commerce. The proposed section also covers murders, kidnapings, maimings, serious assaults and threats of violence committed as a means of gaining entrance into or improving one's status in an enterprise engaged in racketeering activity. Attempts and conspiracy to commit these offenses are also covered. The person who ordered the offenses set forth in the section could also be punished as an aider and abettor under 18 U.S.C. 2.

Part B - Solicitation to Commit a Crime of Violence

Section 1403 adds a new section 373 to title 18 of the United States Code, to proscribe the offense of solicitation to commit a crime of violence. This section is of principal utility in a situation where a person makes a serious effort to induce another to engage in activity constituting a crime of violence but is unsuccessful in doing so. The solicitor is clearly a dangerous person and his act merits criminal sanctions. Yet at present there is no federal law that prohibits solicitation generally, although a solicitation offense was included in S. 2572 as passed by the Senate in the 97th congress and in S. 1630 (97th Cong.), the proposed federal criminal code reform bill. See S. Rept. No. 97-307, pages 179-186.

Only solicitation to commit a crime of violence is here covered. "Crime of violence" is defined, in a new section 16 to be added to title 18, as a crime that has as an element the use or attempted use of physical force against another's person or property, or any felony that involves a substantial risk that physical force will be so used. Thus, although the new offense

rests primarily on words of instigation to crime, what is involved is legitimately proscribable criminal activity, not advocacy of ideas which is protected by the First Amendment right of free speech.

The punishment provided for the new offense is up to one half the term of imprisonment and one half the fine authorized for the punishment of the crime solicited, and up to twenty years imprisonment for solicitation of an offense punishable by death.[1/]

Part C - Felony Murder

Section 1404 expands the definition of felony murder in 18 U.S.C. 1111. It is identical to a provision in S. 2572 as passed by the Senate in the last Congress. Presently, premeditated murder is murder in the first degree. Under common law, a murder committed during a common law felony was held to be committed with a sufficient degree of malice to warrant punishment as first degree murder, but section 1111 only applies the felony murder doctrine to killings committed during an actual or attempted arson, rape, burglary, or robbery. The amendment would expand the list of underlying offenses by adding escape, murder -- for example if the defendant acts in the heat of passion in an

---

1/ We suggest that the legislative history indicate that "punishable by death" refers to those offenses, such as murder (18 U.S.C. 1111), in which Congress has included the death penalty in the statute, irrespective of whether the penalty is presently enforceable. Alternatively, the Committee may wish to amend this provision to apply the twenty-year penalty to solicitation of a crime that covers a sentence of up to life imprisonment.

attempt to kill A but instead kills B -- kidnaping, treason, espionage, and sabotage since these crimes also pose as great, if not more, danger to human life, as the four presently listed.

Part D - Mandatory Penalty for Firearm Use During Violent Crimes

Section 1405 provides for a mandatory sentence of imprisonment for a determinate period of time for using or carrying a firearm in a federal crime of violence. This section is similar to one included in S. 2572 [2/] as passed by the Senate in the 97th Congress and carries out one of the recommendations of the Attorney General's Task Force on Violent Crime. This section amends present section 924(c) of title 18 which attempts to provide for a mandatory minimum sentence, but is drafted in such a way that a person convicted of a violation may still be given a suspended sentence or placed on probation for his first violation. Moreover, present section 924(c) is ambiguous as to whether the sentence for a first violation may be made to run concurrently with that for the underlying offense. In addition, even if a person is sentenced to imprisonment under section 924(c), the normal parole eligibility rules apply. Section 1405 eliminates the possibility of a suspended or concurrent sentence,

---

[2/] While Part D is similar to a provision in S. 2572, Part D has been drafted to ensure that it applies to offenses such as bank robbery and assault on a federal officer which already provide for an enhanced, but not mandatory, punishment for the use of a firearm. The way in which the provision in S. 2572 was phrased would probably have precluded its use in such a case in light of recent Supreme Court decisions construing section 924(c). See Simpson v. United States, 435 U.S. 6 (1978), and Busic v. United States, 446 U.S. 398 (1980).

probation, and parole. A person convicted of using or carrying a firearm in relation to a crime of violence would be sentenced to imprisonment for five years for his first conviction and ten years for a subsequent conviction.

Part E - Armor Piercing Bullets

Section 1406 is a response to the problem of criminal use of bullets that will pierce the type of armor - resistant clothing now being employed by many police departments. The recent publicity given to the so called "cop killer" bullets has posed a new threat to the police officers and public figures who depend on body armor for protection against surprise handgun attacks. The section adds a new section 929 to title 18 to provide for a mandatory term of imprisonment for using armor-piercing handgun ammunition during and in relation to a federal crime of violence. It is identical to a provision in S. 2572 as passed in the last Congress. A mandatory sentence of imprisonment for five years is provided for using or carrying a handgun loaded with ammunition which would, if fired form the handgun, pierce the type of body armor commonly worn by police officers. A person convicted of a violation of this section could not be given a suspended or concurrent sentence or be placed on probation and he would not be eligible for parole.

Since the new section would only he effective if the bullet is used or carried during a violent crime, it does not threaten any legitimate sporting or recreational use of any type of ammunition of firearm.

It should be noted that the mandatory punishment for the use of the armor-piercing ammunition under section 929 is in addition to the mandatory punishment for the use or carrying of the firearm under the amended section 924. Thus a person who robbed a bank with a handgun loaded with armor-piercing bullets would, if charged with and convicted of a violation of 18 U.S.C. 924 and 929, be sentenced to a mandatory term of imprisonment of ten years -- five years for carrying the gun and five for the bullets -- in addition to any punishment for the underlying bank robbery offense. This cumulative mandatory punishment for firearms and bullets is intended to serve a clear notice on criminals that they face substantial jail time for their use and to persuade them to leave firearms and particularly dangerous bullets at home when they are choosing weapons.

Part F - Kidnaping of Federal Officials

Section 1407 proscribes the kidnaping of a federal officer in the performance of his duties. It is identical to a provision in S. 2572 as passed by the Senate in the 97th Congress and amends the present kidnaping statute, 18 U.S.C. 1201, to cover the abduction of a federal officer listed in 18 U.S.C. 1114 if the crime is committed while the victim is engaged in his official duties or on account of his official duties. Presently only murder and assault on these persons are federal offenses and kidnaping would not be covered unless the victim happened to be transported in interstate commerce or the offense was committed in an area of special federal jurisdiction. The amendment also

complements the amendments contained in the next section of the bill which proscribes the murder, assault, or kidnaping of family members of federal law enforcement officers and high level federal officials if the offense is committed to impede or retaliate against the federal officer or employee because of his official duties.

Part G - Crimes Against Family Members of Federal Officials

Section 1408 adds new section 115 to title 18 to make it a federal offense to commit or threaten to commit murder, kidnaping or assault upon a close relative of a federal judge, federal law enforcement officer, or certain federal officials if the purpose of the attack is to impede, interfere with, intimidate, or retaliate against the federal employee on account of his official duties. Since it would be an element of the new offense that the act was done because of the official duties of the employee, the section represents no real expansion of federal jurisdiction. The scope of the offense is linked to acts done with a purpose to obstruct or retaliate against federal officials because of their job - related responsibilities -- acts for which a State or local jurisdiction might lack the necessary degree of interest to vindicate the crime and for which federal jurisdiction is thus appropriate.

The subjects of the new offense are family members -- spouse, parent, brother, sister, and other relatives of the official who actually live in his household -- of those government employees and officers most likely to be subjected to

attacks by terrorists or other criminals in an attempt to interfere with vital functions of the government and the administration of justice, namely law enforcement officers, the President, Vice President, Members of Congress, Cabinet officers, federal judges including Supreme Court Justices, and person protected by 18 U.S.C. 1114. In part, this section complements the provisions of P.L. 97-285, enacted in 1982 to protect Supreme Court Justices and cabinet officers themselves by making attacks on their persons federal crimes.

Part H - Amendment of the Major Crimes Act

Section 1409 amends the Major Crimes Act, 18 U.S.C. 1153, which provides for federal jurisdiction over the serious interpersonal crimes listed therein if committed by an Indian in the Indian country. Presently 14 felony offenses are covered. The section would be amended to add the offenses of involuntary sodomy and maiming and to cover larceny only if the property involved is worth in excess of $100.00. A crime committed by an Indian against the person or property of another Indian may only be prosecuted in federal court if it is listed in section 1153. Other such interpersonal crimes must be prosecuted in tribal court where the maximum punishment extends to six months' imprisonment and a $500.00 fine. Such punishment is not sufficient for the offenses of maiming, traditionally regarded as among the most serious of all crimes, or for involuntary sodomy, which frequently involves a minor child as the victim. Con-

versely, tribal courts are fully capable of handling petty larceny of amounts less than $100.00 and there is no need to continue federal court jurisdiction over such an offense.

Part I - Destruction of Motor Vehicles

Section 1410 deals with the destruction of motor vehicles. It is identical to a provision contained in S. 2572. It amends the definition of "motor vehicle" in 18 U.S.C. 31, the section that defines the term as it is applied in 18 U.S.C. 33 which proscribes the destruction of motor vehicles. Presently "motor vehicle" means any device used for commercial purposes on the highways for the transportation of passengers or passengers and property. It does not include vehicles used to transport only cargo. Another statute which does cover the actual or attempted destruction of cargo moving in interstate commerce, 15 U.S.C. 1281, is restricted to the destruction of the cargo itself. Thus, there is no federal coverage of a sniper who shoots at a cargo truck since the truck carries only cargo which usually is not destroyed. The amendment would close this gap by expanding the definition of "motor vehicle" to include a device used for carrying "passengers and property, or property or cargo."

Part J - Destruction of Energy Facilities

Section 1411 is also similar to a provision in S. 2572. It adds a new section 1365 to title 18 to make it a federal crime to knowingly and willfully damage the property of an energy producing facility in an amount that exceeds $100,000 or to cause any amount of damage which results in a significant interruption

or impairment of the functions of the facility. The penalty for this offense may extend to ten years' imprisonment and a $50,000 fine. A punishment of up to five years' imprisonment and a $25,000 fine is provided for the lesser included offense of knowingly and willfully damaging the property of an energy facility in an amount that exceeds $5,000. The term "energy facility" is defined to include all types of electrical generating plants, and other facilities involved in the distribution, storage or transmission of electricity or other types of energy. It does not, however, include a facility subject to the jurisdiction of the Nuclear Regulatory Commission since the damaging of such facilities is already proscribed by 42 U.S.C. 2284.

Part K - Assaults as Federal Officers

Section 1412 makes three amendments to section 1114 of title 18 which proscribes the killing of designated federal officers and employees while engaged in, or on account of the performance of their official duties.

First, section 1114 is amended to cover attempted murders. Second, its coverage is expanded to include certain officers in the Intelligence Community. Third, authority is given to the Attorney General to designate by regulation other classes of federal officers and employees for coverage under section 1114, an approach similar to that in several of the criminal code revision bills. This would provide a workable mechanism for extending federal protection to miscellaneous classes of persons

as changing needs dictate. 18 U.S.C. 1114 is also used to define the scope of coverage of 18 U.S.C. 111 which sets out the offense of assault against persons "designated in section 1114." Thus, by virtue of section 111's cross reference to section 1114 the second and third of the above amendments also operate to modify and scope of the assault statute.

Part L - Escape from Custody Imposed by a Civil Commitment Order

Section 1413 is designed to make it an offense to escape from confinement ordered pursuant to a court under the provisions of 28 U.S.C. 1826. That statute empowers a judge to order confined any person who, without just cause, refuses to testify before a federal court or grand jury. Such confinement may extend for the life of the court proceeding or the term of the grand jury. Under present law persons who escape or attempt to escape from confinement as a result of such an order cannot be prosecuted. Moreover, such persons are on occasions already serving federal prison terms when they refuse to testify. If a federal prisoner is ordered civilly committed the criminal sentence is suspended for the duration of the civil contempt sentence to ensure that the confinement is in addition to and extends the time of the confinement for the criminal sentence. See 28 C.F.R. 522.11(d). This in effect gives the prisoner a "free shot" at making an escape while confined pursuant to 28 U.S.C. 1826. Since such confinement is often in a local jail which may not be as secure as a federal prison, the incentive to attempt an escape can be great. Recently an unsuccessful attempt

was made to prosecute under 18 U.S.C. 751 two persons in Arizona confined in a local correctional center pursuant to 28 U.S.C. 1826, but the court ruled that the section was inapplicable. Section 1413 of the bill would eliminate this loophole by adding a new subsection (c) to 28 U.S.C. 1826 specifically proscribing the escape, attempted escape, or rescue of a person confined pursuant to that section. Moreover, the new subsection would cover the escape, attempted escape, or rescue of certain dangerously insane persons who have been committed under the provisions of the new 18 U.S.C. 4243 (added in Title V of the bill dealing with the insanity defense) following an acquittal by reason of insanity. Punishment of up to three years' imprisonment and a $10,000 fine is authorized.

Part M - Extradition Reform

This part would create a new Chapter 210 of Title 18 for international extradition laws. Presently, both rendition, which deals with the return of fugitives form one state of the Untied States to another, and international extradition of fugitives are dealt with in Chapter 209. Under our proposal, Chapter 209 is left substantively unchanged as it pertains to rendition and international extradition is dealt with separately in the new Chapter 210.

The changes made in the extradition laws are designed to update those laws which have proven inadequate in modern times. Many of the statutes on extradition have been in force for over 100 years, some having had no significant alteration since 1882

while others have not been significantly amended since 1848. The marked increase in the number of extradition requests received and made by the United States in recent years has revealed problems with the present antiquated laws. Moreover, the requests have generated a number of published court decisions on constitutional and legal issues involved in international extradition. While these judicial interpretations fill important gaps in statutory law, we believe they should be codified in new extradition legislation. Finally, the United States has concluded new extradition treaties with many foreign countries in the past few years. The language of the present law is not adequate to implement some of their provisions, and it therefore impedes fulfillment by the United States of its international obligations.

Accordingly, the new Chapter 210, which is virtually identical to S. 1940 as passed by the Senate in the last Congress on August 19, 1982, is intended to make the following improvements in international extradition:

(1) It permits the United States to secure a warrant for the arrest of a foreign fugitive even though the fugitive's whereabouts in the United States is unknown or even if he is not in the United States. This warrant can then be entered into the FBI's NCIC system so that if the fugitive attempts to enter the United States or is apprehended in the United States for other reasons, he can be identified and arrested immediately for extradition to the requesting country.

(2) It provides a statutory procedure for waiver of extradition. This feature protects a fugitive's rights while facilitating his removal to the requesting country in instances in which he is willing to voluntarily go to the requesting country without a formal extradition hearing.

(3) It permits both a fugitive and the United States on behalf of the requesting country to directly appeal adverse decisions by an extradition court. Under present law a fugitive can only attack an adverse decision through habeas corpus. The only option available to the United States acting on behalf of a requesting country is to refile the extradition complaint with another magistrate.3/

(4) It clarifies the applicable standards for bail at all stages of an extradition case by adopting standards largely derived from Federal court cases.

(5) It establishes clear statutory procedures and standards applicable to all critical phases of the handling and litigation of a foreign extradition request.

(6) It sets forth specific procedures for determination of applicability of the political offense exception to extradition and removes from that exception violent acts committed by terrorists and others and those offenses involving international drug trafficking.

3/ Matter of Mackin, 668 F.2d 122 (2 Cir. 1981).

(7) It limits access to United States courts in connection with foreign extradition requests to cases initiated by the Attorney General.

(8) It permits use of a summons instead of a warrant of arrest in appropriate cases.

(9) It codifies the rights of a fugitive to legal representation and to a speedy determination of an extradition request.

(10) It simplifies and rationalizes the procedures for authenticating documents for use in extradition proceedings.

(11) It facilitates temporary extradition of fugitives to the United States.

TITLE XV -- Serious Non-Violent Offenses

Title XV deals with serious, but non-violent crimes.

PART A - Product Tampering

Part A concerns product tampering, which is also the subject of S. 216. Since we previously testified on S. 216 before the full Committee, which has since favorably reported that bill, I will not discuss the product tampering provision of S. 829.

PART B - Child Pornography

Another area addressed by Title XV is child pornography. The bill amends the federal child pornography laws to facilitate the prosecution of purveyors of material depicting children engaging in sexually explicit conduct. The bill's child pornography provision is based in part on New York v. Ferber, 102 S. Ct. 3348 (1982), in which the Supreme Court held that material showing children engaging in sexually explicit conduct could be banned even though the material might not meet the legal definition of obscenity as set out in Miller v. California, 413 U.S. 15 (1973). Ferber recognized that where children were involved the State had a much greater interest in regulating pornography. Accordingly, the bill amends 18 U.S.C. 2252 to cover the transportation, shipment, receipt, sale, or distribution of material visually depicting minors engaging in sexually explicit conduct whether or not the conduct is legally obscene, as the law presently

requires. In addition, the section eliminates the present requirement that the material must be sold or produced for pecuniary profit. Experience has shown that a certain amount of this type of material is produced and traded by "collectors" rather than sold, but the harm to the children involved is, of course, the same regardless of the motive.

PART C - Warning the Subject of a Search

Title XV provides for a new type of obstruction of justice offense. Under section 2232 of title 18, it is a misdemeanor to impair an authorized search by a law enforcement officer, such as a search in the execution of a warrant, by destroying or removing the property that is the object of the search. It is not, however, an offense to warn a person that his property is about to be the target of a search so that he can himself remove or destroy it. Title XV fills this gap by making it unlawful to give notice, or to attempt to give notice of a search in order to prevent the authorized seizing of any property.

PART D - Program Fraud and Bribery

Another area covered by Title XV is fraud or bribery concerning a program of a private organization or of a State or local government that receives federal financial assistance. Presently, 18 U.S.C. 665 makes theft or embezzlement by an officer or employee of an agency receiving assistance under the Job Training Partnership Act a federal offense. However, there is no statute of general applicability in this area, and thefts from other organizations receiving federal financial assistance can be prosecuted under 18 U.S.C. 641 only if it can be shown

that the money stolen is property of the United States. However, in many cases title has passed to the State or local government before the property is stolen, or the funds are so commingled by the State or municipality that the federal character of the funds cannot be shown. The program fraud and bribery provision of Title XV is designed to remedy this situation and to protect federal assistance programs by making it unlawful to steal, embezzle, or fraudulently obtain property valued at $5,000 or more from an organization that receives federal benefits or to give or accept a bribe in connection with such an organization if the matter involves $5,000 or more.

PART E - Counterfeiting of State and Corporate Securities and Forging of Endorsements or Signatures on United States Securities

Title XV makes it a federal crime to counterfeit or forge State or corporate securities. Present law is inadequate to combat widespread fraud schemes involving the use of counterfeit corporate and State securities. The use of these securities as collateral for loans and for other illegal purposes has a serious detrimental effect on interstate commerce. Moreover, these crimes commonly reach beyond State borders, and thus local officials are generally unable to cope with them.

Title XV also prohibits the forging of an endorsement or signature on a Treasury check, bond, or other security of the United States and the passing of such an obligation with intent

to defraud. The bill also makes it a felony to exchange or receive, with knowledge of its false character, an obligaton of the United States that has been stolen or bears a forged endorsement.

At present, violations involving forgery of endorsement or fraudulent negotiation of a Treasury check or bond or other security of the United States are prosecuted under title 18, section 495. However, because section 495 was not drafted to deal with Treasury checks or bonds or other obligations of the United States, many of the variations of offenses involved with the forgery of obligations are not included under section 495. Similarly, other provisions of federal law are inadequate to prevent the types of violations covered by this part of Title XV.

The proposal would make it possible to prosecute both forgeries of endorsements and related crimes involving obligations of the United States under one section. It would greatly assist the Secret Service, which has the primary jurisdiction to investigate crimes involving obligations and securities of the United States and which would have jurisdiction with regard to the new offense.

PART F - Receipt of Stolen Bank Property

Title XV includes a provision which deals with the receipt of stolen bank property. 18 U.S.C. 2113, proscribing bank robbery and bank burglary, prohibits the receipt of property with the knowledge that it was stolen from a bank. Cases under this provision have held that the government must show that the defendant had knowledge that the property he received was stolen

from a bank, not merely that he knew that it was stolen. The offender's culpability, however, is not altered by his knowledge or lack thereof as to the source of the stolen property, provided he knew that it was stolen. Therefore, this requirement that the defendant knew the property was stolen from a bank is unreasonable, and the bill revises 18 U.S.C. 2113(c) to eliminate it. The government must still prove, however, that the defendant knew the property he was receiving was stolen.

PART G - Bank Bribery

Title XV revises and brings up to date the statute dealing with bribery of bank officers. Sections 215 and 216 of title 18 presently cover the receipt of commissions or gifts by bank employees for procuring loans, but they are inadequate, unduly complex, and obsolete in many respects. For example, these sections do not cover bribery of employees of federally insured credit unions, of member banks of the Federal Home Loan Bank System, such as savings and loan associations, or of bank holding companies. The bill combines existing sections 215 and 216 to bring up to date the list of covered institutions and to make other needed improvements, including the prohibition of indirect as well as direct payments and an increase in applicable penalties.

PART H - Bank Fraud

Title XV adds a new section to title 18 to provide for an offense of defrauding financial institutions which are federally chartered or insured. Present law covers the offenses of embezzlement, robbery, larceny, burglary, and false statements

directed at these institutions. There is no similar statute generally proscribing bank fraud, and federal prosecution of a fraud directed at a bank may only be undertaken if the government can prove the elements of some other offense, such as mail or wire fraud, or making a false statement to a bank. The utility of these statutes has been greatly diminished by Supreme Court decisions precluding their applicability in certain cases and by the increasing use of private courier services for collection purposes in lieu of the mails. The bank fraud provision in Title XV is designed to fill the gaps in present law and to provide a straightforward way of preventing bank frauds.

PART I - Possession of Contraband in Prison

The draft language adequately responds to our concern that the present law should be extended so as to reach possession of contraband by prisoners. We are also in agreement with the language of the draft which extends the current law so as to specifically reach possession of narcotics and materials to aid escapes.

However, we would propose that the draft contain specific statutory authority to forfeit contraband. Without such specific legislative authority, seizure and forfeiture is not permitted. Sell v. Parratt, 548 F.2d 753 (8th Cir. 1977). Also, such a provision should specifically authorize summary seizure of contraband items.

TITLE XVI - Miscellaneous Procedural Amendments

PART A - Juvenile Prosecutions

Sections 1601-1603 make several amendments to chapter 403 of title 18 concerning juvenile delinquency. In general they are designed to make it easier to prosecute certain hard-core juvenile offenders as adults. Similar provisions were contained in S. 2572. Initially, section 1601 amends section 5031 to lower from eighteen to seventeen the age at which an act that would be considered a crime if committed by an adult is instead considered to be only an act of juvenile delinquency.

Section 1602 contains an amendment to current law that was recommended by the Attorney General's Task Force on Violent Crime. The Task Force report indicates, at page 83, that it believes that the federal government "should have the opportunity to prosecute those individuals be they adults or juveniles, who violate federal law." Accordingly, section 1602 amends 18 U.S.C. 5032 to provide that the provision relating to deferral of juvenile prosecutions to State authority does not apply to an offense that is a felony if there is such a substantial federal interest in the case or in the offense that the exercise of federal jurisdiction is warranted. Under present law, a juvenile may not be federally prosecuted unless the Attorney General certifies that there is no state jurisdiction over the offense or that state programs and services for juveniles are not adequate.

Section 1602 also amends section 5032 to permit adult prosecution of anyone over fourteen who is charged with a crime of violence or an offense described in section 841, 952(a), 955, or 959 of title 21, United States Code, relating to drug trafficking. Under current law, a person may be charged as an adult only if he is over 16 and is charged with an offense punishable by ten years or more in prison, life imprisonment, or death.

Section 1603 amends section 5038 of title 18 to permit the fingerprinting and photographing of a juvenile found guilty of an act of juvenile delinquency that, if committed by an adult, would be a felony crime of violence or an offense relating to drug trafficking under section 841, 952(a), 955, or 959 of title 21. Under current law, the name and picture of a juvenile cannot be released in connection with any juvenile delinquency proceeding. The result is that frequently an adult with an extensive record will be sentenced as a first offender because the court is not familiar with his juvenile criminal history. This amendment of section 5038 is consistent with recommendation 58 of the Attorney General's Task Force on Violent Crime.

PART B - Wiretap Amendments

Section 1604 amends section 2518(7) of title 18, which is part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, to provide for emergency interceptions of wire or oral communications in life endangering situations. A similar provision was included in S. 2572, and in S. 1640 as passed by the Senate on March 25, 1982.

Generally, Title III requires prior court authorization of an interception of communications. However, 18 U.S.C. 2518(7) permits an emergency interception without such prior authorization under two types of emergency situations when there is not time to obtain a court order: those involving either "conspiratorial activities threatening the national security" or "conspiratorial activities characteristic of organized crime." The absence of similar specific authority to intercept communications in emergency situations in which there is an imminent threat to human life has been of grave concern of law enforcement authorities. For example, terrorists or other felons, while holding hostages, may use an available telephone to arrange with associates strategy to force action on their demands or a plan of escape. Similarly, there may be situations in which plans for an imminent murder are learned, but the location or identity of the victim is unknown or law enforcement authorities are otherwise unable to take measures to assure his safety. In such situations, the interception of communications may be necessary to protect the lives of the hostages or victims, yet time for obtaining a court order may not be available.

Section 1604 would amend 18 U.S.C. 2518(7) to provide the needed authority to make an emergency interception in this type of imminently life-threatening situation. It also amends section 2516 of title 18 to add the offenses of wire fraud, child pornography, and violations of the currency transaction reporting statute (31 U.S.C. 5322) to the list of offenses for which a

court ordered interception of a wire or oral communication is authorized, and to ensure that such an interception may be used in the investigation of the new witness tampering statutes, 18 U.S.C. 1512 and 1513, as added by P.L. 97-291.

PART C - Venue for Threat Offenses

Part C is designed to remove an unnecessarily restrictive choice of venue presently placed on the government in cases involving mailing or telephoning threatening communications. Under 18 U.S.C. 3239, venue with respect to the offense of threatening or mailing threats in violation of 18 U.S.C. 875, 876, or 877 lies only in the district where the threat was first placed in motion such as the district in which the letter was mailed or in which the call was made. This statute is an exception to the general rule contained in 18 U.S.C. 3237 that an offense involving the use of the mails or transportation in interstate or foreign commerce is a continuing offense and may be prosecuted in any district form, through, or into which the commerce or mail matter moves.

It is difficult to discern any reason to treat venue in threat cases differently from other continuing offenses, as a matter of right. For example, there appears to be no reason to mandate that a defendant who mailed a threat be tried where he mailed it but allow the government to prosecute a defendant who mailed an explosive in the district of mailing, the district of receipt, or any district through which it passed. Hence, section 3239 is repealed.

In addition, section 3237 is reworded to make it clear that the importation of an object or person into the United States is a continuing offense and may be prosecuted in any district from, through, or into which the person or object moves. Cases such as United States v. Lember, 319 F. Supp. 249 (E.D. Va., 1970) have limited venue in importation cases to the district of entry rather than of final destination. This has created difficulties as the witnesses are usually located in the place of destination.

PART D - Injunctions Against Fraud

Part D is designed to allow the Attorney General in appropriate cases to enjoin a violation of chapter 63 dealing with wire fraud and mail fraud, and, as amended by section 1508 of this bill, with bank fraud. Current law, except for the area of securities fraud schemes, contains no injunction authority, thus enabling the perpetrators of fraudulent enterprises to continue to victimize the public even after the filing of criminal charges and the obtaining of a conviction. The section adds a new section 1345 to title 18 to allow the Attorney General to put a speedy end to a fraud scheme by seeking an injunction in federal district court whenever he determines he has received sufficient evidence to initiate such an action. A similar provision was contained in S. 1630 in the last Congress. Once the Attorney General commences the case for injunction relief, the Federal Rules of Civil Procedure apply except that if an indictment is returned the more restrictive discovery rules of the Federal Rules of criminal Procedure would become applicable.

PART E - Government Appeal of New Trial Orders

Section 1607 deals with the rights of the government to appeal a decision of the district court to grant a new trial to a convicted defendant. It is similar to a provision in S. 1630. Presently 18 U.S.C. 3731 allows an appeal by the government from a decision, judgment, or order of a district court dismissing an indictment or information except where prohibited by the Double Jeopardy clause. There is no provision for a government appeal of an order granting a new trial after a verdict or judgment, although such an appeal would not violate the Double Jeopardy clause. If the government prevails on appeal the original verdict or judgment can simply be reinstated. This is a far better way to correct an erroneous decision than a costly, time-consuming new trial, the only alternative under present law. Accordingly, Part E amends section 3731 to allow a government appeal after any decision, judgment or order in a district court granting a new trial.

PART F - Witness Security Program Improvements

This part of the bill makes several improvements in the Witness Protection Program as presently set out in Title V of the Organized Crime Control Act of 1970, P.L. 91-452. It adds a new chapter 224 (sections 3521-3523) to title 18.

Initially, the new section 3521 expands the authority of the Attorney General to provide witness protection in cases other than those involving organized crime and broadens the definition of witness to include potential witnesses, victims, and their

families. Moreover, the new section also gives the Attorney General wider discretion to order the kinds of protective measures which he deems necessary than are authorized under present law. The Attorney General could provide official documents to enable a protected person to establish a new identity. He could provide housing and transportation of household goods to a new location if a protected person must be relocated. The Attorney General could also provide tax-free subsistence payments in a sum established pursuant to regulations for such time as he deems necessary. The Attorney General would also be authorized to assist the relocated person in obtaining employment. Finally, the Attorney General would be authorized, in his discretion, to refuse to disclose to anyone the identity, location, or other matter concerning a protected person. In ruling on a possible disclosure, he would be authorized to consider the danger that would result to a relocated or protected person, the detriment a disclosure would cause to the general effectiveness of the program, and, conversely, the possible benefit to the public that might result from a disclosure.

One problem with the present Witness Protection Program that has arisen occasionally concerns a citizen who has a civil cause of action against a protected person but who cannot litigate because he is unable to learn of the person's new identity or location. Subsection 3521(c) is designed to deal with this issue by seeking a balance between the usual policy of nondisclosure and the right of an innocent person to litigate for civil

damages. The Attorney General is authorized to accept service or process on a person and is required to make a reasonable effort to serve the process on him at his last known address. If a judgment is entered, the Attorney General must determine if the relocated person has made reasonable efforts to comply with its provisions. If the Attorney General concludes that such reasonable efforts at compliance have not been made, he is granted discretion to reveal to the plaintiff the defendant's location, after giving appropriate weight to the danger to the protected person that will be caused.

Title XVI, Part G, would clarify the change of venue provisions contained in 18 U.S.C. 3237(b) which apply to certain tax offenses. Section 3237(b) is commonly referred to as the "home venue option" because it affords a defendant the right in certain tax prosecutions and under specified circumstances to transfer the venue of the prosecution to the district of his residence.

Section 3237(b) of Title 18 is an exception to 18 U.S.C. 3237(a), which permits, inter alia, prosecution of any offense involving use of the mails in any district from, through, or into which the mail matter involved moves. Under 18 U.S.C. 3237(b), a defendant has the option to require prosecution in the district where he resided at the time of the alleged offense "where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code * * * and prosecution is begun in a judicial district other than the judicial district in which the defendant resides * * *." A motion to transfer prosecution must be filed within twenty days after arraignment of the defendant on an indictment or information. The correct interpretation of Section 3237(b) is of critical importance in prosecutions directed at abusive tax shelter and tax protestor schemes, as well as other multi-defendant tax prosecutions.

The position of the Justice Department is that the home venue option is available only in tax prosecutions brought in a district other than the defendant's place of residence as a consequence or result of the use of the mails by the defendant. The Court of Appeals for the Second Circuit

sustained the Government's interpretation in In re United States (Clemente), 608 F. 2d 76 (1979), cert. denied, 446 U.S. 908 (1980), holding that Section 3237(b) is applicable at most only in situations where use of the mails is the basis on which the prosecution seeks to establish venue in a district where the defendant does not reside. Thus, the court rejected the contention that a defendant is entitled to change venue under Section 3237(b) in a case in which the prosecution seeks to establish venue on the basis of criminal conduct wholly apart from the use of the mails. In reaching its conclusion, the court pointed out that the mischief at which Section 3237(b) was directed was the prosecution of a taxpayer a great distance from his residence simply because his tax return had been mailed to a far distant office of the IRS. The court opined that the interpretation of the statute suggested by the United States and adopted by the court "fully meets the problem that concerned the Congress." 608 F. 2d at 79.

In United States v. United States District Court (Solomon), 693 F. 2d 68 (1982), the Court of Appeals for the Ninth Circuit adopted a contrary interpretation of Section 3237(b), finding that where the mails are used as part of the offense--such as to file tax returns--defendants who did not reside in the district of prosecution were entitled to have the substantive tax counts transferred to their district of residence even though venue was not predicated on use of the mails. The indictment had been returned in the Southern District of California (San Diego) against five defendants and the court acknowledged that virtually all of the alleged criminal activity had occurred in San Diego. Two defendants who resided in the San Francisco Bay

area filed motions for transfer of venue under Section 3237(b) and the grant of those motions by the district court was sustained by the Ninth Circuit.

The Ninth Circuit felt that its reading of the statute was compelled by the plain language of Section 3237(b), holding that (693 F. 2d at 70): "Whatever may have been the original intent of the bill's sponsors, the language adopted to accomplish those goals is much broader than that which would have covered the situations actually considered by Congress." Thus, the venue was transferred inasmuch as the defendants had mailed the tax returns at issue to the IRS, despite the fact that the transfer would require a trial "in a remote district with no connection to the crime except the fortuity of the defendants' residence there." 693 F. 2d at 70.

Litigation on this issue is pending before the Court of Appeals for the Fourth Circuit in United States v. District Court (Nardone), No. 83-1149, a bizarre case that might aptly be described as "a case without a home." In Nardone three individual defendants were indicted in the Southern District of West Virginia for various offenses revolving around ten fraudulent tax shelters involving coal properties located in West Virginia. The defendant Nardone resided in New York and filed a motion to transfer venue under Section 3237(b). The district court granted the motion relying on reasoning similar to that of the Solomon decision and the case was transferred to the Eastern District of New York. The New York court retransferred the case to West Virginia, citing the Clemente decision. The West Virginia court then refused to delay the prosecution of Nardone's two co-defendants and refused to redocket the prosecution against Nardone. The result is that at the

present time Nardone cannot be prosecuted in either West Virginia or New York. The United States has filed a petition for mandamus with the Fourth Circuit, seeking review of the decision to transfer the case to New York and requesting that the West Virginia court be compelled to hear the case.

Nardone illustrates the difficulties caused by a liberal interpretation of Section 3237. The trial of Nardone's two co-defendants commenced on December 13, 1982, and continued until January 5, 1983, with twenty-seven witnesses testifying. When the impasse over the place of prosecution of Nardone is resolved, a like amount of court time and prosecutorial resources will again be expended; another panel of twelve jurors along with alternates will be called to serve; and the various witnesses will be inconvenienced again by being subpoenaed to testify a second time. Indeed, if the case is ultimately transferred to New York, the inconvenience to witnesses required to travel from West Virginia to New York to give testimony will be great.

Finally, the scope of Section 3237(b) and of the Solomon decision is before the Ninth Circuit in United States v. Dahlstrom, Nos. 82-1137, 82-1138, 82-1141, 82-1142 and 82-1143. The case involves five defendants who were convicted, following a jury trial in the Western District of Washington, of offenses arising out of the promotion and sale in the State of Washington of fraudulent tax shelters involving foreign trusts and sham transactions. The trial took 29 days over a two-month period; the evidence consisted of testimony by 40 witnesses and the introduction into evidence of over 250 exhibits (many of which were multi-document exhibits). Two of the defendants, including the primary defendant Dahlstrom, filed motions under Section 3237(b). Dahlstrom was a resident of Texas and the other defendant

resident of Arizona. The district court, prior to the decision in Solomon, denied the motions. These two defendants now contend that their convictions should be overturned and their cases remanded for a transfer of venue and retrial in Texas and Arizona respectively. The United States in urging that the convictions be sustained, contends that Solomon is distinguishable on the facts and alternatively suggests that if Solomon would require reversal, the matter should be heard by the Ninth Circuit en banc.

The facts of the Solomon, Nardone and Dahlstrom cases are compelling evidence that whatever the correct interpretation of current Section 3237(b), legislation is needed to expressly confine the home venue option to the situation which prompted its enactment--a prosecution in which venue is laid in a district where the defendant does not reside solely on the basis of the receipt by the IRS of materials transmitted by mail. Section 3237(b) was intended to be a shield against the power of the Government to prosecute a defendant in a district remote from his residence on the basis of a mailing to a distant office of the IRS. It is not and should not be a sword enabling a taxpayer to transfer prosecution to a place remote from the primary criminal acts simply on the fortuity that the defendant resided there.

The Section 3237(b) issue has arisen primarily in multi-defendant prosecutions of persons promoting fraudulent tax shelters. The Justice Department and the IRS have given high priority to these kinds of prosecutions because of concerns about the adverse impact of these criminal

activities on tax compliance generally. The number of prosecutions involving tax shelters has increased in recent years. There there has been, however, congressional concern that a greater number of such prosecutions have not been initiated. See generally, House Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means, 97th Cong., 2d Sess. (1982).

Prosecutions of tax shelter cases are difficult in part because the transactions in these cases generally are extremely complex. The true facts are disguised and funds must often be traced through multiple corporations, partnerships or trusts. The witnesses and documentation may be scattered throughout the United States and even overseas, and each prosecution involves a major commitment and outlay of resources by the Justice Department, the IRS and the courts. Enactment of the suggested clarification to Section 3237(b) would simply ensure that the public need not bear the cost of two (or in cases like Dahlstrom three or possibly even more) substantially similar trials arising out of criminal actions taken by persons acting in concert. The amendment also would have the beneficial effect of avoiding substantial inconvenience to members of the public necessarily called as witnesses in such prosecutions. The resources of our prosecutors, investigators and the courts are much too scarce to be squandered unnecessarily by multiple trials of the promoters of these tax illegal tax schemes.