and (4) maintain close contact with CFIUS and with interested member agencies as the review proceeds. A forthcoming approach by the parties will significantly increase the likelihood that the transaction will be cleared during the initial 30-day evaluation period.

If serious national security concerns focus on the production, R&D or assets of specific subsidiaries, divisions or facilities, the parties should consider the option of insulating the foreign acquiror from the sensitive portions of the acquired company (e.g., by means of a proxy or voting trust agreement). Alternatively, the parties may wish to consider an undertaking to hold separate and to divest the sensitive portions of the acquired business.

A hostile takeover bid that raises potential national security concerns can present a much more difficult situation for the foreign acquiror. A coordinated and cooperative approach to CFIUS by the parties is obviously precluded. A target company may attempt to use the Exon-

Florio process as a defensive or delaying tactic. In addition to meeting with CFIUS members, the target may engage in a lobbying or public relations campaign designed to generate political pressure on CFIUS to block the acquisition. CFIUS has generally been able to resist such pressure, and to decide cases on the merits, but the adverse publicity and political controversy generated can be disturbing to some foreign acquirors.

A hostile foreign bidder must anticipate these tactics. The bidder should be prepared to address any real or apparent national security issues, both in its submissions to CFIUS and in a more general lobbying and public relations campaign designed to diffuse opposition among Members of Congress and the public.

SUMMARY AND CONCLUSIONS

With careful planning and preparation, it should be possible to avoid significant interference resulting from Exon-Florio in all but a small number of transactions. Given the lack of guidance in the Proposed Regulations, the key decision regarding whether to submit notification will have to be reached on the basis of an informed assessment of the national security implications and political profile of

the transaction, a knowledge of prior actions of CFIUS, and, in many instances, consultations with CFIUS. If notification is warranted, the submission of a carefully prepared document followed by close coordination with CFIUS will substantially increase the likelihood of clearance within the 30-day period. In more difficult cases, it may be necessary to propose to CFIUS modifications in the transaction designed to mitigate national security concerns. In connection with high-profile or hostile acquisitions, the parties must also be prepared to address publicly the national security issues and economic consequences of the proposed transaction, both in the media and in various political fora.

P. W. R. W. & G.

September 23, 1991

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

TO OUR CLIENTS

NOVEMBER 1991

TREASURY PUBLISHES FINAL EXON-FLORIO REGULATIONS

The Exon-Florio statute, enacted as part of the Trade Act of 1988, authorizes the President to investigate transactions that result in foreign control of a U.S. business, and to block those transactions that threaten U.S. national security. The President has delegated his investigative authority to the Committee on Foreign Investment in the United States ("CFIUS"), which is chaired by the Department of the Treasury.

On November 21, 1991, Treasury published in the *Federal Register* final regulations implementing the Exon-Florio statute. While the final regulations are generally similar to proposed regulations under which Treasury has been operating for the past two years, they do clarify several points of potential significance to parties subject to the statute. The most important provisions of the new regulations are summarized below.

1. What Transactions Involve "National Security"?

Treasury has rejected numerous comments urging it to define "national security," either by developing a "positive" list that would enumerate sectors considered to be related to national security, or a "negative" list of unrelated areas. It has also declined to render advisory opinions, or to publish digests of its completed investigations. In the preamble to the regulations, Treasury notes that the acquisition of a company producing products, services or technology important to U.S. defense requirements will usually involve significant national security concerns, while the acquisition of a company that produces no such products, services or technology will not. This is the extent of the guidance Treasury is willing to offer.

2. What Transactions Are Covered by Exon-Florio?

Treasury has declined to establish "bright line" tests, either with respect to the dollar value of a transaction or the market share involved, observing that there is "no predictable relationship" between these factors and an assessment of national security.

3. What Constitutes "Foreign Control"?

Once again, Treasury has declined to establish a "bright line" test based either on the percentage of stock acquired or the extent of Board representation of foreign interests. It has made minor clarifications in the definition of "foreign control" contained in section 800.204 of the regulations by:

(a) deleting a prior test for control based on the ability to "formulate" policies or decisions; and

(b) indicating that the interests of foreign investors will not be aggregated for purposes of determining control unless they are related or have agreed to act in concert.

Section 800.301(b)(5) of the regulations clarifies two significant points concerning control over joint ventures.

(a) Joint ventures are covered by the statute only if the U.S. party contributes an existing business over which a foreign interest would gain control; and

(b) Joint ventures in which each party has veto power over significant decisions do not vest control in the foreign investor.

4. Acquisition of Control by Foreign Lenders

The final regulations contain a new section, 800.303, that clarifies the application of the statute to foreign banks financing the acquisition of U.S. businesses. The acquisition of a security interest or other rights normally incident to financing transactions does not, *per se*, vest control in a lender. Where there is a significant possibility that a foreign lender may obtain control as a result of an actual or threatened default or other condition of the loan agreement, lenders are encouraged to consider filing notifications with CFIUS. Where default occurs, CFIUS will ordinarily view the appointment of a trustee, coupled with a commitment to sell the company in default, as an indication that the foreign lender is not exercising control.

The regulations also provide that foreign members of a syndicate of banks will not be deemed to acquire control where the consent of a majority of U.S. participants is required to take action, or the foreign bank is otherwise precluded by provisions in the financing documents from acquiring control over the debtor.

5. Processing of an Exon-Florio Notification

(a) Treasury has declined to establish a "fast track" review process, observing that the statutory time limits were already quite short.

(b) With respect to procedures for filing a voluntary notification, section 800.402 makes clear that both parties must supply information required by the regulations or requested by CFIUS. Where one party is reluctant to cooperate (e.g., the target of a hostile takeover attempt), CFIUS will obtain information from that party, if necessary through compulsory process.

(c) Section 800.402 requires the parties to summarize the essentials of the transaction, and the preamble emphasizes the importance of presenting a summary that is as clear and concise as possible.

(d) Section 800.501(b) codifies existing practice under which the Staff Chairman of CFIUS may request that the parties meet with CFIUS staff, and will ordinarily grant a request by the parties for such a meeting. The preamble notes that CFIUS will continue its practice of permitting the parties to comment on the substance of third party communications received by CFIUS, but will not adopt procedures that would make the review process more formalistic or adversarial.

6. Finality of Decisions Under Exon-Florio

The final regulations contain several limited provisions that, in some cases, may decrease the risk of adverse action after a transaction has been concluded.

(a) Section 800.401(c) precludes agencies that are members of CFIUS from initiating investigations more than three years after a transaction is concluded; the Chairman of CFIUS may, however, initiate an investigation at any time.

(b) The ability of CFIUS to reopen cases in the event of a material misstatement or omission by the parties in a notification has been narrowed somewhat by defining as immaterial:

- (i) financial or commercial matters unrelated to national security; and
- (ii) changes conceived and executed by the parties after a decision by the President or CFIUS not to block or investigate a transaction.

(c) A new section 800.601(d) states that transactions found by CFIUS not to be subject to the statute (e.g., because no foreign party will acquire control) may not be subsequently investigated or challenged.

* * *

This memorandum summarizes significant changes in the final regulations, and is not intended to render legal advice on any particular matter. If you have any questions, or would like to discuss any aspect of this subject, please call Terence J. Fortune at 202-223-7325.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

Document Originally
Attached to
Following Page

3/24/12

Please file for Cam Findlay :

Reformulated Gasoline

United States Senate

WASHINGTON, DC 20510-1401

*file:
reformulated
gasoline*

March 18, 1992

The Honorable Dan Quayle
Vice President
The White House
Washington, D.C. 20500

Dear Mr. Vice President:

As you know, there is a large-scale ethanol facility in South Bend which has provided jobs and economic benefits for Indiana for almost ten years. This plant generates employment in both urban and rural areas and is also a very important market for Indiana corn.

With the support of President Bush, the Clean Air Act of 1990 enhanced the market opportunities for ethanol through its provisions on fuel volatility, reformulated gasoline and carbon monoxide attainment.

I understand, however, that the potential for jobs and economic growth in Indiana and in rural America resulting from the Clean Air Act may not be realized because of pending EPA interpretations of the Act.

The provisions in the Clean Air Act with respect to fuel volatility, reformulated gasoline and carbon monoxide attainment were carefully drafted and approved after careful and lengthy consideration of all the technical and policy issues involved and in full consultation with the Administration. They were designed to allow a major role for ethanol blended fuels in reducing ozone-forming volatile organic compounds (VOCs), toxic air pollutants, and carbon monoxide.

Section 211 (h) of the Clean Air Act allows ethanol blended fuels a one psi tolerance from the RVP (volatility) standard of 9.0 pounds. However, EPA's regulations under Section 211 (k) are inconsistent with this section 211 (h) of the Act. As Senator Durenberger states in his March 3, 1992 letter to Administrator Reilly:

The Congress clearly did not expect the mandated 15% reduction in VOC emissions [in Section 211 (k)] to be recast as a tighter standard for RVP. If that outcome had been foreseen, we would have made allowance for ethanol, while maintaining air quality benefits, as we did in section 211 (h) of the revised statute.

Section 211 (h)'s provision for a one pound RVP waiver for ethanol blended fuels was adopted only after lengthy scientific review of the evidence on ethanol and volatility. It is important that Section 211 (k) be implemented in a manner consistent with congressional intent.

Furthermore, with respect to the use of ethanol blended fuels for carbon monoxide attainment, Section 211 (m) calls for an oxygenated fuels program to be adopted by November 1, 1992, with guidelines on oxygen credits to be adopted by August 15, 1991. However, the oxygen credit guidelines have not been adopted in a timely manner and, as a result, states lack federal guidance to implement this program by November 1, 1992.

I would request that the Administration act to ensure that EPA implements the Oxygenated Fuels program in a timely fashion, without unnecessarily limiting the use of 10-percent ethanol blends; and to clarify that the one-pound volatility tolerance provided to ethanol sold in ozone nonattainment areas permits the use of ethanol in reformulated gasolines.

The employment benefits of an expanding ethanol market are substantial nationally, as well as in Indiana. According to a recent report by Iowa State University, a one 100 million gallon ethanol plant will create as many as 5000 direct and indirect jobs in ethanol production, farming, mining, and related services. Proper implementation of these provisions is important to rural America.

Thank you for your attention to this request.

Sincerely,



Richard G. Lugar
United States Senator

cc: ✓ Samuel Skinner, Chief of Staff
Honorable Edward R. Madigan, Secretary of Agriculture
Honorable James D. Watkins
William K. Reilly, Administrator, EPA
C. Boyden Gray, III

Document Originally
Attached to
Following Page

3/24/92

Please file for Cam Findlay:

Religious Freedom Restoration
Act

Coalitions for America

Paul M. Weyrich
National Chairman
Eric Licht
President
Library Court
Social Issues
Stanton
Defense & Foreign Policy
Kingston
Budget & Economic Policy
721 Group
Judicial & Legal Policy
Siena Group
Catholic Coalition
The Omega Alliance
Young Activist Coalition
Resistance Support Alliance
Freedom Fighter Policy
Jewish/Conservative Alliance

721 Second Street
Capitol Hill
Washington, D.C. 20002
(202) 546-3003

file:
Religious Freedom
Restoration Act

TO: Cameron FINDLAY

OFFICE: CHIEF OF STAFF

FAX #: 456-2883

FROM: TDM JIPPING

FAX #: (202) 547-0392

NUMBER OF PAGES (INCLUDING COVER): 8

COMMENTS:

not
convincing



SCHOOL OF LAW

THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street, Austin, Texas 78705-1200 (512) 471-5151
Teleprinter Number (512) 471-6988

ENTERED SEP 20 1996

Direct Dial: 512-471-3275

September 17, 1990

Mr. Oliver Thomas
Baptist Joint Committee on Public Affairs
200 Maryland Ave., NE
Washington, DC 20002-5797

Dear Mr. Thomas:

You have asked my opinion whether the proposed Religious Freedom Restoration Act is within the power of Congress under section 5 of the fourteenth amendment. The Act would restrict the power of states to regulate or prohibit religious exercise pursuant to facially neutral laws. It is my judgment that Congress has such power. That is my personal judgment as a scholar; it should be obvious that The University of Texas takes no position on the question.

Repeated majorities of the Supreme Court have upheld analogous exercises of Congressional power to enforce the reconstruction amendments, and every justice has joined in such opinions. Some justices have raised questions about the boundaries of Congressional power in separate opinions, but the proposed Act appears to be within the bounds that these justices have recognized.

I. Cases Recognizing Congressional Power

Section 5 gives with respect to the fourteenth amendment "the same broad powers expressed in the Necessary and Proper Clause" with respect to Article I. *Ratzenbach v. Morgan*, 384 U.S. 641, 650 (1966). "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view," is within the power of Congress, unless prohibited by some other provision of the Constitution. *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879). Similar enforcement provisions in sections 2 of the thirteenth and fifteenth amendments have been given similar interpretations, and the cases are often cited interchangeably. See *Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980) (plurality opinion); *id.* at 500 (Powell, J., concurring); *City of Rome v. United States*, 446 U.S. 156, 207-08 n.1 (Rehnquist, J., dissenting).

It is the fourteenth amendment that makes the free exercise clause binding on the states. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Thus, Congressional power to enforce the fourteenth amendment includes Congressional power to enforce the free exercise clause. The proposed Act is well adapted to carry out the objects of the free exercise clause -- to protect religious liberty and to eliminate laws "prohibiting the free exercise" of religion.

The Supreme Court of Oregon recently passed on the precise question: "Congress, of course, has the power under section 5 of the Fourteenth Amendment to protect against state infringement what it believes to be free exercise of religion under the First Amendment." *Smith v. Employment Division*, 307 Or. 68, 763 P.2d 146, 149 (1988), rev'd on other grounds, 110 S. Ct. 1595 (1990). The Oregon court thought that mere legislative history was enough to bind it, and a statute was unnecessary. The Supreme Court of the United States did not consider the issue, presumably because Congress must enact a statute before the issue is properly posed. The Religious Freedom Restoration Act would be such a statute.

What may make the Act seem anomalous at first blush is that it seems to attempt to overrule the Supreme Court's decision in *Smith*. But the statute would not overrule the Court; rather, it would create a statutory right where the Court declined to create a constitutional right. This distinction is not a mere formality; it has real consequences that I explore in part III of this letter. And there is nothing unusual about Congress exercising its section 5 power in this fashion.

but
then it's
not
enforcing
right

The express Congressional power to "enforce" the amendment is independent of the judicial power to adjudicate cases and controversies arising under it. Congress is not confined "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional." *Katzenbach v. Morgan*, 384 U.S. 641, 659 (1966). Thus, Congress may sometimes provide statutory protection for constitutional values that the Supreme Court is unwilling or unable to protect on its own authority.

Cite

The clearest illustration of this power is the Voting Rights Act, in which Congress has forbidden discriminatory practices that the Supreme Court had been prepared to tolerate. The Supreme Court has held that literacy tests for voting do not violate the equal protection clause, *Lassiter v. Northampton Election Board*, 360 U.S. 45 (1959), but that Congress may ban literacy tests for voting, *Oregon v. Mitchell*, 400 U.S. 112, 131-24, 144-47, 216-17, 231-36, 282-84 (1970) (five separate opinions, collectively joined by all nine justices); *Gaston County v. United States*, 395 U.S. 287 (1969); *Katzenbach v. Morgan*, 384 U.S. 641, 649-50 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Similarly, the Court has held that electoral practices with racially discriminatory effect do

not violate the Constitution, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), but that Congress may forbid such practices pursuant to its section 5 powers, *Thornburg v. Gingles*, 478 U.S. 30 (1986); *City of Rome v. United States*, 446 U.S. 156, 172-83 (1980).

Much of the law of private racial discrimination depends on Congress's analogous powers under section 2 of the thirteenth amendment. No one would suggest that the Supreme Court could, on its own authority to adjudicate cases arising under the thirteenth amendment, prohibit all private discrimination in the making of contracts or the sale and ownership of property. There is no case rejecting such a claim because no one has been bold enough to present it. But Congress has banned all such discrimination pursuant to its power to enforce the amendment. *Runyon v. McCrary*, 427 U.S. 160, 179 (1975); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968).

These holdings were not limited -- indeed, they were implicitly reaffirmed -- by *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2371 (1989). *Patterson* unanimously reaffirmed *Runyon*'s holding that the Reconstruction civil rights acts forbid private discrimination, which necessarily assumes that Congress has power to forbid private discrimination not forbidden by the Constitution itself. The controversial holding in *Patterson* went only to the range of private conduct covered; it cast no doubt on the constitutional rule that Congress can reach private discrimination pursuant to its power to enforce the thirteenth amendment.

why not
Commerce
Clause

Most recently, the Court relied on section 5 of the fourteenth amendment to explain why Congress may, but state and local governments may not, authorize preferences for racial minorities without a finding of past discrimination. Compare *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997, 3008-09 (1990), and *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (plurality opinion joined by Justices Burger, White, and Powell), with *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1990), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). The Court has never said that the Constitution requires such preferences of its own force.

All incumbent members of the Court have recognized Congress's section 5 power to go beyond the limits of Supreme Court decisions; the only disagreement is over how far beyond. Just this June, the Court was unanimous on the point in *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990). The five-justice majority relied on section 5 to uphold racial preferences in the award of broadcast licenses. *Id.* at 3008-09. The four dissenters thought this power irrelevant to a statute governing federal agencies, but they recognized that "Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its 'unique remedial powers under

section 5." *Id.* at 3031, quoting the plurality opinion in *J.A. Croson v. City of Richmond*.

The *Croson* plurality, consisting of Justices O'Connor, Rehnquist, and White, stated that: "The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." 109 S. Ct. 706, 719 (1989) (emphasis in original). Justices Kennedy and Scalia recognized the accuracy of the plurality's account, but questioned its application to racial preferences. *Id.* at 734 (Kennedy, J., concurring), *id.* at 736 (Scalia, J., concurring). As Justice Kennedy put it, "The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me."

II. The Limits of Congressional Power

Only a few opinions suggest limits to the reach of Congressional power to enforce the fourteenth amendment. The most obvious is that Congress may not "restrict, abrogate, or dilute" the protections of the bill of rights in the guise of enforcing them. *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966). Thus, Congress cannot evade Supreme Court decisions protecting constitutional rights, although it can supplement Supreme Court decisions refusing to protect constitutional rights. It is this limitation that fuels Justice Kennedy's doubts about Congressionally mandated racial preferences. If racial preferences actually violate the equal protection clause, as he apparently believes, then mandating these violations of the clause is not a means of enforcing the clause.

catch
effect

Congressional power under section 5 is also subject to other express allocations of power in the Constitution. Thus, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), a majority of the Court invalidated a provision requiring states to extend voting rights to citizens aged eighteen and over. The justices in the majority concluded that the text of the Constitution or the clear intent of the founders reserved to states the power to determine the qualifications of their own electors, subject only to the express amendments concerning race, sex, and poll taxes. See 400 U.S. at 124-31, 154-213, 293-96 (three opinions joined by Justices Black, Harlan, Stewart, Burger, and Blackmun).

Finally, Congress may not assert its section 5 powers as a sham to achieve ends unrelated to the fourteenth amendment. Congress may not act under section 5 where it does not believe that a constitutional right is at stake, or perhaps where there could be no plausible claim that a constitutional right is at stake.

This is the point of dissenting opinion in *EEOC v. Wyoming*, 460 U.S. 226, 259-63 (1983) (joined by Justices Burger, Powell, Rehnquist, and O'Connor), rejecting Congressional power to prohibit mandatory retirement for state employees. The dissent said that "Congress may act only where a violation lurks. The flaw in the Commission's analysis is that in this instance, no one -- not the Court, not the Congress -- has determined that mandatory retirement plans violate any rights protected by these amendments." *Id.* at 260. The opinion pointed to Congressional enactment and retention of mandatory retirement for several classifications of federal employees to show that Congress did not think that mandatory retirement was unconstitutional. The dissent recognized that the Court's decisions "allow Congress a degree of flexibility in deciding what the Fourteenth Amendment safeguards." *Id.* at 262. The majority upheld the statute on commerce clause grounds and did not speak to the section 5 issues.

1/8
but not flat inconsistent!

III. The Religious Freedom Restoration Act

The Religious Freedom Restoration Act does not run afoul of these limitations. First, there is no plausible claim that the Act would violate the court's interpretation of the free exercise clause or any other right incorporated into the fourteenth amendment. *Employment Division v. Smith* reaffirms that legislative exemptions to protect religious exercise are "expected . . . permitted, and even . . . desirable." 110 S. Ct. at 1606. The Court unanimously rejected an establishment clause challenge to legislative exemptions in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

But what abx
Texas Monthly
Bullock

Second, the Act does not violate any other express allocation of power in the Constitution. The federal Constitution does not recognize or preserve any specific state power to regulate religion. The state regulatory powers that would be affected by the proposed Act are part of the general reserve of state powers, fully subject to the fourteenth amendment.

Third, the Act does not assert fourteenth amendment power where there is no plausible fourteenth amendment claim. Quite the contrary, it is plain that the Act protects religious exercise from prohibitions; there is no plausible claim that it does anything else.

After Smith
definition there is 14th claim

The Act is necessary because the Supreme Court refused to provide similar protection as a matter of independent constitutional interpretation. But the opinion unambiguously acknowledged that the conduct at issue is religious exercise. "The 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts." 110 S. Ct. at 1599.

The Court interprets the Constitution of its own force to protect these religious acts at least from discriminatory regulation. "A state would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Id.* It is equally clear that the Court would find a constitutional violation if a state banned a religious act for some denominations but not for others. The *Smith* opinion upholds only "neutral law[s] of general applicability." *Id.* at 1600.

From the perspective of a believer whose religious exercise has been prohibited, it makes little difference whether the prohibition is found in a discriminatory law or in a neutral law of general applicability. Either way, he must abandon his faith or risk imprisonment and persecution. Either way, it is undeniably true that his religious exercise has been prohibited. The *Smith* opinion does not deny that this is a plausible reading of the constitutional text. The Court says only that "we do not think the words must be given that meaning." *Id.* at 1599 (emphasis added).

The Court's reason for avoiding that reading is institutional. The opinion is quite clear that the Court does not want final responsibility for applying the compelling interest test to religious conduct. The majority does not want a system "in which judges weigh the social importance of all laws against the centrality of all religious beliefs." *Id.* at 1606 (emphasis added); see also *id.* n.5. To say that an exemption for religious exercise "is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts." *Id.* at 1606.

These institutional concerns do not apply to the Religious Freedom Restoration Act. Congress, rather than the Court, will make the decision that religious exercise should sometimes be exempted from generally applicable laws. And Congress, rather than the Court, will retain the ultimate responsibility for the continuation and interpretation of that decision. S. 167

Of course the courts would apply the compelling interest test under the Act, and these decisions would require courts to balance the importance of government policies against the burden on religious exercise. But striking this balance in the enforcement of a statute is fundamentally different from striking this balance in the independent judicial enforcement of the Constitution. Under the statute, the judicial striking of the balance is not final. If the Court strikes the balance in an unacceptable way, Congress can respond with new legislation.

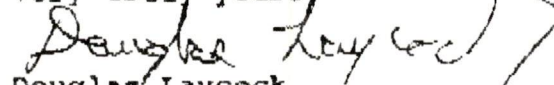
Thus, the Act would protect the religious exercise that the Court felt unable to protect on its own authority, and the Act would solve the institutional problem that inhibited the Court

from acting independently. The difficulties the Court identified in *Smith* are a perfect illustration of why there is need for independent power to enforce the bill of rights in both the judiciary and the Congress.

Our Constitution addresses the Madisonian dilemma of protecting the minority from the majority without subjecting the majority to control by the minority. The Court's insulation from the normal political processes is an essential virtue in protecting the minority. But in the difficult balancing of interests required by some free exercise cases, the Court now feels the need for a majoritarian voice. Because of the size and diversity of the national polity, Congress can provide more reliable majoritarian protection for individual rights than the states can provide. For a recent judicial explanation of this essential Madisonian idea, see *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 736-37 (1989) (Scalia, J., concurring).

By creating judicially enforceable statutory rights, Congress can call on the powers of the judiciary that the Court feared to invoke on its own. Because the rights created would be statutory, Congress can retain a voice that it could not have retained if the Court had acted on its own. By legislating generally, for all religions, instead of case-by-case for particular religions, Congress can reduce the danger that it will not respond to the needs of small faiths. If Court and Congress cooperate in this way, then the oppression of small faiths need not be, as the Court feared, "an inevitable consequence of democratic government." 110 S. Ct. at 1606. One function of section 5 of the fourteenth amendment is to provide for just such interbranch cooperation.

Very truly yours,



Douglas Laycock

Alice McKean Young Regents Chair in Law