IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SACRAMENTO NONPROFIT COLLECTIVE, DBA EL CAMINO WELLNESS CENTER, a mutual benefit nonprofit collective; RYAN LANDERS, an individual; ALTERNATIVE COMMUNITY HEALTH CARE COOPERATIVE, INC. et al; MARIN ALLIANCE FOR MEDICAL MARIJUANA et al,

Plaintiffs – Appellants,

v.

ERIC HOLDER, Attorney General et al,

Defendants –Appellees.
_____/

No. 12-15991
No. 12-55775
No. 12-16710

D.C. No. 2:11-cv-02939-GEB-EFB Eastern District of California, Sacramento

D.C. No. 3:11-cv-02585-DMS-BGS Southern District of California, San Diego

D.C. No. 4:11-cv-05349-SBA Northern District of California, Oakland

APPELLANTS' CONSOLIDATED OPENING BRIEF

DAVID M. MICHAEL
EDWARD M. BURCH
Law Offices of David M. Michael
1 Sansome Street, Suite 3500
San Francisco, CA 94104
Telephone: (415) 946-8996
Facsimile: (877) 538-6220
E-mail: david@davidmichaellaw.com

MATTHEW W. KUMIN
Kumin Sommers LLP
870 Market Street Ste. 428
San Francisco, CA 94102
Telephone: (415) 434-4500
Facsimile: (415) 434-8453
E-mail: matt@kuminsommers.com

ALAN SILBER
Walder, Hayden, & Brogan, P.A.
5 Becker Farm Road
Roseland, NJ 07068
Telephone: (973) 436-4122
Facsimile: (973) 436-4232
E-mail: ASilber@whbesqs.com

Attorneys for Appellants

Rule 26.1 CORPORATE DISCLOSURE STATEMENT

Appellants are either not corporate parties or are corporate parties that do not have any parent corporations, and no public company owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

JURISDICTIONAL STATEMENT (FRAP 28(a)(4))

Appellants (Plaintiffs below) brought their actions to redress the deprivation of rights secured to them by the 5th, 9th, and 10th Amendments to the United States Constitution.

Appellants claim for declaratory relief in their actions arise under the 5th, 9th, and 10th Amendments to the United States Constitution and 28 U.S.C. § 2201. The claim for injunctive relief arises under the 5th, 9th, and 10th Amendments to the United States Constitution and 5 U.S.C. § 702.

The District Court had subject matter jurisdiction over this action under 28 U.S.C. § 1346(a)(2) because the United States is a defendant, and under 28 U.S.C. § 1331 because the case involves a federal question. Venue in the respective District Courts was proper under 28 U.S.C. § 1391(e), and respective local rules, because plaintiffs reside in the respective Districts and the harms for which they complain all occurred in those respective Districts.

This Honorable Court has jurisdiction over final decisions of the District Courts pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The broad and overarching issue in this case is whether Appellants pled sufficient facts to state a cause of action. The District Courts each found that Plaintiffs did not so plead. Plaintiffs submit that the District Courts erred to reject

as a matter of law the following causes of action asserted by Plaintiffs'/Appellants below:

- Plaintiffs have a Ninth Amendment and Substantive Due Process right to distribute, possess and use medical cannabis;
- Banning medical cannabis for the alleviation of suffering and treatment of disease while permitting prescription drugs has no rational basis and thus violates the Equal Protection clause; and
- Defendant/Appellants are judicially estopped from enforcing medical marijuana prohibition following their representations in, and the disposition of, an earlier litigation in the Northern District of California.

The Addendum which follows the body and certificates of this brief contains all of the Constitutional and other statutory provisions pertinent to these issues, verbatim.

STATEMENT OF THE CASE

Various plaintiffs including medical cannabis patients, cooperatives of patients and landlords of those cooperatives, from each of California's four Judicial Districts, filed nearly simultaneous complaints for declaratory and injunctive relief against Eric Holder (United States Attorney General), Michelle Leonhart (Administrator of the Drug Enforcement Administration ("DEA")) and the individual U.S. Attorneys of each California District. Each complaint asserted

the same causes of action for violations of constitutional provisions and judicial principles including, Judicial Estoppel, Ninth Amendment, Due Process and Equal Protection.

In three of those four districts, the plaintiffs also filed applications for Temporary Restraining Orders and Motions for Preliminary Injunctions. The Government opposed those motions and filed a motion to dismiss in each district.

All four District Courts denied the provisional remedies sought by plaintiffs and granted the government's motion to dismiss. Appeals were filed in the Northern District, the Central District, and the Southern District, appealing the District Courts' granting of the government's motions to dismiss.[1]

Eastern District of California

The Complaint in this case was filed on 11/4/12 (Excerpts of Record, "ER", 397, 2:11-cv-02939-GEB-FFB Docket Number, EDCA 1)[2]. The Defendants filed their motion to dismiss on 1/13/12 (EDCA 7). The court granted the motion dismissing the complaint on 2/28/12 (EDCA 13) and entered Judgment that same

[1] Plaintiffs' complaint in the Central District, Case No. 2:11-cv-09200 DMG PJWx, filed 11/8/11 (Doc. 1) and dismissed on 4/17/12, was not appealed because the decision was made on procedural grounds related to standing.

[2] "EDCA" refers to the District Court for the Eastern District of California and the number following that designation refers to the docket number in that court. "NDCA" refers to the District Court for the Northern District of California and the number following that designation refers to the Docket number in that court. "SDCA" refers to the District Court for the Southern District of California and the number following that designation refers to the Docket number in that court.

day (Doc. 14). Plaintiffs filed a notice of appeal on 4/25/12 (ER 70, EDCA 17) and the case has been assigned number 12-15991. This Court, on 4/27/12, issued the Scheduling Order.

Northern District of California

The Complaint in this case was filed on 11/4/11 (ER 412, NDCA 1), No. 4:11-cv-5349 DMR. An Amended Complaint was filed on 11/11/11 (ER 217, NDCA 21), and by then, had been re-assigned to an Article III Judge, the Honorable Sandra Brown Armstrong (SBA). Plaintiffs filed their application for a temporary restraining order and their motion for a preliminary injunction on 11/8/11 (NDCA 5). Defendants filed their motion to dismiss on 1/10/12 (NDCA 38). The Court denied the TRO on 11/28/11 (NDCA 34) and on 7/11/12, denied the motion for the preliminary injunction and granted the government's motion to dismiss (ER 1, NDCA 52.). Plaintiffs filed a notice of appeal on 8/2/12 (ER 65, NDCA 53) and the case has been assigned number 12-16710.

Southern District of California

The Complaint in this case was filed on 11/7/11, (ER 381, No. 3:11-cv-02585 DMS BGS, SDCA 1). Plaintiffs filed their application for a TRO and for a Preliminary Injunction on 11/8/11 (SDCA 4). The government filed its motion to dismiss on 1/13/12 (SDCA 25). The court denied the TRO on 11/18/11 (ER 57, SDCA 15), and the motion for the preliminary injunction on 12/13/11 (SDCA 22).

On 3/5/12, the court granted the government's motion to dismiss (ER 24, SDCA 31) and entered Judgment that same day (ER 72, SDCA 32). Plaintiffs filed their notice of appeal on 4/27/12 (SDCA 34) and this court assigned the case No. 12-55775

Ninth Circuit

On September 21, 2012, the Ninth Circuit granted appellants unopposed motion to consolidate the three appeals.

STATEMENT OF JURISDICTION (CIRCUIT RULE 28-2)

Plaintiffs/Appellants brought their actions under and claims for declaratory relief under the 5th, 9th, and 10th Amendments to the United States Constitution and 5 U.S.C. § 702. The harms for which Plaintiffs'/Appellants claim occurred as a result of Defendants'/Appellees' actions. The District Court had subject matter jurisdiction over these actions action under 28 U.S.C. § 1346(a)(2) because the United States and/or its agents are defendants, and under 28 U.S.C. § 1331 because the case involves federal questions.

The District Courts' orders dismissing the complaints (ER 1-50) are appealable final decisions for Defendant/Appellees and against Plaintiff/Appellants and dispose of all parties' claims. *See* 28 U.S.C. § 1291.

The EDCA's order dismissing Plaintiffs' Complaint with prejudice was issued on 02/28/2012 (ER 33-50, EDCA 13), the clerk entered judgment on that

same date (ER 73, EDCA 14), and Appellant/Plaintiffs there timely filed their notice of appeal on 04/25/2012 (ER 70-71, EDCA 15). *See* Fed.R.App.Proc. 4(a)(1)(B).

The SDCA's order dismissing Plaintiffs' Complaint with prejudice issued on 03/05/2012 (ER 24-32, SDCA 31), the clerk entered judgment on that same date (ER 72, SDCA 32), and Appellant/Plaintiffs there timely filed their notice of appeal on 04/26/2012 (ER 67-79, SDCA 33). *See* Fed.R.App.Proc. 4(a)(1)(B).

The NDCA's order granting Defendants'/Appellees' motion to dismiss and denying those Plaintiffs'Appellants' motion for temporary restraining order and preliminary injunction as moot issued on 07/11/2012 (ER 1-23, NDCA # 52) and Plaintiffs/Appellants there timely filed their Notice of Appeal on 08/02/2012 (ER 65-66, NDCA 53). *See* Fed.R.App.Proc. 4(a)(1)(B).

STANDARD OF REVIEW

The standard of appellate review for the grant of a motion to dismiss the complaint is *de novo*. *Shepard v David Evans & Assoc.* __F.3d __, 2012 WL 3983909 (9th Cir. 2012); *Star v Baca*, 652 F.3d 1202, 1204 (9th Cir. 2011).

STATEMENT OF FACTS

In 1996, California passed the Compassionate Use Act (CUA), authorizing the possession, growing and distribution of medical cannabis if recommended by a physician. In the fall of 2011 and into 2012, the United States Attorneys (USAs)

for the four judicial districts launched a campaign to enforce the Controlled Substance Act passed by Congress, which contains no acceptable use for the possession growing and distribution of all cannabis, including that which is possessed, grown and distributed for medical purposes in accordance with California law.

SUMMARY OF ARGUMENT

Appellants contend that the actions of the government, including the individual United States Attorneys in the three judicial districts of California, violate Amendments to the United States Constitution as well as the doctrine of Judicial Estoppel. The essential question this controversy implicates is whether the federal government's decades-long refusal to recognize the scientifically proven medical benefits of cannabis is irrational, without justification, unsupported by past and recently discovered scientific evidence; and, is, therefore, arbitrary and capricious. The result of the government's (almost anti-science and anti-medicine) policy is to cause needless suffering to many humans for whom doctors have recommended cannabis as medicine. Appellants' position is that citizens have a fundamental right to make decisions, with their doctors, about their choices for medical treatment to alleviate needless suffering. Appellants also argue that the law which prohibits patients with a recommendation from a physician to choose medical cannabis to alleviate suffering while permitting prescription medicines,

which can be less effective and deliver more harmful side effects, violates the Equal Protection Clause because such a dichotomy has no rational (scientific or medicinal) basis. Finally, Appellants demonstrate that the federal government promised a federal district court that a new policy was in place that exempted those in compliance with the CUA from the threat of criminal prosecution or forfeiture.

The ill, in compliance with state law and with a physician's recommendation, are made to suffer needlessly by the federal threats and denial of access to medical cannabis due to irrational governmental policy. Judicial intervention is the only way to stop the federal government from acting irrationally and from willfully ignoring the science supporting the use of cannabis as medicine. This court should reverse the district courts' granting of the dismissal of the complaint and permit plaintiffs to prove the allegations pled in the complaints in a public court of law.

ARGUMENT

I. PLAINTIFFS HAVE PLED FACTS SUFFICIENT TO STATE A CAUSE OF ACTION

Fed. R. Civ. P. 12 (b) (6) permits a party to move the court to dismiss an action if the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 8(a) provides that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." The Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544

(2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), have clarified how the sufficiency of a complaint is to be evaluated under Rule 8. Under these cases, there are two essential requirements for a pleading: that its allegations are sufficient and that its allegations are plausible.

In evaluating the sufficiency of a complaint under *Twombly* and *Iqbal,* a district court must engage in a two-step process. First, the court must begin by "identifying allegations in the pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal,* 129 S. Ct. at 1949. In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. Second, the court must decide whether the remaining allegations in the complaint—taken as true—state a "plausible claim for relief." *Id.* (quoting *Twombly*, 550 U.S. at 570). This determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense" to decide whether the facts "permit the court to infer more than the mere possibility of misconduct." *Id.* at 1950 (citing *Iqbal v. Hasty,* 490 F.3d 143, 157 (2d Cir. 2007). In essence, "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949.

Significantly, none of the three District Court opinions being appealed engaged in this necessary analysis. Furthermore, if the District Courts had done

the required analysis, Plaintiffs' would have easily met the requirements that their allegations were sufficient and plausible.

II. THE ALLEGATIONS IN THE CONSOLIDATED CASES, TAKEN AS TRUE, STATE A PLAUSIBLE CLAIM THAT PLAINTIFFS HAVE A NINTH AMENDMENT AND SUBSTANTIVE DUE PROCESS RIGHT TO DISTRIBUTE, POSSESS AND USE MEDICAL CANNABIS

A. The History of Cannabis Use for Medical Purposes

Clearly established principles of federalism related to fundamental rights, represented by a long line of cases, teaches that our citizens have a fundamental right to make decisions, with their doctors, about their choices for medical treatment. What the federal government refuses to acknowledge, and what the district courts seem to concur in that refusal - whether under a belief of compelling circuit authority or as a matter of decisional authority - is that the legitimate, state-sanctioned use of cannabis for medical purposes in this country has a long, rich history, interrupted only by a brief 26 year period from 1970, when Congress passed the Controlled Substances Act (CSA), to 1996, when Californians passed the Compassionate Use Act (CUA). That CUA actually restored the universally accepted exception for medical use found in all state and federal laws that otherwise criminalized the possession of marijuana (except for that 26 year period). See, for example, 26 U.S.C. §4753 (now repealed) and, *Raich v. Gonzales, et al.,* 500 F.3d. 850, 864-865 (9th Cir. 2007) (on remand) ("*Raich II*").

What this history demonstrates is that marijuana use for medical purposes is, and always has historically been, an accepted, safe medical treatment, and it was only the unconstitutional act of Congress in intruding on that right in 1970, that interfered with that right to use cannabis.[3] Respected medical establishment entities have come out in support of the value of cannabis as medicine, most recently, the California Medical Association.

In dismissing Plaintiffs' complaints, the District Courts not only ignored evaluation under the standard necessary to survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), but also ignored evaluating the compelling language of this court fully five years ago (*see infra.*).

B. This Ninth Circuit in *Raich II* Opened the Door to a Finding of a Fundamental Right to use Cannabis For Medical Purposes

In its arguments before the district courts, the government sought to attribute more to *Raich II* (at 861-866) than what this Court said and then tries to exclude from that decision the precise language that supports Plaintiffs' Ninth Amendment and Substantive Due Process rights to possess, distribute and use marijuana lawfully under California state law. The District Courts were in error to accept that version of the law in seeking to dismiss Plaintiffs' complaints.

[3] "Marijuana" and "cannabis" are used interchangeably throughout the pleadings and the orders and decisions in the underlying District Court cases and throughout this brief. For the purposes of this appeal, they have the same meaning.

First, the government argued that *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997) holds that the right to alleviate serious medical symptoms with the use of medical cannabis is not "deeply rooted in this Nation's history and tradition", as claimed by Appellees below. But, nowhere does *Glucksberg* say such a thing.

Then the government suggests that *Raich II* somehow holds that the use of marijuana is not "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed" (*Id.* at 16:7-11) and that there exists a "long history of federal regulation aimed to limit or prohibit the use of marijuana for any purpose. *Id.* at 16:23-24. The government is wrong on all three points and the District Courts were in error to grant the government's motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim.

First, four concurring opinions in *Glucksberg* strongly suggest that the Due Process Clause protects an individual's right to obtain medical treatment to alleviate unnecessary pain. Justice O'Connor's opinion (with which Justice Ginsburg concurred, *Glucksberg* (521 U.S. at 789) makes clear that suffering patients should have access to any palliative medication that would alleviate pain even where such medication might hasten death. "[A] patient who is suffering from a terminal illness and who is experiencing great pain has **no legal barriers** to obtaining medication, from qualified physicians." *Id.* at 736-37 (O'Conner, J.,

concurring) (*emphasis supplied*). Similarly, Justice Breyer's concurrence suggests that a "right to die with dignity" includes a right to "the avoidance of unnecessary and severe physical suffering." *Id.* at 790 (Breyer, J., concurring).

Second, the government's view of history is myopic at best. There are numerous studies that document the long and historical use of marijuana as a therapeutic medicine, even dating back thousands of years.[4] The first evidence of the medical use of marijuana was published during the reign of the Chinese Emperor Chen Nun, more than five thousand years ago. *Grinspoon*, ER 173 ¶ 9. By the mid-nineteenth century, physicians in the United States were using marijuana for a wide variety of medical purposes, and between 1840 and 1900, over one-hundred journal articles on the medical use of marijuana were published. *Id.* at 4. In the twentieth century, moreover, physicians found marijuana to be an effective treatment for a range of ailments, including: nausea and vomiting associated with chemotherapy, weight loss associated with AIDS; glaucoma; epilepsy; muscle spasms and chronic pain in cases of multiple sclerosis, quadriplegia and other spastic disorders; migraines; severe pruritus; depression and

[4] *See also*, Declaration of Lester Grinspoon, M.D. in Support of the Brief of *Amici Curiae* National Organization for the Reform of Marijuana Laws (NORML) and the NORML Foundation, submitted to the U.S. Supreme Court in *Ashcroft v. Raich,* Case No. 03-1454. ER 168-187. Dr. Grinspoon is an associate professor of psychiatry at Harvard Medical School. ER 170.

other mood disorders; asthma, insomnia, dystonia, scleroderma, Crohn's Disease and diabetic gastroparesis. *E.g.* ER 177 ¶ 17.[5]

In the face of such documented history, the government's claim that there is a "long history of federal regulation" reveals itself, as it should, to be absurd. Yet, the government not only ignores history, but fails to concede that the very appellate court it claims does not recognize that medical marijuana is deeply rooted in this country's history and traditions says exactly the opposite, which is that this Nation's long history and tradition actually embraced the use of medical cannabis, reflected in both medical practices and in the Nation's laws, a vital requirement for the recognition of a fundamental right.

For example, when the government passed the Marijuana Tax Act in 1937 (repealed), it specifically exempted from registration (and the other reporting requirements of that Act), any possession for medical use. 26 U.S.C. §4753. Moreover, the Uniform Narcotic Drug Act, adopted by almost every state in the Union, exempted patients from prosecution for marijuana possession. See footnote 16, *U.S. v. Leary*, *supra.* The Court in *Raich II* recognized these critical facts:

> It is beyond dispute that marijuana has a long history of use -- medically and otherwise -- in this country.

---

[5] For other evidence documenting contemporary therapeutic benefits of medical cannabis, see Declaration of Paul Armentano, filed with the District Courts (*See e.g.* ER 104-167, EDCA 10-6). The court is asked to take judicial notice of that declaration and the referenced studies.

> Marijuana was not regulated under federal law until Congress passed the Marihuana Tax Act of 1937, Pub. L. No. 75-348, 50 Stat. 551 (repealed 1970), and marijuana was not prohibited under federal law until Congress passed the Controlled Substances Act in 1970. See *Gonzales v. Raich,* 125 S. Ct. at 2202. There is considerable evidence that efforts to regulate marijuana use in the early-twentieth century targeted recreational use, but permitted medical use. *See* Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 Va. L. Rev. 971, 1010, 1027, 1167 (1970) (noting that all twenty-two states that had prohibited marijuana by the 1930s created exceptions for medical purposes). By 1965, although possession of marijuana was a crime in all fifty states, almost all states had created exceptions for "persons for whom the drug had been prescribed or to whom it had been given by an authorized medical person." *Leary v. United States,* 395 U.S. 6, 16-17, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969).

Raich II, 500 F.3d at 864-865.

Moreover, a majority of states, explicitly recognizing the fundamental use of marijuana to alleviate suffering and pain, continue to allow for the medical use of marijuana, provide for a medical necessity defense or have instituted a therapeutic research program which allows for the use of cannabis. [6]

[6] At the time of the litigation in the courts below, California was not alone in experimenting with the use of cannabis as a medicine or palliative. In fact, 17 states plus the District of Columbia had laws allowing for the medical use of cannabis: [Alaska (Ballot Measure 8)(1998); Arizona, (Proposition 203)(2010); California (Proposition 215)(1996); Colorado (Ballot Amendment 20)(2000); District of Columbia (Amendment Act B18-622)(2010); Delaware (SB17, HB 17-

As the *Raich II* court then recognized, it was only with the passage of the Controlled Substances Act in 1970, that Congress placed marijuana on Schedule I of the Controlled Substances Act, taking it outside of the realm of all uses, including medical, under federal law. Therefore, it was only from 1970 to 1996, that the possession or use of marijuana – medically or otherwise – was proscribed (except for medical necessity or TARP under some state laws) under state and federal law, a short period of only 26 years, which proscription ended with California's passage of The Compassionate Use Act of 1996 (CUA). *Raich II,* 500 F.3d at 865. In addition, the *Raich II* court also made clear that "[t]he mere enactment of a law, state or federal, that prohibits certain behavior does not

---

4)(2011); Hawaii (SB 862, HB 13-12)(2000); Maine (Ballot Question 2)(1999); Michigan (Proposal 1)(2008); Montana (Initiative 148)(2004); Nevada (Ballot Question 9)(2000); New Jersey (SB 119, HB 25-13)(2010); New Mexico (SB 523, ,HB 32-3)(2007); Oregon (Ballot Measure 67)(1998); Rhode Island (SB 0710, HB 33-1)(2006); Vermont (SB 76, HB 645)(2004); Washington (Initiative 692)(1998)].

In addition, 6 states have pending legislation to legalize medical cannabis: [Illinois (HB 0030); Massachusetts (SB 1161, HB 625); New Hampshire (HB 442); New York (SB 2774); Ohio (HB 214); Pennsylvania (SB 1003). Maryland has separately passed a law favorable to medical cannabis but not directly legalizing it (SB 308). Source: http://medicalmarijuana.procon.org.

The total combined population of the above states is 160,000,000 citizens. This represents 52% of the complete population of the United States as of 2010. Source: http://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_population.

necessarily mean that the behavior is not deeply rooted in this country's history and traditions. *Id.* at 865. fn. 14.

So, the government is very wrong to suggest, as it did, that the medical use of marijuana is not part of this nation's long history and tradition. On the contrary, this long history shown here, as well as in the District Courts below, satisfies a vital requirement for the recognition of a fundamental right as this Ninth Circuit has recognized:

> For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, **that day may be upon us sooner than expected.**

Raich II, 500 F.3d at 866 (emphasis supplied).

The government, in the courts below, also accused Plaintiffs here of engaging in "a head count of states," appealing to the reasoning in *Lawrence v. Texas,* 539 U.S. 558 (2003). But Plaintiffs have done no such thing. The fact that over 160,000,000 citizens of this nation (and more to follow) have re-discovered the fundamental right to use cannabis to alleviate pain and suffering and the long history of marijuana as medicine, is even more compelling that the consensual right enumerated in *Lawrence.* In *Lawrence*, the right was unrelated to the right to alleviate pain and suffering - historically recognized in this country when it comes

to the health of its citizens - but merely a right of freedom of conduct that had nothing to do with human suffering. To that extent, Plaintiffs' argument is more compelling. And, in the same way that the government claimed that "Congress" has already "rejected" Plaintiffs' arguments, this Court must note that the Constitution exists to protect citizens against the government, not the other way around as the government suggests.

Therefore, the allegations in Plaintiffs' complaint, as to their fundamental right to use cannabis for medical purposes "state[s] a plausible claim for relief and survive[s] any motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct.1937, 1950 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555(2007)).

In granting the government's motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the District Courts not only ignored the compelling language of this Court just 5 years ago (*Raich v. Gonzales, et al*., 500 F.3d. 850, 864-865 (9th Cir. 2007) (on remand) ("*Raich II*")) but further ignored the minimal standard necessary to survive a motion to dismiss under Rule (12)(b)(6). Under the Supreme Court's decisions in both *Twombly* and *Iqbal*, the allegations in Plaintiffs' complaints are both sufficient and plausible and the District Courts were in error to grant the government's motions to dismiss.

The record before this Court shows that each of the District Courts, whether feeling compelled by this court's decisional authority or by their own initiative,

concluded that Plaintiff's complaints did not present a plausible cause of action. But, in doing so, the district courts created a bar far higher than Plaintiffs needed to overcome in order to survive a motion to dismiss pursuant to Rule 12(b)(6).

For example, the District Court in the Eastern District ignored this Ninth Circuit's explicitly asserted invitation to consider that there may be facts to support a fundamental right under the Ninth Amendment to use medical marijuana.

> For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, **that day may be upon us sooner than expected.**

Raich II, 500 F.3d at 866 (emphasis supplied).

Instead, the District Court in the Eastern District ignores the constitutional issue involved and merely states that medical cannabis is a "non-federally approved Schedule I controlled substance" and "Plaintiffs' allegations…..do not support [the] conclusory contention that these rights exist under federal law." ER 43, EDCA 13 at p. 11. Consequently, the District Court there effectively cut off Plaintiff's ability to show, in an evidentiary hearing, that the day for a fundamental right to use medical marijuana to relieve excruciating pain has, in fact, now dawned, an invitation explicitly made by this Ninth Circuit. By shutting that door to Plaintiffs', the District Court was in error and did not apply the proper legal standard in granting the government's motion to dismiss pursuant to Rule 12(b)(6).

Plaintiffs' allegations in their complaint are far more than just conclusions and are clearly entitled, in the face of a motion to dismiss pursuant to Rule 12(b)(6), to the assumption of truth." *Iqbal,* 129 S. Ct. at 1949. Furthermore, the allegations in the complaint, when taken as true, state at least a "plausible claim for relief." *Twombly*, 550 U.S. at 570).

The District Court in the Northern District, although using different language, and perhaps also feeling compelled by this court's decisional authority**,** has also foreclosed Plaintiffs' ability to present facts to support its claim that "the day may be upon us sooner than expected". There, the District Court actually turned *Raich II* against Plaintiffs, ignored this Court's earlier invitation, and merely concluded that "*Raich II* is binding precedent", that *Raich II* holds that "currently, society recognizes no such fundamental right" and that Plaintiffs' "claim fails as a matter of law". ER 19, NDCA 52 p. 19:11-12.

Consequently, the District Court there also effectively cut off Plaintiff's ability to show, in an evidentiary hearing, that the day for a fundamental right to use medical marijuana to relieve excruciating pain has, in fact now dawned. By shutting that door to Plaintiffs, the District Court was in error and applied the wrong legal standard in granting the government's motion to dismiss pursuant to Rule 12(b)(6). Plaintiffs' allegations in their complaint are far more than just conclusions, they are supported by clearly delineated historical facts and decisional

authority, and are clearly entitled, in the face of a motion to dismiss pursuant to Rule 12(b)(6), to the assumption of truth." *Iqbal,* 129 S. Ct. at 1949. Furthermore, the allegations in the complaint, when taken as true, state at least a "plausible claim for relief." *Twombly*, 550 U.S. at 570).

Likewise, the District Court in the Southern District, whether also feeling compelled by this court's decisional authority or by their own initiative, came to the same conclusion as the other district courts. In its final ruling, the District Court there granted the government's motion to dismiss, citing its earlier reasoning in two prior written opinions. "….Defendant's motion to dismiss the Ninth Amendment claim is granted for the reasons stated in the November 18 and December 13 Orders." ER 28, SDCA 31 at p. 5 (citing to prior orders, *see* ER 57-64; SDCA 15 pp. 5-6, filed 11/18/11; ER 51-56; SDCA 22 pp. 2-4, filed 12/13/11).

In those prior orders, the District Court stated that:

> Plaintiffs contend that at the time of *Reich II* [sic] only eleven states had passed laws decriminalizing medical marijuana use, *id.* at 865, but "now 23 states [have] authorized [medical marijuana] use, or have pending legislation authorizing such use, with a combined population of about 53% of the people in this country." (Pls' Mem. of P. & A. at 22.) The Court is not persuaded. Taking Plaintiffs' assertions regarding the acceptance of medical marijuana use at face value, the 53% approval suggests that the issue of medical marijuana use has not left "the arena of public debate and legislative action." *Raich II*, 500 F.3d at 866. Plaintiffs have therefore not shown the probability of success on the merits of their Fifth and Ninth Amendment claims.

ER 61-62; SDCA 15, pp. 5-6 (filed 11/18/11).

The District Court's language is generous in its November 2011 order. But, the District Court there was discussing the Plaintiffs' burden in seeking an preliminary injunction, not Plaintiffs' burden in opposing a motion to dismiss pursuant to Rule 12(b)(6). So, even by the court's own language, it seems clear that Plaintiffs' have a right to develop facts that support their claim that this fundamental right has left the "arena of public debate and legislative action".

Likewise, in the district court's December 2011 order, the court states:

> Plaintiffs contend that the "future day" has arrived. (Pls' Mem. of P. & A. at 22.) They point out that in the four years since *Raich II* was decided, five more states (for a total of sixteen states) and the District of Columbia have passed medical marijuana laws. (*Id.* at 5 n.7.) Seven more states have similar legislation pending. (*Id*. at 22; Pls' Supp. Brief at 4 n.3.)
>
> For their analysis, Plaintiffs rely on *Lawrence v. Texas*, 539 U.S. 558 (2003). *Raich II* cited *Lawrence*, suggesting that its framework "might certainly apply to the instant case." *Raich II*, 500 F.3d at 865. *Lawrence* overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), which held there was no fundamental right to engage in consensual sexual activity, including homosexual activity, in the home without government intrusion. The *Lawrence* Court indicated that when it decided *Bowers*, twenty-four states and the District of Columbia had sodomy laws, but at the time of *Lawrence*, only thirteen states had maintained those laws and there was a "pattern of nonenforcement" among them. *Raich II*, 500 F.3d at 865; *Lawrence*, 539 U.S. at 572-73.
>
> The current state of enforcement in Plaintiffs' case is different from that at issue in *Lawrence*. Here, only the District of Columbia and sixteen states have passed medical marijuana laws. In addition, Plaintiffs present no evidence that the thirty-four states which prohibit

> the possession or distribution of marijuana are not enforcing their laws. Moreover, unlike in *Lawrence*, where the relevant conduct was criminalized only by state law, federal law explicitly prohibits possession and distribution of marijuana, even for medical use. *See United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 491 (2001). Based on these facts, it is apparent that the issue of medical marijuana has not left "the arena of public debate and legislative action." *See Raich II*, 500 F.3d at 866. Plaintiffs have therefore not shown a probability of success on the merits of their Fifth and Ninth Amendment claims.

ER 53-54; SDCA 22 pp. 3-4 (filed 12/13/11).

Again, giving deference to the District Court's identification of the relevant issue, the court's later referral to this determination in deciding in favor of the government's motion to dismiss ignores the correct standard to be applied pursuant to Rule 12 (b)(6). Plaintiffs are not required to show a probability of success on the merits to survive a motion to dismiss. Instead, Plaintiffs are only required to show that their complaint shows a plausible claim for relief so that it may proceed to a factual determination in an adversarial proceeding. Even the District Court's own language begs an evidentiary hearing to resolve the factual issue this Court has previously referenced within the context of a fundamental right. *Raich II,* 500 F.3d at 866

Plaintiffs' allegations in their complaint are far more than just conclusions and are clearly entitled, in the face of a motion to dismiss pursuant to Rule 12(b)(6), to the assumption of truth." *Iqbal,* 129 S. Ct. at 1949. Furthermore, the allegations in the complaint, when taken as true, state at least a "plausible claim for

relief." *Twombly*, 550 U.S. at 570). The District Courts were in error to grant the government's motions to dismiss pursuant to Rule 12(b)(6) as to the issue of fundamental rights.

III. BANNING MEDICAL CANNABIS FOR THE ALLEVIATION OF SUFFERING AND TREATMENT OF DISEASE WHILE PERMITTING PRESCRIPTION DRUGS HAS NO RATIONAL BASIS AND, THUS, VIOLATES THE EQUAL PROTECTION CLAUSE

A. The Equal Protection Clause Requires a Rational Basis For Treating Medical Cannabis Users Who Use Cannabis with a Doctor's Recommendation in Compliance with State Law Differently from Those Who Use a Prescription Pharmaceutical Drug When Both Drugs Impact the Same Medical Conditions

The Equal Protection Clause requires that when government seeks to treat different populations in a different manner, it must do so in a rational way ("rational basis") *City of Cleburne, TX v. Cleburne Living Center*, 473 U.S. 432 (1985). There, the Court ruled that the City could not deny zoning approval for a home for the developmentally disabled based on a fear of that population. (…"mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." Id. at 447.)

Despite the fact that this Court has ruled that doctors may speak with their patients about the use of cannabis for medical conditions, *Walters v. Conant,* 309

F.3d 629 (2003), federal law still subjects the medical cannabis patients themselves, and those who help them procure medicine, to draconian criminal penalties and forfeiture. As the remainder of this section demonstrates, such discrimination is not rationally based on science. Thus the allegations state a plausible claim for relief.

B. The Medical Evidence Reliably Demonstrates the Medicinal Benefit of Cannabis and the Absence of Toxic Side Effects

The declarations filed in this consolidated appeal from the different districts all include heart-rending stories of people with horrible illnesses whose use of cannabis alleviates real suffering.

Consider the case of Plaintiff Briana Bilbray, daughter of Republican Congressman Brian Bilbray. She has Stage 4 Melanoma cancer and wonders every day that she is in treatment, whether she can endure the horrible side effects of chemotherapy. Only one drug has given her solace and hope to stop the nausea and vomiting that accompanies her treatment – cannabis. ER 234-237. Her doctor has recommended the use of cannabis. She uses it. It helps immensely. It is a god-send.

John D'Amato suffers from neuropathy caused by diabetes, a pain that makes it difficult or even impossible for him to walk. He is also a heart attack and stroke survivor. Though he has been prescribed various opiate-derivative medications for the pain, these medications take too long to take effect, last too long, and leave him "feeling like a zombie." ER 237-300. Because of those problematic side effects,

D'Amato has been using cannabis per his doctor's recommendation for the past 6 years. Cannabis gives him immediate pain relief without clouding his brain. He also states that since becoming a qualified patient and using medical cannabis, it is the only medicine that effectively treats his pain without undesirable side effects.

Other patients' declarations in the record, combined with the scientific studies, bolster the movement by the scientific and medical community to recommend cannabis as a treatment and a palliative. Paul Armentano's Declaration and his attachment contains numerous scientific references to medical cannabis applications for a wide variety of illnesses. He states,

"[…] over the past decade investigators worldwide have published several thousand papers assessing the therapeutic efficacy of cannabis, cannabinoids, and their synthetic agonists. This total includes over 2,700 separate papers published in 2009, 1,950 papers published in 2010, and another 2,100 published to date in 2011 (according to a key word search on the search engine PubMed Central, the US government repository for peer-reviewed scientific research). Hundreds of these papers have found cannabis and organic cannabinoids to be efficacious in preclinical and clinical settings for a multitude of serious and chronic diseases, and investigators have recommended the use cannabis and cannabinoids for the treatment of several of these diseases in clinical trial and/or physician supervised settings." ER 106 ¶ 7.

Armentano goes on to declare that

[ ] since 2005 there have been an estimated 40 controlled studies assessing the safety and efficacy of cannabinoids, involving over 2,500 subjects. (Arno Hazekamp and Franjo Grotenhermen. 2010. Review on clinical studies with cannabis and ananbinoids:2005-2009. Cannabinoids 5: 1-21.) These include: a. Abrams et al. 2007. Cannabis in painful HIV-associated sensory neuropathy: a randomized placebo-controlled trial. Neurology 68: 515-521.b. Ellis et al. 2008. Smoked medicinal cannabis for neuropathic pain in HIV: a randomized, crossover clinical trial. Neuropsychopharmacology 34: 672-80. c. Wallace et al. 2007. Dose-dependent Effects of Smoked Cannabis on Capsaicin-induced Pain and Hyperalgesia in Healthy Volunteers. Anesthesiology 107: 785-796.d. Wilsey et al. 2008. A randomized, placebo-controlled, crossover trial of cannabis cigarettes in neuropathic pain. Journal of Pain 9: 506-521. e. Ware et al. 2010. Smoked cannabis for chronic neuropathic pain: a randomized controlled trial. CMAJ 182: 694-701. f. Johnson et al. 2009. Multicenter, double-blind, randomized, placebo controlled, parallel-group study of the efficacy, safety, and tolerability of THC: Case4:11-cv-05349-SBA Document37 Filed12/13/11 CBD extract in patients with intractable cancer-related pain. Journal of Symptom Management 39: 167-179. g. Abrams et al.2003. Short-term effects of cannabinoids in patients with HIV-1 infection: a randomized, placebo-controlled clinical trial. Annals of Internal Medicine 139: 258-266. h. Haney et al. 2007. Dronabinol and marijuana in HIV-positive marijuana smokers: caloric intake, mood, and sleep. Journal of Acquired Immune Deficiency Syndromes 45: 545-554. i. Wade et al. 2003. A preliminary controlled study to determine whether wholeplant cannabis extracts can improve intractable neurogenic symptoms. Clinical Rehabilitation 17: 21-29. j. Vaney et al. 2004. Efficacy, safety and tolerability of an orally administered cannabis extract in the treatment of spasticity in patients with multiple sclerosis: a randomized, double-blind, placebo-controlled, crossover study. Multiple Sclerosis 10: 417-424. k. Rog et al. 2005. Randomized, controlled trial of cannabis-based medicine in central pain in multiple sclerosis. Neurology 65: 812-819. l. Wade et al. 2006. Long-term use of a cannabis-based medicine in the treatment of spasticity and other symptoms of multiple sclerosis. Multiple Sclerosis 12:639-645. m. Rog et al. 2007. Oromucosal delta-9-tetrahydrocannabinol/cannabidiol for neuropathic pain associated with

> multiple sclerosis: an uncontrolled, openlabel,2-year extension trial. Clinical Therapeutics 29: 2068-2079."Id., para. 10."

ER 107-109 ¶ 10.

Unfortunately, none of the District Courts appeared to have reviewed or taken these relatively recent studies (mostly undertaken in the past 10 years) into consideration in determining that Plaintiffs' had not made enough of a showing to allow the case to proceed. Indeed, if this Court reinstated the complaint or allowed the complaint to be amended, Plaintiffs would gather declarations from numerous experts to present at trial, many of whom have studied cannabis.

C. The Government's Claimed Rational Basis is Outdated and Obsolete

At least one of the District Courts' below based its decision, at least in part, on the notion that once a drug is scheduled under the CSA, only a re-scheduling petition or a *sua sponte* re-scheduling by the Executive Branch can change its status. That court, more significantly, also based its order upon very old and dated cases that reviewed the CSA for equal protection violations in a very different era.

However, the state of the art scientific and medical evidence now points to a very different conclusion than that reached in old precedent (in the case of the appellate decisions, most were rendered over 30 years ago). The bottom line: Cannabis does have medical value. To deny that is to skip the rational basis analysis. Times change. The pace and scope of national and international research

since then into cannabis's role in the human cannaboid system, and the results of the clinical tests that have taken place reveal that cannabis has substantial therapeutic value, with only minimal side-effects. If we gain new and better knowledge of a thing, we must acknowledge that. If we learn that something we once thought was bad or harmful is actually good, we must acknowledge that as well. The evidence is substantial that medical cannabis has healing and curative properties, yet no 9th Circuit panel has undertaken an equal protection analysis since *U.S. v. Miroyan*, 577 F. 2d 489 (9th Cir. 1978) (the procedural context was the assertion of equal protection as a criminal defense). In the intervening 34 years, not only has the research proceeded apace, but, 17 states including the District of Columbia have passed laws allowing medical use of cannabis. *See,* fn. 6*, ante*.

D. There is No Rational Basis for Treating a Doctor's Recommendation for Cannabis in Compliance with State Law Different From a Prescription for Pharmaceutical Drugs Which Impact the Same Medical Conditions

The government's efforts to prosecute medical use of cannabis by those in compliance with California law, is simply not rationally based. Those who use prescription drugs suffer no penalty. The federal government is irrationally depriving Californians of an opportunity to use a medicine that is considered safe, while forcing them to resort to other drugs that may be more toxic with harmful side-effects.

While cannaboid science has made huge strides, and scientists around the world have become increasingly hopeful about clinical applications for cannabis, that scientific progress is totally ignored by those who would prosecute, and forfeit from, Californians who use cannabis as medicine in compliance with State law. Yet, the United States' Veterans Administration has published a formal policy that allows veterans using opiates to also use cannabis in states where medical cannabis is "legal". ER 102-103. The Center for Medicinal Cannabis Research at the University of California at San Diego (UCSD) was able to receive approval to conduct a variety of studies addressing numerous medical conditions including pain relief, particularly for HIV neuropathy pain, and reducing spasticity in MS patients. Human subjects were used in the double-blind placebo tests. Additional studies from the Center provided even deeper insights in the mechanisms of cannabinoids and the human cannaboid system. The latter system, was, interestingly enough, discovered by US Government scientists who subsequently applied for an obtained a patent on a cannaboid. *See* ER 190-211.

Plaintiffs have alleged facts that state a cause of action for violation of their equal protection rights and their complaint should be reinstated with discovery to follow.

E. Plaintiffs' Allegations are Sufficient and Plausible

The science is significant and unassailable. The patient stories are plausible and credible. The Doctors can recommend this medicine to their patients. In many instances, cannabis is equal to or superior as medicine to prescription pharmaceutical drugs. There is not rational basis to treat the medicines differently.

F. Because the Allegations are Sufficient and Plausible, Plaintiffs Deserve the Opportunity to Prove Them to the Trier of Fact

It is axiomatic that many sub-populations of the United States started their long journey to equal protection, personal freedom and liberty in an underdog position. In the relatively short history of the United States, we have witnessed populations that were once subject to irrational discrimination, obtain equal rights and privileges. Some populations were subjugated and forced off their lands (Native Americans). Others were enslaved (African Americans), discriminated against (Jews, Italians, Irish, Muslim), criminalized (African Americans, homosexuals), or not allowed to vote (women, African Americans).

Each of these groups wanted protection equal to that given the majority of citizens, and in many cases, the courts eventually provided it, when the political system would or could not. And now, medical cannabis users seek that same protection as those who use prescription pharmaceuticals. Courts are critical in adjusting reality so that discrimination and ignorance are no longer tolerated. Plaintiffs here seek limited relief, namely, an opportunity to prove the sufficient and plausible allegations that the discrimination against the use of medical cannabis by

those in compliance with State law is based on ignorance and politics rather than rationally-based science.

IV. PLAINTIFFS' JUDICIAL ESTOPPEL CAUSE OF ACTION STATED A CLAIM FOR WHICH RELIEF MAY BE GRANTED

A. The Elements of Judicial Estoppel

The elements required for the application of the doctrine of Judicial Estoppel to the facts alleged in the Complaint, documents attached to or relied upon in the complaint, and matters of which the Court may take Judicial Notice are: (1) a party's later position is clearly inconsistent with its earlier position; (2) a court has previously accepted that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine*, 532 U.S. 732, 750-51 (2001*); U.S. v. Liquidators of European Federal Credit Bank*, 630 F. 3d 1139, 1148 (9th Cir. 2011); *American Civil Liberties Union of Nevada v. Masto*, 670 F. 3d 1046, 1065 (9th Cir. 2012); *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1133 (9th Cir. 2012).

The elements pled in the Plaintiffs' Complaints are:

(a) The position articulated in the letters from the United States Attorney for the Central District of California (US Attorney) to landlords and dispensary operators is inconsistent with the representations of the legal position made

by the Department of Justice (DOJ)[7] lawyers to the United States District Court in County of Santa Cruz, *WAMM, et. al. v Eric Holder et al*., No. 03-1802 (*WAMM*) in 2009.

(b) The DOJ representations were accepted and relied upon by both the District Court and the *WAMM* plaintiffs, and were the basis for the agreed upon dismissal of the *WAMM* complaint.

(c) Therefore, any later judicial acceptance of (implementation; failure to reject) the threats contained in the letters from the US Attorney demonstrate that the District Court in *WAMM* was misled; and

(d) The DOJ would derive an unfair advantage by making representations of a changed position in *WAMM* in order to settle that matter and to avoid discovery, including the depositions of the named defendants, while failing to now adhere to that new position without filing an appropriate pleading in the *WAMM* matter. *New Hampshire v. Maine,* 532 U.S. 742, 749-51 (2001).

The facts alleged in the complaint, (as augmented by the documents of which the District Court took judicial notice, including the transcript of the October 30, 2009 status conference in *WAMM*) are not threadbare recitals supported by mere conclusory allegations. Moreover, in this procedural posture, they must be accepted as true.

B. The District Court Decisions

All three District Court opinions employ virtually the same erroneous reasoning.

---

[7] The government and its lawyers in the *WAMM* litigation will be referred to as "DOJ" and "DOJ lawyers" to differentiate from the government positions and lawyers in this case.

The Eastern District Judge found that the Ogden Memo "does not contain a promise not to enforce the [Controlled Dangerous Substance Act (CSA)] CSA, and therefore the future enforcement of the CSA in not inconsistent with it. ER 45; EDCA 13 p. 17. We agree with that judicial conclusion, though it is irrelevant to any issue raised.[8]. However, both the Eastern and Northern District Courts erred when basing dismissal on the following erroneous analysis:

> [T]he transcript of that hearing [October 30, 2009 hearing in the WAMM litigation] demonstrates that the Department of Justice did not make representations about non-enforcement of the CSA beyond what is stated in the Ogden Memo. (ND Doc 52 at p. 16) Therefore, Plaintiffs do not state a viable judicial estoppel claim based on … the Department of Justice's representations at the hearing in the Santa Cruz action, and this claim is dismissed.

ER 45; EDCA 13 p. 17 (internal citations omitted).

The District Court judges in both the Northern and Southern Districts denied motions for Temporary Restraining Orders (TRO) and Preliminary Injunctions (PI) based on a standard wholly different from the test applied to the sufficiency of a complaint facing a motion to dismiss. Each of those opinions granting the government's dismissal motion pointed out that the plaintiffs had submitted no

[8] For clarity, we refer to the identical document as the "Ogden Memo" when it was announced outside of a judicial context, and as "Marijuana Medical Guidance" ("MMG") when filed and discussed in the WAMM litigation. Plaintiffs do not rely upon the Ogden Memo, but do rely on Medical Marijuana Guidance.

new legal argument, without analysis of what was submitted under the appropriate standard. ER 16, NDCA 52 p. 16; ER 26, SDCA 31 p. 3.

The Southern District denied the TRO and Preliminary Injunction, finding that the dismissal in *WAMM* was "based on a shared understanding the enforcement policy could change in the future" and therefore it was unlikely plaintiffs would prevail because "it does not appear that the Court in the Santa Cruz Action was misled", that the enforcement complained of is not inconsistent with DOJ representations in *WAMM*, and DOJ gained no clear advantage. ER 60-61, SDCA 15 pp. 4-5.

The Northern District denied the TRO and PI on the basis that

> [p]laintiffs have not alleged facts showing that: (1) there is a clear inconsistency between the government's position in the Santa Cruz action and the actions threatened in the Haag letters [Footnote 5 noted that the Ogden memo contains no promise not to enforce the CSA, and therefore the new enforcement policy is not inconsistent with the Ogden memo.]; (2) [d]efendants successfully persuaded the district court in the Santa Cruz action to dismiss the action based upon any promise to indefinitely forego enforcement of the CSA against persons or entities involved in the production sale or use of medical marijuana; and (3) [d]efendants gained an unfair advantage by virtue of submitting the Ogden memo as a basis for the stipulation for dismissal in the Santa Cruz action.

ER 16, NDCA 52 p. 16.

C. The District Courts' Analyses are Erroneous

These conclusions of the District Courts are erroneous. The government made significant representations of its changed legal position to the *WAMM* District Court and *WAMM's* counsel.

First, DOJ filed a pleading – attaching the Medical Marijuana Guidance (MMG) –, which the DOJ told the District Court embodied a new policy with regard to enforcement of the CSA in relation to California medical cannabis laws. The new policy defines what activities "can go forward" where no guidance was given under the old policy -- "a policy that is in the past".

> MR. QUINLIVAN… the theory of the plaintiffs 10th Amendment claim is that **the prior administration had, in effect, a policy of selective enforcement in applying the Controlled Substances Act in California that made it impossible for local communities to know what was --what activities would be targeted under federal law and what activities could go forward. We are in a completely different posture now; given The Guidance issued by the Attorney General.**

ER 85-86, Transcript of October 30, 2009 proceeding, at 3-4 (emphasis added).

Second, the DOJ represented to the District Court that the new enforcement policy rendered the WAMM complaint moot.

> MR. QUINLIVAN: I think from the defendant's [the named government officials] perspective this case is moot. …

> [S]o I fail to see how we really — any kind of litigation about what happened in the past would have no bearing whatsoever in terms of trying — **the plaintiffs would be seeking to enjoin, basically, a policy that is in the past....**

ER 85-86 (emphasis added).

Third, the DOJ told the court that dismissal was required as a result of the new policy rendering the *WAMM* complaint moot, and further represented that there was no reasonable expectation that the new policy would be abrogated, thus surmounting the barrier of the voluntary cessation doctrine.

> But, otherwise [if no settlement], you know, we are willing to brief the question about whether or not this is moot. **And the main issue on that would simply be whether the voluntary cessation doctrine would apply, given this change. I think we could get past that barrier.**

ER 86-87 (emphasis supplied).

The voluntary cessation doctrine, referred to by the DOJ lawyer, is a doctrine, which makes a litigation moot and deprives the court of jurisdiction. However, it takes more than a change in policy; it requires a party, moving to dismiss a cause of action as moot, to prove that the change is enduring – that there is no reasonable expectation that the old policy will be reinstated.

> [V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the

> case moot. A controversy may remain to be settled in such circumstances, e. g., a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.[**For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right**. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement. . . **The case may nevertheless be moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated.**

United States v. W. T. Grant Co., 345 U.S. 629, 632-33 (1953) (internal citations omitted) (emphasis supplied).

By representing to the WAMM District Court that the DOJ would overcome the voluntary cessation doctrine, DOJ represented that there was no reasonable expectation that the old policy (the prosecution and seizure of the property of even those in compliance with State law) would be repeated.

The DOJ followed that representation with a choice for the *WAMM* plaintiffs, either agree to voluntarily dismiss the Complaint, based on the DOJ's legal position that there was now a new enforcement policy in place **that would not change,** or the DOJ would move to dismiss the Complaint on grounds of mootness (this time successfully). The DOJ represented to the WAMM District Court it would establish that there is no reasonable expectation that the old policy

would be reinstated (thus, overcoming the barrier of the voluntary cessation doctrine). As a result of the DOJ's representations of a new enduring enforcement policy, the status conference morphed into a discussion of settlement, predicated entirely upon the DOJ's representation of the change in the federal government's enforcement policy that could "get by the barrier of voluntary cessation doctrine". The *WAMM* court and plaintiffs understood that the DOJ was correct and that such a new enduring policy did, in fact, make the *WAMM* complaint moot.

Fourth, the new enforcement policy applied, not just to the *WAMM* plaintiffs, but to federal enforcement with regard to medical cannabis in California. The DOJ understood that the new policy was to provide guidance for **all communities in California**. The previous policy of applying the CSA in California

> made it impossible for **local communities** to know what was – what activities would be targeted under federal law and what activities could go forward.

ER 86 (emphasis added).

The DOJ lawyer supported the representation that the Medical Marijuana Guidance was a new policy for the general public in contrast to Memos that are internal to Justice Department lawyers and supervisors.

> Typically, the kind of guidance that is just given internally to the United States Attorneys, and, yet, this was publicly released. It's on the Department's website.

ER 86.

D. The Allegations, Taken as True, State a Plausible Claim that DOJ Represented to the WAMM District Court that those in Compliance with State Law would not be Prosecuted nor would their Property be Subject to Forfeiture, Which is Clearly Inconsistent With the US Attorneys' Enforcement Policy Enunciated in November of 2011 and Currently Being Enforced

1. The Enforcement Policy in US Attorney Communications and Actions are Inconsistent with DOJ Representations made to the WAMM District Court

The CSA bans all marijuana possession and distribution, even medical cannabis in compliance with California law, as the US Attorneys made clear in the letters disseminated and the legal positions taken. The US Attorney letters state that every possession and distribution of marijuana is a violation of the CSA. The representation that the new DOJ enforcement policy carved out medical cannabis possession and distribution "that can go forward," is completely contrary to that position. Those words "can go forward" have only one meaning: activity that can be lawfully undertaken without fear of being federally prosecuted or having one's property seized and forfeiture attempted by the government.

What activity does the MMG say can go forward? There is no possible alternative to defining the activities that "can go forward" other than as those which are in compliance with California medical cannabis law. This is supported not only by the language in MMG, but also by the DOJ's assertion that the WAMM cause of action had been rendered moot as a result of the new permanent

enforcement policy.

2. DOJ Represented That There Was No Reasonable Expectation That Its New Policy Would Be Abandoned

The DOJ position in *WAMM* was that the changed governmental policy, which would endure, deprived the *WAMM* District Court of jurisdiction because the *WAMM* complaint was now moot. If there is no actual controversy – an alleged injury in fact, traceable to the defendant's acts and redressable by a court decision that continues through all stages of federal judicial proceedings – a federal court lacks jurisdiction under Article III of the Constitution. When the possibility of injury to the plaintiff ceases, the case is rendered moot and federal courts lack jurisdiction to decide it. *American Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1061-2 (9th Cir. 2012). Here, the DOJ represented that the new and enduring enforcement policy extinguished the actual controversy that had existed prior to its new enforcement policy, and would thus deprive the District Court of its jurisdiction.

However, the DOJ recognized that the mere promulgation, and even implementation, of a new policy in lieu of the old policy, without proving that the new policy will endure, does not make the case moot. The case becomes moot only if the defendants can demonstrate that there is no reasonable expectation that the old policy would be reinstated. The DOJ recognized that "the main issue" to determine whether or not the case was actually moot was the application of the

voluntary cessation doctrine. The DOJ represented that the new policy was sufficiently permanent to "get past that barrier".

The hard boot of the U.S. Attorney's 2011-2012 strikes against those in compliance with California Medical Cannabis laws is in stark contrast to DOJ's representations to the District Court that there was a new enforcement policy delineating what medical cannabis activities could go forward, and that there was no reasonable expectation that the new policy would be abandoned.

E. The Allegations, Taken as True, State a Plausible Claim that The District Court Accepted The DOJ Representations that a New Federal Enforcement Policy was now in Place, and will have been misled if the Current Action of the United States Attorney is Not Estopped

As the transcript makes clear, the *WAMM* District Court, (also the plaintiffs and DOJ) agreed to dismiss plaintiff's complaint because it was expressly accepted that the new enforcement policy really did make the *WAMM* litigation moot. Judge Fogel and *WAMM* took the DOJ at its word.

> THE COURT: Right. It [the dismissal] would have to be conditioned upon the government following the Guidance or something like that....

ER 87.

> THE COURT: What we are really talking about, I think, is wordsmithing a dismissal.
>
> MR. QUINLIVAN: I think that's right. ... I agree it's preferable we try to reach that resolution than necessarily brief mootness...

ER 89.

> THE COURT: ...You are almost like abating the case. You are just, technically it would be a dismissal, I suppose, but what you are talking about is an abatement and it **would not be unabated unless and until the government didn't follow its policy**. There would have to be a showing.

ER 90.

It is self-evident from the transcript, that the *WAMM* District Court accepted the DOJ's representations of a new enforcement policy. If the government can, without returning to the *WAMM* litigation to announce the termination of its new policy, prosecute and forfeit the property of those in compliance with State law; there can be no doubt that the *WAMM* Court was misled by DOJ's representations. The DOJ has the option of abrogating the new enforcement policy announced in MMG in *WAMM*, though it would obviously be both an embarrassment to for the DOJ do so, in light of its advocacy that it could meet the strictures of the voluntary cessation doctrine, as well as highly undesirable because discovery and depositions in *WAMM* would then take place.

The letters sent by the United States Attorney threatening prosecutions and seizures of those operating in compliance with California's medical cannabis program are clearly inconsistent with the DOJ's representations to Judge Fogel. Such prosecution or seizure demonstrates that the *WAMM* District Court was

misled by the DOJ's representation that there was a new government policy in place, and that it could demonstrate that there was no reasonable expectation that the new policy would not be followed.

Plaintiff's counsel in *WAMM* understood:

> I don't really see why we should brief and argue and have the Court decide the issue of mootness when I do think we have an agreement, perhaps in principle, of the idea that there is no need to litigate this case so long as the federal government follows the policy that has recently been announced.

ER 87-88.

Judicial estoppel may be applied to prevent a party from making a legal assertion that contradicted his earlier legal assertion. " 'For a court to be misled it need not itself adopt the statement; those who induce their opponents to surrender have prevailed as surely as persons who induce the judge to grant summary judgment.' [Citation omitted] When a party settles a case involving false allegations or claims, the court is deemed to have been misled." *Baughman*, 685 F.3d at 1134.

F. The Allegations, Taken as True, State a Plausible Claim that DOJ would Derive an Unfair Advantage By Avoiding Discovery in WAMM by its Quickly Rescinded Representations

The procedural posture of the *WAMM* litigation is important for an understanding of the significance of the government's position, the Court's

acceptance of it and the unfair advantage the government will derive, if not now estopped from a volte-face. DOJ's motion to dismiss the *WAMM* Complaint (on grounds other than mootness) had been denied, and discovery, including the deposition of the named Defendants, was about to commence. DOJ sought to avoid that discovery by converting the Ogden Memo into a changed governmental policy that met the voluntary cessation doctrine, which then would give rise to a new motion to dismiss *WAMM* complaint as moot.

The DOJ lawyer recognized that absent an enduring new policy that made it clear to the local communities what medical cannabis possession and distribution could go forward without being federally prosecuted or be the basis for forfeiture, the *WAMM* plaintiffs would move forward with discovery.

> Mr. Quinlivan: I think their [plaintiffs] primary concern is that if something were to change and they were to reopen the suit, they don't want to necessarily start from square one.

ER 87.

It was no secret that the DOJ sought to avoid the discovery phase of the *WAMM* litigation, which was about to commence following the *WAMM* Court's denial of the DOJ motion to dismiss. This led the DOJ to: (1) file a pleading that announced a new enforcement policy that would advise Californians of what medical cannabis distribution and possession would not be prosecuted or lead to forfeiture attempts; (2) take the legal position that it would file and win a motion to

dismiss; this time based on the mootness created by the announcement of the new policy; (3) avoid having the named defendants deposed by the securing the dismissal of the case based on its representations of the existence of a new enforcement policy, which **actually did make the WAMM litigation goals moot**.

To permit the government to avoid the discovery it was facing in *WAMM* by representing that there was a new and permanent enforcement policy, fail to make any application or announcement to the *WAMM* court, yet have the United States Attorney act in dramatic contravention of the new policy by threatening prosecution and seizure of property from those, even if in compliance with California medical cannabis law, would give the government an unfair advantage.

G. Precedent Requires Reversal of the District Courts Decisions and that the Government be Estopped from Prosecuting, or Forfeiting from, those in Compliance with State Medical Cannabis Law

The policy justifying the doctrine of judicial estoppel is to protect the integrity of the judicial process by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine,* 532 U.S. at 749–50 . "A litigation position … conveyed to a court becomes binding *in any forum in which the same controversy arises*. (*Emphasis supplied*) [Citations omitted] … The State, like any party, is responsible for the official representations that it makes to the court." *American Civil Liberties Union v. Masto*, 670 F. 3d at 1065.

This Circuit has applied judicial estoppel against the federal government in a criminal forfeiture case. *United States v Liquidators*, 630 F.3d at 1148. The Liquidators were not criminal defendants; therefore, under the statutory scheme, could not assert a legal interest in the property until the entry of a Preliminary Order for Forfeiture after the criminal defendants were convicted. Liquidators had meritorious defenses such as *res judicata* and statute of limitations, but their claim did not fit within either of the grounds for a third party to prevail in an ancillary hearing pursuant to 21 U.S.C. 853 (n) (6) (A) (B).

The government opposed Liquidators' position that due process required an early plenary hearing to remedy that defect. The government argued, first in the District Court and, then in the Ninth Circuit, that such a hearing was premature because Liquidators could raise "all legal arguments that might bar the government's forfeiture in the 853 (n) ancillary hearing" after the Preliminary Order of Forfeiture had been entered. This Circuit accepted the government's legal position, and affirmed the District Court's denial of an early plenary hearing. After the Preliminary Forfeiture Order had been entered, Liquidators filed its petition for the funds pursuant to 853 (n). The government successfully argued that because Liquidators' claim was not based on either of the two 853 (n) grounds, the Liquidators claim failed. The District Court denied the Liquidator claim on that ground.

On appeal, the Ninth Circuit judicially estopped the government from arguing or prevailing on a legal position that was inconsistent with its previous legal position that Liquidators could raise "all legal arguments that might bar the government's forfeiture in the ancillary hearing". This Circuit reversed the District Court's denial of the Liquidators 853 (n) claim by judicially estopping the government from arguing or prevailing on a legal position contrary to its previously taken legal position on the same issue.

The DOJ lawyer's legal position to the District Court in *WAMM* is analogous to the government's initial representation to the Ninth Circuit. The subsequent contrary position set forth in the United States Attorney's attack on medical cannabis possession and distribution that is in compliance with California law is analogous to the inconsistent legal position that the government took in both the ancillary hearing in the District Court and on appeal to the Circuit Court. As this Circuit did in *Liquidators*, the government must be judicially estopped from its contrary position of threatening, prosecuting or seeking forfeiture from those in compliance with California medical cannabis law.

The allegations, taken as true, are more than plausible, and require the application of the Judicial Estoppel doctrine. The District Court's grant of the government's motion to dismiss the Complaint should be reversed.

//

CONCLUSION

For all of the reasons expressed above, the decisions of the District Courts should be reversed, and the cases permitted to proceed.

Respectfully Submitted,

Dated: 24 October 2012

s/*David M. Michael*
DAVID M. MICHAEL

s/*Edward M. Burch*
EDWARD M. BURCH

s/*Alan Silber*
ALAN SILBER

s/*Matthew W. Kumin*
MATTHEW W. KUMIN

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE STATEMENT

Pursuant to rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the applicable type-volume limitation. Specifically, the countable sections contain 11,689 words, using proportional spacing and 14-point type (Times New Roman font, Microsoft Word), and 911 lines of text, according to Microsoft Word 2008 v12.2.0 – the program from which this brief was created.

s/*David M. Michael*
DAVID M. MICHAEL
Lead Counsel for Plaintiffs/Appellants

STATEMENT OF RELATED CASES

Counsel for Appellants/Plaintiffs is unaware of any related case as defined by Ninth Circuit Rule 28-2.6.

s/*David M. Michael*
DAVID M. MICHAEL
Lead Counsel for Plaintiffs/Appellants

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that, on October 24, 2012, I caused to be electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/*David M. Michael*
DAVID M. MICHAEL

ADDENDUM TABLE OF CONTENTS

ADDENDUM

Compassionate Use Act

(11362.5 H&S)

(a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

(b) (1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

SEC. 2. If any provision of this measure or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the measure that can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

MEDICAL MARIJUANA PROGRAM ACT

California Health and Safety Code sections 11362.7 et seq.; 11362.9

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) On November 6, 1996, the people of the State of California enacted the Compassionate Use Act of 1996 (hereafter the act), codified in Section 11362.5 of the Health and Safety Code, in order to allow seriously ill residents of the state, who have the oral or written approval or recommendation of a physician, to use marijuana for medical purposes without fear of criminal liability under Sections 11357 and 11358 of the Health and Safety Code.

(2) However, reports from across the state have revealed problems and uncertainties in the act that have impeded the ability of law enforcement officers to enforce its provisions as the voters intended and, therefore, have prevented qualified patients and designated primary caregivers from obtaining the protections afforded by the act.

(3) Furthermore, the enactment of this law, as well as other recent legislation dealing with pain control, demonstrates that more information is needed to assess the number of individuals across the state who are suffering from serious medical conditions that are not being adequately alleviated through the use of conventional medications.

(4) In addition, the act called upon the state and the federal government to develop a plan for the safe and affordable distribution of marijuana to all patients in medical need thereof.

(b) It is the intent of the Legislature, therefore, to do all of the following:

(1) Clarify the scope of the application of the act and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers.

(2) Promote uniform and consistent application of the act among the counties within the state.

(3) Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.

(c) It is also the intent of the Legislature to address additional issues that were not included within the act, and that must be resolved in order to promote the fair and orderly implementation of the act.

(d) The Legislature further finds and declares both of the following:

(1) A state identification card program will further the goals outlined in this section.

(2) With respect to individuals, the identification system established pursuant to this act must be wholly voluntary, and a patient entitled to the protections of Section 11362.5 of the Health and Safety Code need not possess an identification card in order to claim the protections afforded by that section.

(e) The Legislature further finds and declares that it enacts this act pursuant to the powers reserved to the State of California and its people under the Tenth Amendment to the United States Constitution.

SEC. 2. Article 2.5 (commencing with Section 11362.7) is added to Chapter 6 of Division 10 of the Health and Safety Code, to read:

Article 2.5. Medical Marijuana Program

11362.7. For purposes of this article, the following definitions shall apply:

(a) "Attending physician" means an individual who possesses a license in good standing to practice medicine or osteopathy issued by the Medical Board of California or the Osteopathic Medical Board of California and who has taken responsibility for an aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient and who has conducted a medical examination of that patient before recording in the patient's medical record the physician's assessment of whether the patient has a serious medical condition and whether the medical use of marijuana is appropriate.

(b) "Department" means the State Department of Health Services.

(c) "Person with an identification card" means an individual who is a qualified patient who has applied for and received a valid identification card pursuant to this article.

(d) "Primary caregiver" means the individual, designated by a qualified patient or by a person with an identification card, who has consistently assumed responsibility for the housing, health, or safety of that patient or person, and may include any of the following:

(1) In any case in which a qualified patient or person with an identification card receives medical care or supportive services, or both, from a clinic licensed pursuant to Chapter 1

(commencing with Section 1200) of Division 2, a health care facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2, a residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 (commencing with Section 1568.01) of Division 2, a residential care facility for the elderly licensed pursuant to Chapter 3.2 (commencing with Section 1569) of Division 2, a hospice, or a home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2, the owner or operator, or no more than three employees who are designated by the owner or operator, of the clinic, facility, hospice, or home health agency, if designated as a primary caregiver by that qualified patient or person with an identification card.

(2) An individual who has been designated as a primary caregiver by more than one qualified patient or person with an identification card, if every qualified patient or person with an identification card who has designated that individual as a primary caregiver resides in the same city or county as the primary caregiver.

(3) An individual who has been designated as a primary caregiver by a qualified patient or person with an identification card who resides in a city or county other than that of the primary caregiver, if the individual has not been designated as a primary caregiver by any other qualified patient or person with an identification card.

(e) A primary caregiver shall be at least 18 years of age, unless the primary caregiver is the parent of a minor child who is a qualified patient or a person with an identification card or the primary caregiver is a person otherwise entitled to make medical decisions under state law pursuant to Sections 6922, 7002, 7050, or 7120 of the Family Code.

(f) "Qualified patient" means a person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article.

(g) "Identification card" means a document issued by the State Department of Health Services that document identifies a person authorized to engage in the medical use of marijuana and the person's designated primary caregiver, if any.

(h) "Serious medical condition" means all of the following medical conditions:

(1) Acquired immune deficiency syndrome (AIDS).

(2) Anorexia.

(3) Arthritis.

(4) Cachexia.

(5) Cancer.

(6) Chronic pain.

(7) Glaucoma.

(8) Migraine.

(9) Persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis.

(10) Seizures, including, but not limited to, seizures associated with epilepsy.

(11) Severe nausea.

(12) Any other chronic or persistent medical symptom that either:

(A) Substantially limits the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990 (Public Law 101-336).

(B) If not alleviated, may cause serious harm to the patient's safety or physical or mental health.

(i) "Written documentation" means accurate reproductions of those portions of a patient's medical records that have been created by the attending physician, that contain the information required by paragraph (2) of subdivision (a) of Section 11362.715, and that the patient may submit to a county health department or the county's designee as part of an application for an identification card.

11362.71. (a) (1) The department shall establish and maintain a voluntary program for the issuance of identification cards to qualified patients who satisfy the requirements of this article and voluntarily apply to the identification card program.

(2) The department shall establish and maintain a 24-hour, toll-free telephone number that will enable state and local law enforcement officers to have immediate access to information necessary to verify the validity of an identification card issued by the department, until a cost-effective Internet Web-based system can be developed for this purpose.

(b) Every county health department, or the county's designee, shall do all of the following:

(1) Provide applications upon request to individuals seeking to join the identification card program.

(2) Receive and process completed applications in accordance with Section 11362.72.

(3) Maintain records of identification card programs.

(4) Utilize protocols developed by the department pursuant to paragraph (1) of subdivision (d).

(5) Issue identification cards developed by the department to approved applicants and designated primary caregivers.

(c) The county board of supervisors may designate another health-related governmental or nongovernmental entity or organization to perform the functions described in subdivision (b), except for an entity or organization that cultivates or distributes marijuana.

(d) The department shall develop all of the following:

(1) Protocols that shall be used by a county health department or the county's designee to implement the responsibilities described in subdivision (b), including, but not limited to, protocols to confirm the accuracy of information contained in an application and to protect the confidentiality of program records.

(2) Application forms that shall be issued to requesting applicants.

(3) An identification card that identifies a person authorized to engage in the medical use of marijuana and an identification card that identifies the person's designated primary caregiver, if any. The two identification cards developed pursuant to this paragraph shall be easily distinguishable from each other.

(e) No person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article, unless there is reasonable cause to believe that the information contained in the card is false or falsified, the card has been obtained by means of fraud, or the person is otherwise in violation of the provisions of this article.

(f) It shall not be necessary for a person to obtain an identification card in order to claim the protections of Section 11362.5.

11362.715. (a) A person who seeks an identification card shall pay the fee, as provided in Section 11362.755, and provide all of the following to the county health department or the county's designee on a form developed and provided by the department:

(1) The name of the person, and proof of his or her residency within the county.

(2) Written documentation by the attending physician in the person' s medical records stating that the person has been diagnosed with a serious medical condition and that the medical use of marijuana is appropriate.

(3) The name, office address, office telephone number, and California medical license number of the person's attending physician.

(4) The name and the duties of the primary caregiver.

(5) A government-issued photo identification card of the person and of the designated primary caregiver, if any. If the applicant is a person under 18 years of age, a certified copy of a birth certificate shall be deemed sufficient proof of identity.

(b) If the person applying for an identification card lacks the capacity to make medical decisions, the application may be made by the person's legal representative, including, but not limited to, any of the following:

(1) A conservator with authority to make medical decisions.

(2) An attorney-in-fact under a durable power of attorney for health care or surrogate decisionmaker authorized under another advanced health care directive.

(3) Any other individual authorized by statutory or decisional law to make medical decisions for the person.

(c) The legal representative described in subdivision (b) may also designate in the application an individual, including himself or herself, to serve as a primary caregiver for the person, provided that the individual meets the definition of a primary caregiver.

(d) The person or legal representative submitting the written information and documentation described in subdivision (a) shall retain a copy thereof.

11362.72. (a) Within 30 days of receipt of an application for an identification card, a county health department or the county's designee shall do all of the following:

(1) For purposes of processing the application, verify that the information contained in the application is accurate. If the person is less than 18 years of age, the county health department or its designee shall also contact the parent with legal authority to make medical decisions, legal guardian, or other person or entity with legal authority to make medical decisions, to verify the information.

(2) Verify with the Medical Board of California or the Osteopathic Medical Board of California that the attending physician has a license in good standing to practice medicine or osteopathy in the state.

(3) Contact the attending physician by facsimile, telephone, or mail to confirm that the medical records submitted by the patient are a true and correct copy of those contained in the physician's office records. When contacted by a county health department or the county' s designee, the attending physician shall confirm or deny that the contents of the medical records are accurate.

(4) Take a photograph or otherwise obtain an electronically transmissible image of the applicant and of the designated primary caregiver, if any.

(5) Approve or deny the application. If an applicant who meets the requirements of Section 11362.715 can establish that an identification card is needed on an emergency basis, the county or its designee shall issue a temporary identification card that shall be valid for 30 days from the date of issuance. The county, or its designee, may extend the temporary identification card for no more than 30 days at a time, so long as the applicant continues to meet the requirements of this paragraph.

(b) If the county health department or the county's designee approves the application, it shall, within 24 hours, or by the end of the next working day of approving the application, electronically transmit the following information to the department:

(1) A unique user identification number of the applicant.

(2) The date of expiration of the identification card.

(3) The name and telephone number of the county health department or the county's designee that has approved the application.

(c) The county health department or the county's designee shall issue an identification card to the applicant and to his or her designated primary caregiver, if any, within five working days of approving the application.

(d) In any case involving an incomplete application, the applicant shall assume responsibility for rectifying the deficiency. The county shall have 14 days from the receipt of information from the applicant pursuant to this subdivision to approve or deny the application.

11362.735. (a) An identification card issued by the county health department shall be serially numbered and shall contain all of the following:

(1) A unique user identification number of the cardholder.

(2) The date of expiration of the identification card.

(3) The name and telephone number of the county health department or the county's designee that has approved the application.

(4) A 24-hour, toll-free telephone number, to be maintained by the department, that will enable state and local law enforcement officers to have immediate access to information necessary to verify the validity of the card.

(5) Photo identification of the cardholder.

(b) A separate identification card shall be issued to the person's designated primary caregiver, if any, and shall include a photo identification of the caregiver.

11362.74. (a) The county health department or the county's designee may deny an application only for any of the following reasons:

(1) The applicant did not provide the information required by Section 11362.715, and upon notice of the deficiency pursuant to subdivision (d) of Section 11362.72, did not provide the information within 30 days.

(2) The county health department or the county's designee determines that the information provided was false.

(3) The applicant does not meet the criteria set forth in this article.

(b) Any person whose application has been denied pursuant to subdivision (a) may not reapply for six months from the date of denial unless otherwise authorized by the county health department or the county's designee or by a court of competent jurisdiction.

(c) Any person whose application has been denied pursuant to subdivision (a) may appeal that decision to the department. The county health department or the county's designee shall make available a telephone number or address to which the denied applicant can direct an appeal.

11362.745. (a) An identification card shall be valid for a period of one year.

(b) Upon annual renewal of an identification card, the county health department or its designee shall verify all new information and may verify any other information that has not changed. (c) The county health department or the county's designee shall transmit its determination of approval or denial of a renewal to the department.

11362.755. (a) The department shall establish application and renewal fees for persons seeking to obtain or renew identification cards that are sufficient to cover the expenses incurred by the department, including the startup cost, the cost of reduced fees for Medi-Cal beneficiaries in accordance with subdivision (b), the cost of identifying and developing a cost-effective Internet Web-based system, and the cost of maintaining the 24-hour toll-free telephone number. Each county health department or the county's designee may charge an additional fee for all costs incurred by the county or the county's designee for administering the program pursuant to this article.

(b) Upon satisfactory proof of participation and eligibility in the Medi-Cal program, a Medi-Cal beneficiary shall receive a 50 percent reduction in the fees established pursuant to this section.

11362.76. (a) A person who possesses an identification card shall:

(1) Within seven days, notify the county health department or the county's designee of any change in the person's attending physician or designated primary caregiver, if any.

(2) Annually submit to the county health department or the county' s designee the following:

(A) Updated written documentation of the person's serious medical condition.

(B) The name and duties of the person's designated primary caregiver, if any, for the forthcoming year.

(b) If a person who possesses an identification card fails to comply with this section, the card shall be deemed expired. If an identification card expires, the identification card of any designated primary caregiver of the person shall also expire.

(c) If the designated primary caregiver has been changed, the previous primary caregiver shall return his or her identification card to the department or to the county health department or the county's designee.

(d) If the owner or operator or an employee of the owner or operator of a provider has been designated as a primary caregiver pursuant to paragraph (1) of subdivision (d) of Section 11362.7, of the qualified patient or person with an identification card, the owner or operator shall notify the county health department or the county's designee, pursuant to Section 11362.715, if a change in the designated primary caregiver has occurred.

11362.765. (a) Subject to the requirements of this article, the individuals specified in subdivision (b) shall not be subject, on that sole basis, to criminal liability under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570. However, nothing in this section shall authorize the individual to smoke or otherwise consume marijuana unless otherwise authorized by this article, nor shall anything in this section authorize any individual or group to cultivate or distribute marijuana for profit.

(b) Subdivision (a) shall apply to all of the following:

(1) A qualified patient or a person with an identification card who transports or processes marijuana for his or her own personal medical use.

(2) A designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver.

(3) Any individual who provides assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person.

(c) A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card to enable that person to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, shall not, on the sole basis of that fact, be subject to prosecution or punishment under Section 11359 or 11360.

11362.77. (a) A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient.

(b) If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient' s medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs.

(c) Counties and cities may retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a).

(d) Only the dried mature processed flowers of female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section.

(e) The Attorney General may recommend modifications to the possession or cultivation limits set forth in this section. These recommendations, if any, shall be made to the Legislature no later than December 1, 2005, and may be made only after public comment and consultation with interested organizations, including, but not limited to, patients, health care professionals, researchers, law enforcement, and local governments. Any recommended modification shall be consistent with the intent of this article and shall be based on currently available scientific research.

(f) A qualified patient or a person holding a valid identification card, or the designated primary caregiver of that qualified patient or person, may possess amounts of marijuana consistent with this article.

11362.775. Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.

11362.78. A state or local law enforcement agency or officer shall not refuse to accept an identification card issued by the department unless the state or local law enforcement agency or officer has reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently.

11362.785. (a) Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment or on the property or premises of any jail, correctional facility, or other type of penal institution in which prisoners reside or persons under arrest are detained.

(b) Notwithstanding subdivision (a), a person shall not be prohibited or prevented from obtaining and submitting the written information and documentation necessary to apply for an identification card on the basis that the person is incarcerated in a jail, correctional facility, or other penal institution in which prisoners reside or persons under arrest are detained.

(c) Nothing in this article shall prohibit a jail, correctional facility, or other penal institution in which prisoners reside or persons under arrest are detained, from permitting a prisoner or a person under arrest who has an identification card, to use marijuana for medical purposes under circumstances that will not endanger the health or safety of other prisoners or the security of the facility.

(d) Nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana.

11362.79. Nothing in this article shall authorize a qualified patient or person with an identification card to engage in the smoking of medical marijuana under any of the following circumstances:

(a) In any place where smoking is prohibited by law.

(b) In or within 1,000 feet of the grounds of a school, recreation center, or youth center, unless the medical use occurs within a residence.

(c) On a schoolbus.

(d) While in a motor vehicle that is being operated.

(e) While operating a boat.

11362.795. (a) (1) Any criminal defendant who is eligible to use marijuana pursuant to Section 11362.5 may request that the court confirm that he or she is allowed to use medical marijuana while he or she is on probation or released on bail.

(2) The court's decision and the reasons for the decision shall be stated on the record and an entry stating those reasons shall be made in the minutes of the court.

(3) During the period of probation or release on bail, if a physician recommends that the probationer or defendant use medical marijuana, the probationer or defendant may request a modification of the conditions of probation or bail to authorize the use of medical marijuana.

(4) The court's consideration of the modification request authorized by this subdivision shall comply with the requirements of this section.

(b) (1) Any person who is to be released on parole from a jail, state prison, school, road camp, or other state or local institution of confinement and who is eligible to use medical marijuana pursuant to Section 11362.5 may request that he or she be allowed to use medical marijuana during the period he or she is released on parole. A parolee's written conditions of parole shall reflect whether or not a request for a modification of the conditions of his or her parole to use medical marijuana was made, and whether the request was granted or denied.

(2) During the period of the parole, where a physician recommends that the parolee use medical marijuana, the parolee may request a modification of the conditions of the parole to authorize the use of medical marijuana.

(3) Any parolee whose request to use medical marijuana while on parole was denied may pursue an administrative appeal of the decision. Any decision on the appeal shall be in writing and shall reflect the reasons for the decision.

(4) The administrative consideration of the modification request authorized by this subdivision shall comply with the requirements of this section.

11362.8. No professional licensing board may impose a civil penalty or take other disciplinary action against a licensee based solely on the fact that the licensee has performed acts that are necessary or appropriate to carry out the licensee's role as a designated primary caregiver to a person who is a qualified patient or who possesses a lawful identification card issued pursuant to Section 11362.72. However, this section shall not apply to acts performed by a physician relating to the discussion or recommendation of the medical use of marijuana to a patient. These discussions or recommendations, or both, shall be governed by Section 11362.5.

11362.81. (a) A person specified in subdivision (b) shall be subject to the following penalties:

(1) For the first offense, imprisonment in the county jail for no more than six months or a fine not to exceed one thousand dollars ($1,000), or both.

(2) For a second or subsequent offense, imprisonment in the county jail for no more than one year, or a fine not to exceed one thousand dollars ($1,000), or both.

(b) Subdivision (a) applies to any of the following:

(1) A person who fraudulently represents a medical condition or fraudulently provides any material misinformation to a physician, county health department or the county's designee, or state or local law enforcement agency or officer, for the purpose of falsely obtaining an identification card.

(2) A person who steals or fraudulently uses any person's identification card in order to acquire, possess, cultivate, transport, use, produce, or distribute marijuana.

(3) A person who counterfeits, tampers with, or fraudulently produces an identification card.

(4) A person who breaches the confidentiality requirements of this article to information provided to, or contained in the records of, the department or of a county health department or the county's designee pertaining to an identification card program.

(c) In addition to the penalties prescribed in subdivision (a), any person described in subdivision (b) may be precluded from attempting to obtain, or obtaining or using, an identification card for a period of up to six months at the discretion of the court.

(d) In addition to the requirements of this article, the Attorney General shall develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical use by patients qualified under the Compassionate Use Act of 1996.

11362.82. If any section, subdivision, sentence, clause, phrase, or portion of this article is for any reason held invalid or unconstitutional by any court of competent jurisdiction, that portion shall be deemed a separate, distinct, and independent provision, and that holding shall not affect the validity of the remaining portion thereof.

11362.83. Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

In addition, no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for other costs mandated by the state because this act includes additional revenue that is specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate, within the meaning of Section 17556 of the Government Code.

Footnotes to the above:

11366. Every person who opens or maintains any place for the purpose of unlawfully selling, giving away, or using any controlled substance which is (1) specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (13), (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b), (c), paragraph (1) or (2) of subdivision (d), or paragraph (3) of subdivision (e) of Section 11055, or (2) which is a narcotic drug classified in Schedule III, IV, or V, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison.

11366.5. (a) Any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, who knowingly rents, leases, or makes available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, storing, or distributing any controlled substance for sale or distribution shall be punished by imprisonment in the county jail for not more than one year, or in the state prison.

(b) Any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, who knowingly allows the building, room, space, or enclosure to be fortified to suppress law enforcement entry in order to further the sale of any amount of cocaine base as specified in paragraph (1) of subdivision (f) of Section 11054, cocaine as specified in paragraph (6) of subdivision (b) of Section 11055, heroin, phencyclidine, amphetamine, methamphetamine, or lysergic acid diethylamide and who obtains excessive profits from the use of the building, room, space, or enclosure shall be punished by imprisonment in the state prison for two, three, or four years.

(c) Any person who violates subdivision (a) after previously being convicted of a violation of subdivision (a) shall be punished by imprisonment in the state prison for two, three, or four years.

(d) For the purposes of this section, "excessive profits" means the receipt of consideration of a value substantially higher than fair market value.

11570. Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance, precursor, or analog specified in this division, and every building or place wherein or upon which those acts take place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

Medical Marijuana Research program

11362.9. (a) (1) It is the intent of the Legislature that the state commission objective scientific research by the premier research institute of the world, the University of California, regarding the efficacy and safety of administering marijuana as part of medical treatment. If the Regents of the University of California, by appropriate resolution, accept this responsibility, the University of California shall create a program, to be known as the California Marijuana Research Program. (2) The program shall develop and conduct studies intended to ascertain the general medical safety and efficacy of marijuana and, if found valuable, shall develop medical guidelines for the appropriate administration and use of marijuana. (b) The program may immediately solicit proposals for research projects to be included in the marijuana studies. Program requirements to be used when evaluating responses to its solicitation for proposals, shall include, but not be limited to, all of the following:

(1) Proposals shall demonstrate the use of key personnel, including clinicians or scientists and support personnel, who are prepared to develop a program of research regarding marijuana's general medical efficacy and safety.

(2) Proposals shall contain procedures for outreach to patients with various medical conditions who may be suitable participants in research on marijuana.

(3) Proposals shall contain provisions for a patient registry. (4) Proposals shall contain provisions for an information system

that is designed to record information about possible study participants, investigators, and clinicians, and deposit and analyze data that accrues as part of clinical trials.

(5) Proposals shall contain protocols suitable for research on marijuana, addressing patients diagnosed with the acquired immunodeficiency syndrome (AIDS) or the human immunodeficiency virus (HIV), cancer, glaucoma, or seizures or muscle spasms associated with a chronic, debilitating condition. The proposal may also include research on other serious illnesses, provided that resources are available and medical information justifies the research.

(6) Proposals shall demonstrate the use of a specimen laboratory capable of housing plasma, urine, and other specimens necessary to study the concentration of cannabinoids in various tissues, as well as housing specimens for studies of toxic effects of marijuana.

(7) Proposals shall demonstrate the use of a laboratory capable of analyzing marijuana, provided to the program under this section, for purity and cannabinoid content and the capacity to detect contaminants.

(c) In order to ensure objectivity in evaluating proposals, the program shall use a peer review process that is modeled on the process used by the National Institutes of Health, and that guards against funding research that is biased in favor of or against particular outcomes. Peer reviewers shall be selected for their expertise in the scientific substance and methods of the proposed

research, and their lack of bias or conflict of interest regarding the applicants or the topic of an approach taken in the proposed research. Peer reviewers shall judge research proposals on several criteria, foremost among which shall be both of the following:

(1) The scientific merit of the research plan, including whether the research design and experimental procedures are potentially biased for or against a particular outcome.

(2) Researchers' expertise in the scientific substance and methods of the proposed research, and their lack of bias or conflict of interest regarding the topic of, and the approach taken in, the proposed research.

(d) If the program is administered by the Regents of the University of California, any grant research proposals approved by the program shall also require review and approval by the research advisory panel.

(e) It is the intent of the Legislature that the program be established as follows:

(1) The program shall be located at one or more University of California campuses that have a core of faculty experienced in organizing multidisciplinary scientific endeavors and, in particular, strong experience in clinical trials involving psychopharmacologic agents. The campuses at which research under the auspices of the program is to take place shall accommodate the administrative offices, including the director of the program, as well as a data management unit, and facilities for storage of specimens.

(2) When awarding grants under this section, the program shall utilize principles and parameters of the other well-tested statewide research programs administered by the University of California, modeled after programs administered by the National Institutes of Health, including peer review evaluation of the scientific merit of applications.

(3) The scientific and clinical operations of the program shall occur, partly at University of California campuses, and partly at other postsecondary institutions, that have clinicians or scientists with expertise to conduct the required studies. Criteria for selection of research locations shall include the elements listed in subdivision (b) and, additionally, shall give particular weight to the organizational plan, leadership qualities of the program director, and plans to involve investigators and patient populations from multiple sites.

(4) The funds received by the program shall be allocated to various research studies in accordance with a scientific plan developed by the Scientific Advisory Council. As the first wave of studies is completed, it is anticipated that the program will receive requests for funding of additional studies. These requests shall be reviewed by the Scientific Advisory Council.

(5) The size, scope, and number of studies funded shall be commensurate with the amount of appropriated and available program funding.

(f) All personnel involved in implementing approved proposals shall be authorized as required by Section 11604.

(g) Studies conducted pursuant to this section shall include the greatest amount of new scientific research possible on the medical uses of, and medical hazards associated with, marijuana. The program shall consult with the Research Advisory Panel analogous agencies in other states, and appropriate federal agencies in an attempt to avoid duplicative research and the wasting of research dollars.

(h) The program shall make every effort to recruit qualified patients and qualified physicians from throughout the state.

(i) The marijuana studies shall employ state-of-the-art research methodologies.

(j) The program shall ensure that all marijuana used in the studies is of the appropriate medical quality and shall be obtained from the National Institute on Drug Abuse or any other federal agency designated to supply marijuana for authorized research. If these federal agencies fail to provide a supply of adequate quality and quantity within six months of the effective date of this section, the Attorney General shall provide an adequate supply pursuant to Section 11478.

(k) The program may review, approve, or incorporate studies and research by independent groups presenting scientifically valid protocols for medical research, regardless of whether the areas of study are being researched by the committee.

(l) (1) To enhance understanding of the efficacy and adverse effects of marijuana as a pharmacological agent, the program shall conduct focused controlled clinical trials on the usefulness of marijuana in patients diagnosed with AIDS or HIV, cancer, glaucoma, or seizures or muscle spasms associated with a chronic, debilitating condition. The program may add research on other serious illnesses, provided that resources are available and medical information justifies the research. The studies shall focus on comparisons of both the efficacy and safety of methods of administering the drug to patients, including inhalational, tinctural, and oral, evaluate possible uses of marijuana as a primary or adjunctive treatment, and develop further information on optimal dosage, timing, mode of administration, and variations in the effects of different cannabinoids and varieties of marijuana.

(2) The program shall examine the safety of marijuana in patients with various medical disorders, including marijuana's interaction with other drugs, relative safety of inhalation versus oral forms, and the effects on mental function in medically ill persons.

(3) The program shall be limited to providing for objective scientific research to ascertain the efficacy and safety of marijuana as part of medical treatment, and should not be construed as encouraging or sanctioning the social or recreational use of marijuana.

(m) (1) Subject to paragraph (2), the program shall, prior to any approving proposals, seek to obtain research protocol guidelines from the National Institutes of Health and shall, if the National Institutes of Health issues research protocol guidelines, comply with those guidelines.

(2) If, after a reasonable period of time of not less than six months and not more than a year has elapsed from the date the program seeks to obtain guidelines pursuant to paragraph (1), no guidelines have been approved, the program may proceed using the research protocol guidelines it develops.

(n) In order to maximize the scope and size of the marijuana studies, the program may do any of the following:

(1) Solicit, apply for, and accept funds from foundations, private individuals, and all other funding sources that can be used to expand the scope or timeframe of the marijuana studies that are authorized under this section. The program shall not expend more than 5 percent of its General Fund allocation in efforts to obtain money from outside sources.

(2) Include within the scope of the marijuana studies other marijuana research projects that are independently funded and that meet the requirements set forth in subdivisions (a) to (c), inclusive. In no case shall the program accept any funds that are offered with any conditions other than that the funds be used to study the efficacy and safety of marijuana as part of medical treatment. Any donor shall be advised that funds given for purposes of this section will be used to study both the possible benefits and detriments of marijuana and that he or she will have no control over the use of these funds.

(o) (1) Within six months of the effective date of this section, the program shall report to the Legislature, the Governor, and the Attorney General on the progress of the marijuana studies.

(2) Thereafter, the program shall issue a report to the Legislature every six months detailing the progress of the studies. The interim reports required under this paragraph shall include, but not be limited to, data on all of the following:

(A) The names and number of diseases or conditions under study.

(B) The number of patients enrolled in each study by disease.

(C) Any scientifically valid preliminary findings.

(p) If the Regents of the University of California implement this section, the President of the University of California shall appoint a multidisciplinary Scientific Advisory Council, not to exceed 15 members, to provide policy guidance in the creation and implementation of the program. Members shall be chosen on the basis of scientific expertise. Members of the council shall serve on a voluntary basis, with reimbursement for expenses incurred in the course of their

participation. The members shall be reimbursed for travel and other necessary expenses incurred in their performance of the duties of the council.

(q) No more than 10 percent of the total funds appropriated may be used for all aspects of the administration of this section. (r) This section shall be implemented only to the extent that funding for its purposes is appropriated by the Legislature in the annual Budget Act.

5th Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

9th Amendment to the United States Constitution

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

CONTROLLED SUBSTANCES ACT

Controlled Substances Act

TITLE 21 - FOOD AND DRUGS

CHAPTER 13 - DRUG ABUSE PREVENTION AND CONTROL

SUBCHAPTER I - CONTROL AND ENFORCEMENT

Part A - Introductory Provisions

Part B - Authority to Control; Standards and Schedules

Part C - Registration of Manufacturers, Distributors, and Dispensers of Controled Substances; Piperidine Reporting

Part D - Offenses and Penalties

Part E - Administrative and Enforcement Provisions

Part F - Advisory Commission

Part G - Conforming, Transitional and Effective Date, and General Provisions

PART A - INTRODUCTORY PROVISIONS

§ 801 Note Short Title

This title may be cited as the 'Controlled Substances Act'.

§ 801. Congressional findings and declarations: controlled substances.

The Congress makes the following findings and declarations:

(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because -

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

§ 801a. Congressional findings and declarations: psychotropic substances.

The Congress makes the following findings and declarations:

(1) The Congress has long recognized the danger involved in the manufacture, distribution, and use of certain psychotropic substances for nonscientific and nonmedical purposes, and has provided strong and effective legislation to control illicit trafficking and to regulate legitimate uses of psychotropic substances in this country. Abuse of psychotropic substances has become a phenomenon common to many countries, however, and is not confined to national borders. It is, therefore, essential that the United States cooperate with other nations in establishing effective controls over international traffic in such substances.

(2) The United States has joined with other countries in executing an international treaty, entitled the Convention on Psychotropic Substances and signed at Vienna, Austria, on February 21, 1971, which is designed to establish suitable controls over the manufacture, distribution, transfer, and use of certain psychotropic substances. The Convention is not self-executing, and the obligations of the United States thereunder may only be performed pursuant to appropriate legislation. It is the intent of the Congress that the amendments made by this Act, together with existing law, will enable the United States to meet all of its obligations under the Convention and that no further legislation will be necessary for that purpose.

(3) In implementing the Convention on Psychotropic Substances, the Congress intends that, consistent with the obligations of the United States under the Convention, control of psychotropic substances in the United States should be accomplished within the framework of the procedures and criteria for classification of substances provided in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.). This will insure that

(A) the availability of psychotropic substances to manufacturers, distributors, dispensers, and researchers for useful and legitimate medical and scientific purposes will not be unduly restricted;

(B) nothing in the Convention will interfere with bona fide research activities; and

(C) nothing in the Convention will interfere with ethical medical practice in this country as determined by the Secretary of Health and Human Services on the basis of a consensus of the views of the American medical and scientific community.

§ 802. Definitions.

As used in this subchapter:

(1) The term "addict" means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.

(2) The term "administer" refers to the direct application of a controlled substance to the body of a patient or research subject by -

(A) a practitioner (or, in his presence, by his authorized agent), or

(B) the patient or research subject at the direction and in the presence of the practitioner, whether such application be by injection, inhalation, ingestion, or any other means.

(3) The term "agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser; except that such term does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman, when acting in the usual and lawful course of the carrier's or warehouseman's business.

(4) The term "Drug Enforcement Administration" means the Drug Enforcement Administration in the Department of Justice.

(5) The term "control" means to add a drug or other substance, or immediate precursor, to a schedule under part B of this subchapter, whether by transfer from another schedule or otherwise.

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

(7) The term "counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser.

(8) The terms "deliver" or "delivery" mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.

(9) The term "depressant or stimulant substance" means -

(A) a drug which contains any quantity of (i) barbituric acid or any of the salts of barbituric acid; or (ii) any derivative of barbituric acid which has been designated by the Secretary as habit forming under section 352(d) of this title; or

(B) a drug which contains any quantity of (i) amphetamine or any of its optical isomers; (ii) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (iii) any substance which the Attorney General, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous systems; or

(C) lysergic acid diethylamide; or

(D) any drug which contains any quantity of a substance which the Attorney General, after investigation, has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

(10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

(11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical. The term "distributor" means a person who so delivers a controlled substance or a listed chemical.

(12) The term "drug" has the meaning given that term by section 321(g)(1) of this title.

(13) The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

(14) The term "isomer" means the optical isomer, except as used in schedule I(c) and schedule II(a)(4). As used in schedule I(c), the term "isomer" means any optical, positional, or geometric isomer. As used in schedule II(a)(4), the term "isomer" means any optical or geometric isomer.

(15) The term "manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container; except that such term does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable State or local law by a practitioner as an incident to his administration or dispensing of such drug or substance in the course of his professional practice. The term "manufacturer" means a person who manufactures a drug or other substance.

(16) The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

(17) The term "narcotic drug" means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation. Such term does not include the isoquinoline alkaloids of opium.

(B) Poppy straw and concentrate of poppy straw.

(C) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed.

(D) Cocaine, its salts, optical and geometric isomers, and salts of isomers.

(E) Ecgonine, its derivatives, their salts, isomers, and salts of isomers.

(F) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subparagraphs (A) through (E).

(18) The term "opiate" means any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having such addiction-forming or addiction-sustaining liability.

(19) The term "opium poppy" means the plant of the species Papaver somniferum L., except the seed thereof.

(20) The term "poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(21) The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

(22) The term "production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(23) The term "immediate precursor" means a substance -

(A) which the Attorney General has found to be and by regulation designated as being the principal compound used, or produced primarily for use, in the manufacture of a controlled substance;

(B) which is an immediate chemical intermediary used or likely to be used in the manufacture of such controlled substance; and

(C) the control of which is necessary to prevent, curtail, or limit the manufacture of such controlled substance.

(24) The term "Secretary", unless the context otherwise indicates, means the Secretary of Health and Human Services.

(25) The term "serious bodily injury" means bodily injury which involves -

(A) a substantial risk of death;

(B) protracted and obvious disfigurement; or

(C) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(26) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and the Canal Zone.

(27) The term "ultimate user" means a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household.

(28) The term "United States", when used in a geographic sense, means all places and waters, continental or insular, subject to the jurisdiction of the United States.

(29) The term "maintenance treatment" means the dispensing, for a period in excess of twenty-one days, of a narcotic drug in the treatment of an individual for dependence upon heroin or other morphine-like drugs.

(30) The term "detoxification treatment" means the dispensing, for a period not in excess of one hundred and eighty days, of a narcotic drug in decreasing doses to an individual in order to alleviate adverse physiological or psychological effects incident to withdrawal from the continuous or sustained use of a narcotic drug and as a method of bringing the individual to a narcotic drug-free state within such period.

(31) The term "Convention on Psychotropic Substances" means the Convention on Psychotropic Substances signed at Vienna, Austria, on February 21, 1971; and the term "Single Convention on Narcotic Drugs" means the Single Convention on Narcotic Drugs signed at New York, New York, on March 30, 1961.

(32)

(A) Except as provided in subparagraph (B), the term "controlled substance analogue" means a substance -

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(B) Such term does not include -

(i) a controlled substance;

(ii) any substance for which there is an approved new drug application;

(iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 355 of this title to the extent conduct with respect to such substance is pursuant to such exemption; or

(iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

(33) The term "listed chemical" means any list I chemical or any list II chemical.

(34) The term "list I chemical" means a chemical specified by regulation of the Attorney General as a chemical that is used in manufacturing a controlled substance in violation of this subchapter and is important to the manufacture of the controlled substances, and such term includes (until otherwise specified by regulation of the Attorney General, as considered appropriate by the Attorney General or upon petition to the Attorney General by any person) the following:

(A) Anthranilic acid, its esters, and its salts.

(B) Benzyl cyanide.

(C) Ephedrine, its salts, optical isomers, and salts of optical isomers.

(D) Ergonovine and its salts.

(E) Ergotamine and its salts.

(F) N-Acetylanthranilic acid, its esters, and its salts.

(G) Norpseudoephedrine, its salts, optical isomers, and salts of optical isomers.

(H) Phenylacetic acid, its esters, and its salts.

(I) Phenylpropanolamine, its salts, optical isomers, and salts of optical isomers.

(J) Piperidine and its salts.

(K) Pseudoephedrine, its salts, optical isomers, and salts of optical isomers.

(L) 3,4-Methylenedioxyphenyl-2-propanone.

(M) Methylamine.

(N) Ethylamine.

(O) Propionic anhydride.

(P) Insosafrole.

(Q) Safrole.

(R) Piperonal.

(S) N-Methylepherdrine. (FOOTNOTE 1) (FOOTNOTE 1) So in original. Probably should be "N-Methylephedrine."

(T) N-methylpseudoephedrine.

(U) Hydriotic (FOOTNOTE 2) acid. (FOOTNOTE 2) So in original. Probably should be "Hydriodic".

(V) Benzaldehyde.

(W) Nitroethane.

(X) Any salt, optical isomer, or salt of an optical isomer of the chemicals listed in subparagraphs (M) through (U) of this paragraph.

(35) The term "list II chemical" means a chemical (other than a list I chemical) specified by regulation of the Attorney General as a chemical that is used in manufacturing a controlled substance in violation of this subchapter, and such term includes (until otherwise specified by regulation of the Attorney General, as considered appropriate by the Attorney General or upon petition to the Attorney General by any person) the following chemicals:

(A) Acetic anhydride.

(B) Acetone.

(C) Benzyl chloride.

(D) Ethyl ether.

(E) Repealed. Pub. L. 101-647, title XXIII, Sec. 2301(b), Nov. 29, 1990, 104 Stat. 4858.

(F) Potassium permanganate.

(G) 2-Butanone.

(H) Toluene.

(36) The term "regular customer" means, with respect to a regulated person, a customer with whom the regulated person has an established business relationship that is reported to the Attorney General.

(37) The term "regular importer" means, with respect to a listed chemical, a person that has an established record as an importer of that listed chemical that is reported to the Attorney General.

(38) The term "regulated person" means a person who manufactures, distributes, imports, or exports a listed chemical, a tableting machine, or an encapsulating machine or who acts as a broker or trader for an international transaction involving a listed chemical, a tableting machine, or an encapsulating machine.

(39) The term "regulated transaction" means -

(A) a distribution, receipt, sale, importation, or exportation of, or an international transaction involving shipment of, a listed chemical, or if the Attorney General establishes a threshold amount for a specific listed chemical, a threshold amount, including a cumulative threshold amount for multiple transactions (as determined by the Attorney General, in consultation with the chemical industry and taking into consideration the quantities normally used for lawful purposes), of a listed chemical, except that such term does not include -

(i) a domestic lawful distribution in the usual course of business between agents or employees of a single regulated person;

(ii) a delivery of a listed chemical to or by a common or contract carrier for carriage in the lawful and usual course of the business of the common or contract carrier, or to or by a warehouseman for storage in the lawful and usual course of the business of the warehouseman, except that if the carriage or storage is in connection with the distribution, importation, or exportation of a listed chemical to a third person, this clause does not relieve a distributor, importer, or exporter from compliance with section 830 of this title;

(iii) any category of transaction or any category of transaction for a specific listed chemical or chemicals specified by regulation of the Attorney General as excluded from this definition as unnecessary for enforcement of this subchapter or subchapter II of this chapter;

(iv) any transaction in a listed chemical that is contained in a drug that may be marketed or distributed lawfully in the United States under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) unless -

(I)

(aa) the drug contains ephedrine or its salts, optical isomers, or salts of optical isomers as the only active medicinal ingredient or contains ephedrine or its salts, optical isomers, or salts of optical isomers and therapeutically insignificant quantities of another active medicinal ingredient; or

(bb) the Attorney General has determined under section 814 of this title that the drug or group of drugs is being diverted to obtain the listed chemical for use in the illicit production of a controlled substance; and

(II) the quantity of ephedrine or other listed chemical contained in the drug included in the transaction or multiple transactions equals or exceeds the threshold established for that chemical by the Attorney General; or

(v) any transaction in a chemical mixture which the Attorney General has by regulation designated as exempt from the application of this subchapter and subchapter II of this chapter based on a finding that the mixture is formulated in such a way that it cannot be easily used in the illicit production of a controlled substance and that the listed chemical or chemicals contained in the mixture cannot be readily recovered; and

(B) a distribution, importation, or exportation of a tableting machine or encapsulating machine.

(40) The term "chemical mixture" means a combination of two or more chemical substances, at least one of which is not a list I chemical or a list II chemical, except that such term does not include any combination of a list I chemical or a list II chemical with another chemical that is present solely as an impurity.

(41)

(A) The term "anabolic steroid" means any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, and corticosteroids) that promotes muscle growth, and includes -

(i) boldenone,

(ii) chlorotestosterone,

(iii) clostebol,

(iv) dehydrochlormethyltestosterone,

(v) dihydrotestosterone,

(vi) drostanolone,

(vii) ethylestrenol,

(viii) fluoxymesterone,

(ix) formebulone,

(x) mesterolone,

(xi) methandienone,

(xii) methandranone,

(xiii) methandriol,

(xiv) methandrostenolone,

(xv) methenolone,

(xvi) methyltestosterone,

(xvii) mibolerone,

(xviii) nandrolone,

(xix) norethandrolone,

(xx) oxandrolone,

(xxi) oxymesterone,

(xxii) oxymetholone,

(xxiii) stanolone,

(xxiv) stanozolol,

(xxv) testolactone,

(xxvi) testosterone,

(xxvii) trenbolone, and (xxviii) any salt, ester, or isomer of a drug or substance described or listed in this paragraph, if that salt, ester, or isomer promotes muscle growth.

(B)

(i) Except as provided in clause (ii), such term does not include an anabolic steroid which is expressly intended for administration through implants to cattle or other nonhuman species and which has been approved by the Secretary of Health and Human Services for such administration.

(ii) If any person prescribes, dispenses, or distributes such steroid for human use, such person shall be considered to have prescribed, dispensed, or distributed an anabolic steroid within the meaning of subparagraph (A).

(42) The term "international transaction" means a transaction involving the shipment of a listed chemical across an international border (other than a United States border) in which a broker or trader located in the United States participates.

(43) The terms "broker" and "trader" mean a person that assists in arranging an international transaction in a listed chemical by -

(A) negotiating contracts;

(B) serving as an agent or intermediary; or

(C) bringing together a buyer and seller, a buyer and transporter, or a seller and transporter.

(43) (FOOTNOTE 3) The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances. (FOOTNOTE 3) So in original. Probably should be "(44)".

§ 803. Repealed.

PART B - AUTHORITY TO CONTROL; STANDARDS AND SCHEDULES

§ 811. Authority and criteria for classification of substances.

(a) Rules and regulations of Attorney General; hearing

The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule -

(1) add to such a schedule or transfer between such schedules any drug or other substance if he -

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of title 5. Proceedings for the issuance, amendment, or repeal of such rules may be

initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

(b) Evaluation of drugs and other substances

The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation and recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a) of this section.

(c) Factors determinative of control or removal from schedules

In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

(d) International treaties, conventions, and protocols requiring control; procedures respecting changes in drug schedules of Convention on Psychotropic Substances

(1) If control is required by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

(2)

(A) Whenever the Secretary of State receives notification from the Secretary-General of the United Nations that information has been transmitted by or to the World Health Organization, pursuant to article 2 of the Convention on Psychotropic Substances, which may justify adding a drug or other substance to one of the schedules of the Convention, transferring a drug or substance from one schedule to another, or deleting it from the schedules, the Secretary of State shall immediately transmit the notice to the Secretary of Health and Human Services who shall publish it in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the scientific and medical evaluations which he is to prepare respecting such drug or substance. The Secretary of Health and Human Services shall prepare for transmission through the Secretary of State to the World Health Organization such medical and scientific evaluations as may be appropriate regarding the possible action that could be proposed by the World Health Organization respecting the drug or substance with respect to which a notice was transmitted under this subparagraph.

(B) Whenever the Secretary of State receives information that the Commission on Narcotic Drugs of the United Nations proposes to decide whether to add a drug or other substance to one of the schedules of the Convention, transfer a drug or substance from one schedule to another, or delete it from the schedules, the Secretary of State shall transmit timely notice to the Secretary of Health and Human Services of such information who shall publish a summary of such information in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the recommendation which he is to furnish,

pursuant to this subparagraph, respecting such proposal. The Secretary of Health and Human Services shall evaluate the proposal and furnish a recommendation to the Secretary of State which shall be binding on the representative of the United States in discussions and negotiations relating to the proposal.

(3) When the United States receives notification of a scheduling decision pursuant to article 2 of the Convention on Psychotropic Substances that a drug or other substance has been added or transferred to a schedule specified in the notification or receives notification (referred to in this subsection as a "schedule notice") that existing legal controls applicable under this subchapter to a drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) do not meet the requirements of the schedule of the Convention in which such drug or substance has been placed, the Secretary of Health and Human Services after consultation with the Attorney General, shall first determine whether existing legal controls under this subchapter applicable to the drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act, meet the requirements of the schedule specified in the notification or schedule notice and shall take the following action:

(A) If such requirements are met by such existing controls but the Secretary of Health and Human Services nonetheless believes that more stringent controls should be applied to the drug or substance, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance, pursuant to subsections (a) and (b) of this section, to apply to such controls.

(B) If such requirements are not met by such existing controls and the Secretary of Health and Human Services concurs in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance under the appropriate schedule pursuant to subsections (a) and (b) of this section.

(C) If such requirements are not met by such existing controls and the Secretary of Health and Human Services does not concur in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall -

(i) if he deems that additional controls are necessary to protect the public health and safety, recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance pursuant to subsections (a) and (b) of this section, to apply such additional controls;

(ii) request the Secretary of State to transmit a notice of qualified acceptance, within the period specified in the Convention, pursuant to paragraph 7 of article 2 of the Convention, to the Secretary-General of the United Nations;

(iii) request the Secretary of State to transmit a notice of qualified acceptance as prescribed in clause (ii) and request the Secretary of State to ask for a review by the Economic and Social Council of the United Nations, in accordance with paragraph 8 of article 2 of the Convention, of the scheduling decision; or

(iv) in the case of a schedule notice, request the Secretary of State to take appropriate action under the Convention to initiate proceedings to remove the drug or substance from the schedules under the Convention or to transfer the drug or substance to a schedule under the Convention different from the one specified in the schedule notice.

(4)

(A) If the Attorney General determines, after consultation with the Secretary of Health and Human Services, that proceedings initiated under recommendations made under paragraph (FOOTNOTE 1)

(B) or (C)(i) of paragraph (3) will not be completed within the time period required by paragraph 7 of article 2 of the Convention, the Attorney General, after consultation with the Secretary and after providing interested persons opportunity to submit comments respecting the requirements of the temporary order to be issued under this sentence, shall issue a temporary order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. In the case of proceedings initiated under subparagraph (B) of paragraph (3), the Attorney General, concurrently with the issuance of such order, shall request the Secretary of State to transmit a notice of qualified acceptance to the Secretary-General of the United Nations pursuant to paragraph 7 of article 2 of the Convention. A temporary order issued under this subparagraph controlling a drug or other substance subject to proceedings initiated under subsections (a) and (b) of this section shall expire upon the effective date of the application to the drug or substance of the controls resulting from such proceedings. (FOOTNOTE 1) So in original. Probably should be "subparagraph".

(B) After a notice of qualified acceptance of a scheduling decision with respect to a drug or other substance is transmitted to the Secretary-General of the United Nations in accordance with clause (ii) or (iii) of paragraph (3)(C) or after a request has been made under clause (iv) of such paragraph with respect to a drug or substance described in a schedule notice, the Attorney General, after consultation with the Secretary of Health and Human Services and after providing interested persons opportunity to submit comments respecting the requirements of the order to be issued under this sentence, shall issue an order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under

paragraph 7 of article 2 of the Convention in the case of a drug or substance for which a notice of qualified acceptance was transmitted or whichever the Attorney General determines is appropriate in the case of a drug or substance described in a schedule notice. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. If, as a result of a review under paragraph 8 of article 2 of the Convention of the scheduling decision with respect to which a notice of qualified acceptance was transmitted in accordance with clause (ii) or (iii) of paragraph (3)(C) -

(i) the decision is reversed, and

(ii) the drug or substance subject to such decision is not required to be controlled under schedule IV or V to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention,

the order issued under this subparagraph with respect to such drug or substance shall expire upon receipt by the United States of the review decision. If, as a result of action taken pursuant to action initiated under a request transmitted under clause (iv) of paragraph (3)(C), the drug or substance with respect to which such action was taken is not required to be controlled under schedule IV or V, the order issued under this paragraph with respect to such drug or substance shall expire upon receipt by the United States of a notice of the action taken with respect to such drug or substance under the Convention.

(C) An order issued under subparagraph (A) or (B) may be issued without regard to the findings required by subsection (a) of this section or by section 812(b) of this title and without regard to the procedures prescribed by subsection (a) or (b) of this section.

(5) Nothing in the amendments made by the Psychotropic Substances Act of 1978 or the regulations or orders promulgated thereunder shall be construed to preclude requests by the Secretary of Health and Human Services or the Attorney General through the Secretary of State, pursuant to article 2 or other applicable provisions of the Convention, for review of scheduling decisions under such Convention, based on new or additional information.

(e) Immediate precursors

The Attorney General may, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section, place an immediate precursor in the same schedule in which the controlled substance of which it is an immediate precursor is placed or in any other schedule with a higher numerical designation. If the Attorney General designates a substance as an immediate precursor and places it in a schedule, other substances shall not be placed in a schedule solely because they are its precursors.

(f) Abuse potential

If, at the time a new-drug application is submitted to the Secretary for any drug having a stimulant, depressant, or hallucinogenic effect on the central nervous system, it appears that such drug has an abuse potential, such information shall be forwarded by the Secretary to the Attorney General.

(g) Exclusion of non-narcotic substances sold over the counter without a prescription; dextromethorphan; exemption of substances lacking abuse potential

(1) The Attorney General shall by regulation exclude any non-narcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), be lawfully sold over the counter without a prescription.

(2) Dextromethorphan shall not be deemed to be included in any schedule by reason of enactment of this subchapter unless controlled after October 27, 1970 pursuant to the foregoing provisions of this section.

(3) The Attorney General may, by regulation, exempt any compound, mixture, or preparation containing a controlled substance from the application of all or any part of this subchapter if he finds such compound, mixture, or preparation meets the requirements of one of the following categories:

(A) A mixture, or preparation containing a nonnarcotic controlled substance, which mixture or preparation is approved for prescription use, and which contains one or more other active ingredients which are not listed in any schedule and which are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse.

(B) A compound, mixture, or preparation which contains any controlled substance, which is not for administration to a human being or animal, and which is packaged in such form or concentration, or with adulterants or denaturants, so that as packaged it does not present any significant potential for abuse.

(h) Temporary scheduling to avoid imminent hazards to public safety

(1) If the Attorney General finds that the scheduling of a substance in schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may, by order and without regard to the requirements of subsection (b) of this section relating to the Secretary of Health and Human Services, schedule such substance in schedule I if the substance is not listed in any other schedule in section 812 of this title or if no exemption or approval is in effect for the substance under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355). Such an order may not be issued before the expiration of thirty days from -

(A) the date of the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order and the grounds upon which such order is to be issued, and

(B) the date the Attorney General has transmitted the notice required by paragraph (4).

(2) The scheduling of a substance under this subsection shall expire at the end of one year from the date of the issuance of the order scheduling such substance, except that the Attorney General may, during the pendency of proceedings under subsection (a)(1) of this section with respect to the substance, extend the temporary scheduling for up to six months.

(3) When issuing an order under paragraph (1), the Attorney General shall be required to consider, with respect to the finding of an imminent hazard to the public safety, only those factors set forth in paragraphs (4), (5), and (6) of subsection (c) of this section, including actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution.

(4) The Attorney General shall transmit notice of an order proposed to be issued under paragraph (1) to the Secretary of Health and Human Services. In issuing an order under paragraph (1), the Attorney General shall take into consideration any comments submitted by the Secretary in response to a notice transmitted pursuant to this paragraph.

(5) An order issued under paragraph (1) with respect to a substance shall be vacated upon the conclusion of a subsequent rulemaking proceeding initiated under subsection (a) of this section with respect to such substance.

(6) An order issued under paragraph (1) is not subject to judicial review.

§ 812. Schedules of controlled substances.

(a) Establishment

There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970, and shall be updated and republished on an annual basis thereafter.

(b) Placement on schedules; findings required

Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I. -

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II. -

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III. -

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV. -

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V. -

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

(c) Initial schedules of controlled substances

Schedules I, II, III, IV, and V shall, unless and until amended (FOOTNOTE 1) pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated: (FOOTNOTE 1) Revised schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs.

SCHEDULE I

(a) Opiates

Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Acetylmethadol.

(2) Allylprodine.

(3) Alphacetylmathadol. (FOOTNOTE 2) (FOOTNOTE 2) So in original. Probably should be "Alphacetylmethadol."

(4) Alphameprodine.

(5) Alphamethadol.

(6) Benzethidine.

(7) Betacetylmethadol.

(8) Betameprodine.

(9) Betamethadol.

(10) Betaprodine.

(11) Clonitazene.

(12) Dextromoramide.

(13) Dextrorphan.

(14) Diampromide.

(15) Diethylthiambutene.

(16) Dimenoxadol.

(17) Dimepheptanol.

(18) Dimethylthiambutene.

(19) Dioxaphetyl butyrate.

(20) Dipipanone.

(21) Ethylmethylthiambutene.

(22) Etonitazene.

(23) Etoxeridine.

(24) Furethidine.

(25) Hydroxypethidine.

(26) Ketobemidone.

(27) Levomoramide.

(28) Levophenacylmorphan.

(29) Morpheridine.

(30) Noracymethadol.

(31) Norlevorphanol.

(32) Normethadone.

(33) Norpipanone.

(34) Phenadoxone.

(35) Phenampromide.

(36) Phenomorphan.

(37) Phenoperidine.

(38) Piritramide.

(39) Propheptazine.

(40) Properidine.

(41) Racemoramide.

(42) Trimeperidine.

(b) Opium Derivatives

Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salt of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine.

(2) Acetyldihydrocodeine.

(3) Benzylmorphine.

(4) Codeine methylbromide.

(5) Codeine-N-Oxide.

(6) Cyprenorphine.

(7) Desomorphine.

(8) Dihydromorphine.

(9) Etorphine.

(10) Heroin.

(11) Hydromorphinol.

(12) Methyldesorphine.

(13) Methylhydromorphine.

(14) Morphine methylbromide.

(15) Morphine methylsulfonate.

(16) Morphine-N-Oxide.

(17) Myrophine.

(18) Nicocodeine.

(19) Nicomorphine.

(20) Normorphine.

(21) Pholcodine.

(22) Thebacon.

(c) Hallucinogenic Substances

Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) 3,4-methylenedioxy amphetamine.

(2) 5-methoxy-3,4-methylenedioxy amphetamine.

(3) 3,4,5-trimethoxy amphetamine.

(4) Bufotenine.

(5) Diethyltryptamine.

(6) Dimethyltryptamine.

(7) 4-methyl-2,5-diamethoxyamphetamine.

(8) Ibogaine.

(9) Lysergic acid diethylamide.

(10) Marihuana.

(11) Mescaline.

(12) Peyote.

(13) N-ethyl-3-piperidyl benzilate.

(14) N-methyl-3-piperidyl benzilate.

(15) Psilocybin.

(16) Psilocyn.

(17) Tetrahydrocannabinols.

SCHEDULE II

(a)

Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) coca (FOOTNOTE 3) leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph. (FOOTNOTE 3) So in original. Probably should be capitalized.

(b) Opiates

Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine.

(2) Anileridine.

(3) Bezitramide.

(4) Dihydrocodeine.

(5) Diphenoxylate.

(6) Fentanyl.

(7) Isomethadone.

(8) Levomethorphan.

(9) Levorphanol.

(10) Metazocine.

(11) Methadone.

(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane.

(13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.

(14) Pethidine.

(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.

(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.

(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.

(18) Phenazocine.

(19) Piminodine.

(20) Racemethorphan.

(21) Racemorphan.

(c) Methamphetamine

Unless specifically excepted or unless listed in another schedule, any injectable liquid which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

SCHEDULE III

(a) Stimulants

Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.

(2) Phenmetrazine and its salts.

(3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

(4) Methylphenidate.

(b) Depressants

Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.

(2) Chorhexadol.

(3) Glutehimide.

(4) Lysergic acid.

(5) Lysergic acid amide.

(6) Methyprylon.

(7) Phencyclidine.

(8) Sulfondiethylmethane.

(9) Sulfonethylmethane.

(10) Sulfonmethane.

(c) Nalorphine.

(d) Narcotic Drug

Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.

(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts.

(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.

(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(e) Anabolic steroids.

SCHEDULE IV

(1) Barbital.

(2) Chloral betaine.

(3) Chloral hydrate.

(4) Ethchlorvynol.

(5) Ethinamate.

(6) Methohexital.

(7) Meprobamate.

(8) Methylphenobarbital.

(9) Paraldehyde.

(10) Petrichloral.

(11) Phenobarbital.

SCHEDULE V

Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.

(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.

(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

§ 813. Treatment of controlled substance analogues.

A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.

§ 814. Removal of exemption of certain drugs.

(a) Removal of exemption

The Attorney General shall by regulation remove from exemption under section 802(39)(A)(iv) of this title a drug or group of drugs that the Attorney General finds is being diverted to obtain a listed chemical for use in the illicit production of a controlled substance.

(b) Factors to be considered

In removing a drug or group of drugs from exemption under subsection (a) of this section, the Attorney General shall consider, with respect to a drug or group of drugs that is proposed to be removed from exemption -

(1) the scope, duration, and significance of the diversion;

(2) whether the drug or group of drugs is formulated in such a way that it cannot be easily used in the illicit production of a controlled substance; and

(3) whether the listed chemical can be readily recovered from the drug or group of drugs.

(c) Specificity of designation

The Attorney General shall limit the designation of a drug or a group of drugs removed from exemption under subsection (a) of this section to the most particularly identifiable type of drug or group of drugs for which evidence of diversion exists unless there is evidence, based on the pattern of diversion and other relevant factors, that the diversion will not be limited to that particular drug or group of drugs.

(d) Reinstatement of exemption with respect to particular drug products

(1) Reinstatement On application by a manufacturer of a particular drug product that has been removed from exemption under subsection (a) of this section, the Attorney General shall by regulation reinstate the exemption with respect to that particular drug product if the Attorney General determines that the particular drug product is manufactured and distributed in a manner that prevents diversion.

(2) Factors to be considered In deciding whether to reinstate the exemption with respect to a particular drug product under paragraph (1), the Attorney General shall consider -

(A) the package sizes and manner of packaging of the drug product;

(B) the manner of distribution and advertising of the drug product;

(C) evidence of diversion of the drug product;

(D) any actions taken by the manufacturer to prevent diversion of the drug product; and

(E) such other factors as are relevant to and consistent with the public health and safety, including the factors described in subsection (b) of this section as applied to the drug product.

(3) Status pending application for reinstatement A transaction involving a particular drug product that is the subject of a bona fide pending application for reinstatement of exemption filed with the Attorney General not later than 60 days after a regulation removing the exemption is issued pursuant to subsection (a) of this section shall not be considered to be a regulated transaction if the transaction occurs during the pendency of the application and, if the Attorney General denies the application, during the period of 60 days following the date on which the Attorney General denies the application, unless -

(A) the Attorney General has evidence that, applying the factors described in subsection (b) of this section to the drug product, the drug product is being diverted; and

(B) the Attorney General so notifies the applicant.

(4) Amendment and modification A regulation reinstating an exemption under paragraph (1) may be modified or revoked with respect to a particular drug product upon a finding that -

(A) applying the factors described in subsection (b) of this section to the drug product, the drug product is being diverted; or

(B) there is a significant change in the data that led to the issuance of the regulation.

Return to top

PART C - REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, AND DISPENSERS OF CONTROLLED SUBSTANCES

§ 821. Rules and regulations.

The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances and to the registration and control of regulated persons and of regulated transactions.

§ 822. Persons required to register.

(a) Period of registration

(1) Every person who manufactures or distributes any controlled substance or list I chemical, or who proposes to engage in the manufacture or distribution of any controlled substance or list I chemical, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.

(2) Every person who dispenses, or who proposes to dispense, any controlled substance, shall obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him. The Attorney General shall, by regulation, determine the period of such registrations. In no event, however, shall such registrations be issued for less than one year nor for more than three years.

(b) Authorized activities

Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances or list I chemicals are authorized to possess, manufacture, distribute, or dispense such substances or chemicals (including any such activity in the conduct of research) to the extent authorized by their registration and in conformity with the other provisions of this subchapter.

(c) Exceptions

The following persons shall not be required to register and may lawfully possess any controlled substance or list I chemical under this subchapter:

(1) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled substance or list I chemical if such agent or employee is acting in the usual course of his business or employment.

(2) A common or contract carrier or warehouseman, or an employee thereof, whose possession of the controlled substance or list I chemical is in the usual course of his business or employment.

(3) An ultimate user who possesses such substance for a purpose specified in section 802(25) (FOOTNOTE 1) of this title.

(FOOTNOTE 1) Section 802(25) of this title, referred to in subsec. (c)(3), was redesignated section 802(26) of this title by Pub. L. 98-473, title II, Sec. 507(a), Oct. 12, 1984, 98 Stat. 2071, and was further redesignated section 802(27) of this title by Pub. L. 99-570, title I, Sec. 1003(b)(2), Oct. 27, 1986, 100 Stat. 3207-6.

(d) Waiver

The Attorney General may, by regulation, waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety.

(e) Separate registration

A separate registration shall be required at each principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances or list I chemicals.

(f) Inspection

The Attorney General is authorized to inspect the establishment of a registrant or applicant for registration in accordance with the rules and regulations promulgated by him.

§ 823. Registration requirements.

(a) Manufacturers of controlled substances in schedule I or II

The Attorney General shall register an applicant to manufacture controlled substances in schedule I or II if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule I or II compounded therefrom into other than legitimate medical, scientific, research, or industrial channels, by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes;

(2) compliance with applicable State and local law;

(3) promotion of technical advances in the art of manufacturing these substances and the development of new substances;

(4) prior conviction record of applicant under Federal and State laws relating to the manufacture, distribution, or dispensing of such substances;

(5) past experience in the manufacture of controlled substances, and the existence in the establishment of effective control against diversion; and

(6) such other factors as may be relevant to and consistent with the public health and safety.

(b) Distributors of controlled substances in schedule I or II

The Attorney General shall register an applicant to distribute a controlled substance in schedule I or II unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective control against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels;

(2) compliance with applicable State and local law;

(3) prior conviction record of applicant under Federal or State laws relating to the manufacture, distribution, or dispensing of such substances;

(4) past experience in the distribution of controlled substances; and

(5) such other factors as may be relevant to and consistent with the public health and safety.

(c) Limits of authorized activities

Registration granted under subsections (a) and (b) of this section shall not entitle a registrant to (1) manufacture or distribute controlled substances in schedule I or II other than those specified in the registration, or (2) manufacture any quantity of those controlled substances in excess of the quota assigned pursuant to section 826 of this title.

(d) Manufacturers of controlled substances in schedule III, IV, or V

The Attorney General shall register an applicant to manufacture controlled substances in schedule III, IV, or V, unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule III, IV, or V compounded therefrom into other than legitimate medical, scientific, or industrial channels;

(2) compliance with applicable State and local law;

(3) promotion of technical advances in the art of manufacturing these substances and the development of new substances;

(4) prior conviction record of applicant under Federal or State laws relating to the manufacture, distribution, or dispensing of such substances;

(5) past experience in the manufacture, distribution, and dispensing of controlled substances, and the existence in the establishment of effective controls against diversion; and

(6) such other factors as may be relevant to and consistent with the public health and safety.

(e) Distributors of controlled substances in schedule III, IV, or V

The Attorney General shall register an applicant to distribute controlled substances in schedule III, IV, or V, unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels;

(2) compliance with applicable State and local law;

(3) prior conviction record of applicant under Federal or State laws relating to the manufacture, distribution, or dispensing of such substances;

(4) past experience in the distribution of controlled substances; and

(5) such other factors as may be relevant to and consistent with the public health and safety.

(f) Research by practitioners; pharmacies; research applications; construction of Article 7 of the Convention on Psychotropic Substances

The Attorney General shall register practitioners (including pharmacies, as distinguished from pharmacists) to dispense, or conduct research with, controlled substances in schedule II, III, IV, or V, if the applicant is authorized to dispense, or conduct research with respect to, controlled substances under the laws of the State in which he practices. The Attorney General may deny an application for such registration if he determines that the issuance of such registration would be inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Separate registration under this part for practitioners engaging in research with controlled substances in schedule II, III, IV, or V, who are already registered under this part in another capacity, shall not be required. Registration applications by practitioners wishing to conduct research with controlled substances in schedule I shall be referred to the Secretary, who shall determine the qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol. The Secretary, in determining the merits of each research protocol, shall consult with the Attorney General as to effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use. Registration for the purpose of bona fide research with controlled substances in schedule I by a practitioner deemed qualified by the Secretary may be denied by the Attorney General only on a ground specified in section 824(a) of this title. Article 7 of the Convention on Psychotropic Substances shall not be construed to prohibit, or impose additional restrictions upon, research involving drugs or other substances scheduled under the convention which is conducted in conformity with this subsection and other applicable provisions of this subchapter.

(g) Practitioners dispensing narcotic drugs for narcotic treatment; annual registration; separate registration; qualifications

Practitioners who dispense narcotic drugs to individuals for maintenance treatment or detoxification treatment shall obtain annually a separate registration for that purpose. The Attorney General shall register an applicant to dispense narcotic drugs to individuals for maintenance treatment or detoxification treatment (or both)

(1) if the applicant is a practitioner who is determined by the Secretary to be qualified (under standards established by the Secretary) to engage in the treatment with respect to which registration is sought;

(2) if the Attorney General determines that the applicant will comply with standards established by the Attorney General respecting (A) security of stocks of narcotic drugs for such treatment, and (B) the maintenance of records (in accordance with section 827 of this title) on such drugs; and

(3) if the Secretary determines that the applicant will comply with standards established by the Secretary (after consultation with the Attorney General) respecting the quantities of narcotic drugs which may be provided for unsupervised use by individuals in such treatment.

(h) Applicants for distribution of list I chemicals

The Attorney General shall register an applicant to distribute a list I chemical unless the Attorney General determines that registration of the applicant is inconsistent with the public interest. Registration under this subsection shall not be required for the distribution of a drug product that is exempted under section 802(39)(A)(iv) of this title. In determining the public interest for the purposes of this subsection, the Attorney General shall consider -

(1) maintenance by the applicant of effective controls against diversion of listed chemicals into other than legitimate channels;

(2) compliance by the applicant with applicable Federal, State, and local law;

(3) any prior conviction record of the applicant under Federal or State laws relating to controlled substances or to chemicals controlled under Federal or State law;

(4) any past experience of the applicant in the manufacture and distribution of chemicals; and

(5) such other factors as are relevant to and consistent with the public health and safety.

§ 824. Denial, revocation, or suspension of registration.

(a) Grounds

A registration pursuant to section 823 of this title to manufacture, distribute, or dispense a controlled substance or a list I chemical may be suspended or revoked by the Attorney General upon a finding that the registrant -

(1) has materially falsified any application filed pursuant to or required by this subchapter or subchapter II of this chapter;

(2) has been convicted of a felony under this subchapter or subchapter II of this chapter or any other law of the United States, or of any State, relating to any substance defined in this subchapter as a controlled substance or a list I chemical;

(3) has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances or list I chemicals or has had the suspension, revocation, or denial of his registration recommended by competent State authority;

(4) has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section; or

(5) has been excluded (or directed to be excluded) from participation in a program pursuant to section 1320a-7(a) of title 42.

A registration pursuant to section 823(g) of this title to dispense a narcotic drug for maintenance treatment or detoxification treatment may be suspended or revoked by the Attorney General upon a finding that the registrant has failed to comply with any standard referred to in section 823(g) of this title.

(b) Limits of revocation or suspension

The Attorney General may limit revocation or suspension of a registration to the particular controlled substance or list I chemical with respect to which grounds for revocation or suspension exist.

(c) Service of show cause order; proceedings

Before taking action pursuant to this section, or pursuant to a denial of registration under section 823 of this title, the Attorney General shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, or suspended. The order to show cause shall contain a statement of the basis thereof and shall call upon the applicant or registrant to appear before the Attorney General at a time and place stated in the order, but in no event less than thirty days after the date of receipt of the order. Proceedings to deny, revoke, or suspend shall be conducted pursuant to this section in accordance with subchapter II of chapter 5 of title 5. Such proceedings shall be independent of, and not in lieu of, criminal prosecutions or other proceedings under this subchapter or any other law of the United States.

(d) Suspension of registration in cases of imminent danger

The Attorney General may, in his discretion, suspend any registration simultaneously with the institution of proceedings under this section, in cases where he finds that there is an imminent danger to the public health or safety. A failure to comply with a standard referred to in section 823(g) of this title may be treated under this subsection as grounds for immediate suspension of a registration granted under such section. A suspension under this subsection shall continue in effect until the conclusion of such proceedings, including judicial review thereof, unless sooner withdrawn by the Attorney General or dissolved by a court of competent jurisdiction.

(e) Suspension and revocation of quotas

The suspension or revocation of a registration under this section shall operate to suspend or revoke any quota applicable under section 826 of this title.

(f) Disposition of controlled substances or list I chemicals

In the event the Attorney General suspends or revokes a registration granted under section 823 of this title, all controlled substances or list I chemicals owned or possessed by the registrant pursuant to such registration at the time of suspension or the effective date of the revocation order, as the case may be, may, in the discretion of the Attorney General, be placed under seal.

No disposition may be made of any controlled substances or list I chemicals under seal until the time for taking an appeal has elapsed or until all appeals have been concluded except that a court, upon application therefor, may at any time order the sale of perishable controlled substances or list I chemicals. Any such order shall require the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all such controlled substances or list I chemicals (or proceeds of sale deposited in court) shall be forfeited to the United States; and the Attorney General shall dispose of such controlled substances or list I chemicals in accordance with section 881(e) of this title. All right, title, and interest in such controlled substances or list I chemicals shall vest in the United States upon a revocation order becoming final.

(g) Seizure or placement under seal of controlled substances or list I chemicals

The Attorney General may, in his discretion, seize or place under seal any controlled substances or list I chemicals owned or possessed by a registrant whose registration has expired or who has ceased to practice or do business in the manner contemplated by his registration. Such controlled substances or list I chemicals shall be held for the benefit of the registrant, or his successor in interest. The Attorney General shall notify a registrant, or his successor in interest, who has any controlled substance or list I chemical seized or placed under seal of the procedures to be followed to secure the return of the controlled substance or list I chemical and the conditions under which it will be returned. The Attorney General may not dispose of any controlled substance or list I chemical seized or placed under seal under this subsection until the expiration of one hundred and eighty days from the date such substance or chemical was seized or placed under seal.

§ 825. Labeling and packaging.

(a) Symbol

It shall be unlawful to distribute a controlled substance in a commercial container unless such container, when and as required by regulations of the Attorney General, bears a label (as defined in section 321(k) of this title) containing an identifying symbol for such substance in accordance with such regulations. A different symbol shall be required for each schedule of controlled substances.

(b) Unlawful distribution without identifying symbol

It shall be unlawful for the manufacturer of any controlled substance to distribute such substance unless the labeling (as defined in section 321(m) of this title) of such substance contains, when and as required by regulations of the Attorney General, the identifying symbol required under subsection (a) of this section.

(c) Warning on label

The Secretary shall prescribe regulations under section 353(b) of this title which shall provide that the label of a drug listed in schedule II, III, or IV shall, when dispensed to or for a patient, contain a clear, concise warning that it is a crime to transfer the drug to any person other than the patient.

(d) Containers to be securely sealed

It shall be unlawful to distribute controlled substances in schedule I or II, and narcotic drugs in schedule III or IV, unless the bottle or other container, stopper, covering, or wrapper thereof is securely sealed as required by regulations of the Attorney General.

§ 826. Production quotas for controlled substances.

(a) Establishment of total annual needs

The Attorney General shall determine the total quantity and establish production quotas for each basic class of controlled substance in schedules I and II to be manufactured each calendar year to provide for the estimated medical, scientific, research, and industrial needs of the United States, for lawful export requirements, and for the establishment and maintenance of reserve stocks. Production quotas shall be established in terms of quantities of each basic class of controlled

substance and not in terms of individual pharmaceutical dosage forms prepared from or containing such a controlled substance.

(b) Individual production quotas; revised quotas

The Attorney General shall limit or reduce individual production quotas to the extent necessary to prevent the aggregate of individual quotas from exceeding the amount determined necessary each year by the Attorney General under subsection (a) of this section. The quota of each registered manufacturer for each basic class of controlled substance in schedule I or II shall be revised in the same proportion as the limitation or reduction of the aggregate of the quotas. However, if any registrant, before the issuance of a limitation or reduction in quota, has manufactured in excess of his revised quota, the amount of the excess shall be subtracted from his quota for the following year.

(c) Manufacturing quotas for registered manufacturers

On or before October 1 of each year, upon application therefor by a registered manufacturer, the Attorney General shall fix a manufacturing quota for the basic classes of controlled substances in schedules I and II that the manufacturer seeks to produce. The quota shall be subject to the provisions of subsections (a) and (b) of this section. In fixing such quotas, the Attorney General shall determine the manufacturer's estimated disposal, inventory, and other requirements for the calendar year; and, in making his determination, the Attorney General shall consider the manufacturer's current rate of disposal, the trend of the national disposal rate during the preceding calendar year, the manufacturer's production cycle and inventory position, the economic availability of raw materials, yield and stability problems, emergencies such as strikes and fires, and other factors.

(d) Quotas for registrants who have not manufactured controlled substance during one or more preceding years

The Attorney General shall, upon application and subject to the provisions of subsections (a) and (b) of this section, fix a quota for a basic class of controlled substance in schedule I or II for any registrant who has not manufactured that basic class of controlled substance during one or more

preceding calendar years. In fixing such quota, the Attorney General shall take into account the registrant's reasonably anticipated requirements for the current year; and, in making his determination of such requirements, he shall consider such factors specified in subsection (c) of this section as may be relevant.

(e) Quota increases

At any time during the year any registrant who has applied for or received a manufacturing quota for a basic class of controlled substance in schedule I or II may apply for an increase in that quota to meet his estimated disposal, inventory, and other requirements during the remainder of that year. In passing upon the application the Attorney General shall take into consideration any occurrences since the filing of the registrant's initial quota application that may require an increased manufacturing rate by the registrant during the balance of the year. In passing upon the application the Attorney General may also take into account the amount, if any, by which the determination of the Attorney General under subsection (a) of this section exceeds the aggregate of the quotas of all registrants under this section.

(f) Incidental production exception

Notwithstanding any other provisions of this subchapter, no registration or quota may be required for the manufacture of such quantities of controlled substances in schedules I and II as incidentally and necessarily result from the manufacturing process used for the manufacture of a controlled substance with respect to which its manufacturer is duly registered under this subchapter. The Attorney General may, by regulation, prescribe restrictions on the retention and disposal of such incidentally produced substances.

§ 827. Records and reports of registrants.

(a) Inventory

Except as provided in subsection (c) of this section -

(1) every registrant under this subchapter shall, on May 1, 1971, or as soon thereafter as such registrant first engages in the manufacture, distribution, or dispensing of controlled substances, and every second year thereafter, make a complete and accurate record of all stocks thereof on hand, except that the regulations prescribed under this section shall permit each such biennial inventory (following the initial inventory required by this paragraph) to be prepared on such registrant's regular general physical inventory date (if any) which is nearest to and does not vary by more than six months from the biennial date that would otherwise apply;

(2) on the effective date of each regulation of the Attorney General controlling a substance that immediately prior to such date was not a controlled substance, each registrant under this subchapter manufacturing, distributing, or dispensing such substance shall make a complete and accurate record of all stocks thereof on hand; and

(3) on and after May 1, 1971, every registrant under this subchapter manufacturing, distributing, or dispensing a controlled substance or substances shall maintain, on a current basis, a complete and accurate record of each such substance manufactured, received, sold, delivered, or otherwise disposed of by him, except that this paragraph shall not require the maintenance of a perpetual inventory.

(b) Availability of records

Every inventory or other record required under this section (1) shall be in accordance with, and contain such relevant information as may be required by, regulations of the Attorney General, (2) shall (A) be maintained separately from all other records of the registrant, or (B) alternatively, in the case of nonnarcotic controlled substances, be in such form that information required by the Attorney General is readily retrievable from the ordinary business records of the registrant, and (3) shall be kept and be available, for at least two years, for inspection and copying by officers or employees of the United States authorized by the Attorney General.

(c) Nonapplicability

The foregoing provisions of this section shall not apply -

(1)

(A) to the prescribing of controlled substances in schedule II, III, IV, or V by practitioners acting in the lawful course of their professional practice unless such substance is prescribed in the course of maintenance or detoxification treatment of an individual; or

(B) to the administering of a controlled substance in schedule II, III, IV, or V unless the practitioner regularly engages in the dispensing or administering of controlled substances and charges his patients, either separately or together with charges for other professional services, for substances so dispensed or administered or unless such substance is administered in the course of maintenance treatment or detoxification treatment of an individual;

(2)

(A) to the use of controlled substances, at establishments registered under this subchapter which keep records with respect to such substances, in research conducted in conformity with an exemption granted under section 355(i) or 360b(j) of this title;

(B) to the use of controlled substances, at establishments registered under this subchapter which keep records with respect to such substances, in preclinical research or in teaching; or

(3) to the extent of any exemption granted to any person, with respect to all or part of such provisions, by the Attorney General by or pursuant to regulation on the basis of a finding that the application of such provisions (or part thereof) to such person is not necessary for carrying out the purposes of this subchapter. Nothing in the Convention on Psychotropic Substances shall be construed as superseding or otherwise affecting the provisions of paragraph (1)(B), (2), or (3) of this subsection.

(d) Periodic reports to Attorney General

Every manufacturer registered under section 823 of this title shall, at such time or times and in such form as the Attorney General may require, make periodic reports to the Attorney General of every sale, delivery or other disposal by him of any controlled substance, and each distributor shall make such reports with respect to narcotic controlled substances, identifying by the registration number assigned under this subchapter the person or establishment (unless exempt from registration under section 822(d) of this title) to whom such sale, delivery, or other disposal was made.

(e) Reporting and recordkeeping requirements of drug conventions

In addition to the reporting and recordkeeping requirements under any other provision of this subchapter, each manufacturer registered under section 823 of this title shall, with respect to narcotic and nonnarcotic controlled substances manufactured by it, make such reports to the Attorney General, and maintain such records, as the Attorney General may require to enable the United States to meet its obligations under articles 19 and 20 of the Single Convention on Narcotic Drugs and article 16 of the Convention on Psychotropic Substances. The Attorney General shall administer the requirements of this subsection in such a manner as to avoid the unnecessary imposition of duplicative requirements under this subchapter on manufacturers subject to the requirements of this subsection.

(f) Investigational uses of drugs; procedures

Regulations under sections 355(i) and 360(j) of this title, relating to investigational use of drugs, shall include such procedures as the Secretary, after consultation with the Attorney General, determines are necessary to insure the security and accountability of controlled substances used in research to which such regulations apply.

(g) Change of address

Every registrant under this subchapter shall be required to report any change of professional or business address in such manner as the Attorney General shall by regulation require.

§ 828. Order forms.

(a) Unlawful distribution of controlled substances

It shall be unlawful for any person to distribute a controlled substance in schedule I or II to another except in pursuance of a written order of the person to whom such substance is distributed, made on a form to be issued by the Attorney General in blank in accordance with subsection (d) of this section and regulations prescribed by him pursuant to this section.

(b) Nonapplicability of provisions

Nothing in subsection (a) of this section shall apply to -

(1) the exportation of such substances from the United States in conformity with subchapter II of this chapter;

(2) the delivery of such a substance to or by a common or contract carrier for carriage in the lawful and usual course of its business, or to or by a warehouseman for storage in the lawful and usual course of its business; but where such carriage or storage is in connection with the distribution by the owner of the substance to a third person, this paragraph shall not relieve the distributor from compliance with subsection (a) of this section.

(c) Preservation and availability

(1) Every person who in pursuance of an order required under subsection (a) of this section distributes a controlled substance shall preserve such order for a period of two years, and shall make such order available for inspection and copying by officers and employees of the United States duly authorized for that purpose by the Attorney General, and by officers or employees of States or their political subdivisions who are charged with the enforcement of State or local laws regulating the production, or regulating the distribution or dispensing, of controlled substances and who are authorized under such laws to inspect such orders.

(2) Every person who gives an order required under subsection (a) of this section shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued by the Attorney General in blank in accordance with subsection (d) of this section and regulations prescribed by him pursuant to this section, and shall, if such order is accepted, preserve such duplicate for a period of two years and make it available for inspection and copying by the officers and employees mentioned in paragraph (1) of this subsection.

(d) Issuance

(1) The Attorney General shall issue forms pursuant to subsections (a) and (c)(2) of this section only to persons validly registered under section 823 of this title (or exempted from registration under section 822(d) of this title). Whenever any such form is issued to a person, the

Attorney General shall, before delivery thereof, insert therein the name of such person, and it shall be unlawful for any other person (A) to use such form for the purpose of obtaining controlled substances or (B) to furnish such form to any person with intent thereby to procure the distribution of such substances.

(2) The Attorney General may charge reasonable fees for the issuance of such forms in such amounts as he may prescribe for the purpose of covering the cost to the United States of issuing such forms, and other necessary activities in connection therewith.

(e) Unlawful acts

It shall be unlawful for any person to obtain by means of order forms issued under this section controlled substances for any purpose other than their use, distribution, dispensing, or administration in the conduct of a lawful business in such substances or in the course of his professional practice or research.

§ 829. Prescriptions.

(a) Schedule II substances

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 503(b) of that Act (21 U.S.C. 353(b)). Prescriptions shall be retained in conformity with the requirements of section 827 of this title. No prescription for a controlled substance in schedule II may be refilled.

(b) Schedule III and IV substances

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act (21 U.S.C. 353(b)). Such prescriptions may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner.

(c) Schedule V substances

No controlled substance in schedule V which is a drug may be distributed or dispensed other than for a medical purpose.

(d) Non-prescription drugs with abuse potential

Whenever it appears to the Attorney General that a drug not considered to be a prescription drug under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) should be so considered because of its abuse potential, he shall so advise the Secretary and furnish to him all available data relevant thereto.

§ 830. Regulation of listed chemicals and certain machines.

(a) Record of regulated transactions

(1) Each regulated person who engages in a regulated transaction involving a listed chemical, a tableting machine, or an encapsulating machine shall keep a record of the transaction -

(A) for 4 years after the date of the transaction, if the listed chemical is a list I chemical or if the transaction involves a tableting machine or an encapsulating machine; and

(B) for 2 years after the date of the transaction, if the listed chemical is a list II chemical.

(2) A record under this subsection shall be retrievable and shall include the date of the regulated transaction, the identity of each party to the regulated transaction, a statement of the

quantity and form of the listed chemical, a description of the tableting machine or encapsulating machine, and a description of the method of transfer. Such record shall be available for inspection and copying by the Attorney General.

(3) It is the duty of each regulated person who engages in a regulated transaction to identify each other party to the transaction. It is the duty of such other party to present proof of identity to the regulated person. The Attorney General shall specify by regulation the types of documents and other evidence that constitute proof of identity for purposes of this paragraph.

(b) Reports to Attorney General

(1) Each regulated person shall report to the Attorney General, in such form and manner as the Attorney General shall prescribe by regulation -

(A) any regulated transaction involving an extraordinary quantity of a listed chemical, an uncommon method of payment or delivery, or any other circumstance that the regulated person believes may indicate that the listed chemical will be used in violation of this subchapter;

(B) any proposed regulated transaction with a person whose description or other identifying characteristic the Attorney General furnishes in advance to the regulated person;

(C) any unusual or excessive loss or disappearance of a listed chemical under the control of the regulated person; and

(D) any regulated transaction in a tableting machine or an encapsulating machine.

Each report under subparagraph (A) shall be made at the earliest practicable opportunity after the regulated person becomes aware of the circumstance involved. A regulated person may not complete a transaction with a person whose description or identifying characteristic is furnished to the regulated person under subparagraph (B) unless the transaction is approved by the Attorney General. The Attorney General shall make available to regulated persons guidance documents describing transactions and circumstances for which reports are required under subparagraph (A) and subparagraph (C).

(2) A regulated person that manufactures a listed chemical shall report annually to the Attorney General, in such form and manner and containing such specific data as the Attorney General shall prescribe by regulation, information concerning listed chemicals manufactured by the person. The requirement of the preceding sentence shall not apply to the manufacture of a drug product that is exempted under section 802(39)(A)(iv) of this title.

(c) Confidentiality of information obtained by Attorney General; non-disclosure; exceptions

(1) Except as provided in paragraph (2), any information obtained by the Attorney General under this section which is exempt from disclosure under section 552(a) of title 5, by reason of section 552(b)(4) of such title, is confidential and may not be disclosed to any person.

(2) Information referred to in paragraph (1) may be disclosed only -

(A) to an officer or employee of the United States engaged in carrying out this subchapter, subchapter II of this chapter, or the customs laws;

(B) when relevant in any investigation or proceeding for the enforcement of this subchapter, subchapter II of this chapter, or the customs laws;

(C) when necessary to comply with an obligation of the United States under a treaty or other international agreement; or

(D) to a State or local official or employee in conjunction with the enforcement of controlled substances laws or chemical control laws.

(3) The Attorney General shall -

(A) take such action as may be necessary to prevent unauthorized disclosure of information by any person to whom such information is disclosed under paragraph (2); and

(B) issue guidelines that limit, to the maximum extent feasible, the disclosure of proprietary business information, including the names or identities of United States exporters of listed chemicals, to any person to whom such information is disclosed under paragraph (2).

(4) Any person who is aggrieved by a disclosure of information in violation of this section may bring a civil action against the violator for appropriate relief.

(5) Notwithstanding paragraph (4), a civil action may not be brought under such paragraph against investigative or law enforcement personnel of the Drug Enforcement Administration.

Return to top

PART D - OFFENSES AND PENALTIES

§ 841. Prohibited acts A.

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A) In the case of a violation of subsection (a) of this section involving -

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of -

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- (1- (2-phenylethyl) -4-piperidinyl) propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-pheny propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 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 10 years in addition to such term of imprisonment. Notwithstanding any other

provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving -

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of -

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- (1- (2-phenylethyl) -4-piperidinyl) propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-pheny propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 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 3 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 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of 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 any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 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 a prior conviction for a felony drug offense has 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 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.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 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 of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter 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 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 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 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.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an

individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter 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 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed -

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use -

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(c) Repealed. Pub. L. 98-473, title II, Sec. 224(a)(2), formerly Sec. 224(a)(6), Oct. 12, 1984, 98 Stat. 2030, as renumbered by Pub. L. 99-570, title I, Sec. 1005(a)(2), Oct. 27, 1986, 100 Stat. 3207-6

(d) Offenses involving listed chemicals

Any person who knowingly or intentionally -

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required; shall be fined in accordance with title 18 or imprisoned not more than 10 years, or both.

(e) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(f) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, or importation of a listed chemical may be enjoined

from engaging in any regulated transaction involving a listed chemical for not more than ten years.

(g) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.

§ 842. Prohibited acts B.

(a) Unlawful acts

It shall be unlawful for any person -

(1) who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 829 of this title;

(2) who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration;

(3) who is a registrant to distribute a controlled substance in violation of section 825 of this title;

(4) to remove, alter, or obliterate a symbol or label required by section 825 of this title;

(5) to refuse or fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required under this subchapter or subchapter II of this chapter;

(6) to refuse any entry into any premises or inspection authorized by this subchapter or subchapter II of this chapter;

(7) to remove, break, injure, or deface a seal placed upon controlled substances pursuant to section 824(f) or 881 of this title or to remove or dispose of substances so placed under seal;

(8) to use, to his own advantage, or to reveal, other than to duly authorized officers or employees of the United States, or to the courts when relevant in any judicial proceeding under this subchapter or subchapter II of this chapter, any information acquired in the course of an inspection authorized by this subchapter concerning any method or process which as a trade secret is entitled to protection, or to use to his own advantage or reveal (other than as authorized by section 830 of this title) any information that is confidential under such section;

(9) who is a regulated person to engage in a regulated transaction without obtaining the identification required by 830(a)(3) of this title; or

(10) to fail to keep a record or make a report under section 830 of this title.

(b) Manufacture

It shall be unlawful for any person who is a registrant to manufacture a controlled substance in schedule I or II which is -

(1) not expressly authorized by his registration and by a quota assigned to him pursuant to section 826 of this title; or

(2) in excess of a quota assigned to him pursuant to section 826 of this title.

(c) Penalties

(1) Except as provided in paragraph (2), any person who violates this section shall, with respect to any such violation, be subject to a civil penalty of not more than $25,000. The district courts of the United States (or, where there is no such court in the case of any territory or possession of the United States, then the court in such territory or possession having the jurisdiction of a district court of the United States in cases arising under the Constitution and laws of the United States) shall have jurisdiction in accordance with section 1355 of title 28 to enforce this paragraph.

(2)

(A) If a violation of this section is prosecuted by an information or indictment which alleges that the violation was committed knowingly and the trier of fact specifically finds that the violation was so committed, such person shall, except as otherwise provided in subparagraph (B) of this paragraph, be sentenced to imprisonment of not more than one year or a fine of not more than $25,000, or both.

(B) If a violation referred to in subparagraph (A) was committed after one or more prior convictions of the offender for an offense punishable under this paragraph (2), or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States 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 2 years, a fine of $50,000, or both.

(3) Except under the conditions specified in paragraph (2) of this subsection, a violation of this section does not constitute a crime, and a judgment for the United States and imposition of a civil penalty pursuant to paragraph (1) shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense.

§ 843. Prohibited acts C.

(a) Unlawful acts

It shall be unlawful for any person knowingly or intentionally -

(1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 828 of this title;

(2) to use in the course of the manufacture, distribution, or dispensing of a controlled substance, or to use for the purpose of acquiring or obtaining a controlled substance, a registration number which is fictitious, revoked, suspended, expired, or issued to another person;

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4)

(A) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this subchapter or subchapter II of this chapter, or

(B) to present false or fraudulent identification where the person is receiving or purchasing a listed chemical and the person is required to present identification under section 830(a) of this title;

(5) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit substance;

(6) to possess any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical in violation of this subchapter or subchapter II of this chapter;

(7) to manufacture, distribute, export, or import any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical in violation of this subchapter or subchapter II of this chapter or, in the case of an exportation, in violation of this subchapter or subchapter II of this chapter or of the laws of the country to which it is exported;

(8) to create a chemical mixture for the purpose of evading a requirement of section 830 of this title or to receive a chemical mixture created for that purpose; or

(9) to distribute, import, or export a list I chemical without the registration required by this subchapter or subchapter II of this chapter.

(b) Communication facility

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private

instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

(c) Advertisement

It shall be unlawful for any person to place in any newspaper, magazine, handbill, or other publications, any written advertisement knowing that it has the purpose of seeking or offering illegally to receive, buy, or distribute a Schedule (FOOTNOTE 1) I controlled substance. As used in this section the term "advertisement" includes, in addition to its ordinary meaning, such advertisements as those for a catalog of Schedule (FOOTNOTE 1) I controlled substances and any similar written advertisement that has the purpose of seeking or offering illegally to receive, buy, or distribute a Schedule (FOOTNOTE 1) I controlled substance. The term "advertisement" does not include material which merely advocates the use of a similar material, which advocates a position or practice, and does not attempt to propose or facilitate an actual transaction in a Schedule (FOOTNOTE 1) I controlled substance. (FOOTNOTE 1) So in original. Probably should not be capitalized.

(d) Penalties

Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States 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 8 years, a fine of not more than $60,000, or both.

(e) Additional penalties

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, or importation of a listed chemical may be enjoined from engaging in any regulated transaction involving a listed chemical for not more than ten years.

§ 844. Penalties for simple possession.

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug or narcotic offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug or narcotic offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

(b) Repealed. Pub. L. 98-473, title II, Sec. 219(a), Oct. 12, 1984, 98 Stat. 2027

(c) "Drug or narcotic offense" defined

As used in this section, the term "drug or narcotic offense" means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this subchapter.

§ 844a. Civil penalty for possession of small amounts of certain controlled substances.

(a) In general

Any individual who knowingly possesses a controlled substance that is listed in section 841(b)(1)(A) of this title in violation of section 844 of this title in an amount that, as specified by regulation of the Attorney General, is a personal use amount shall be liable to the United States for a civil penalty in an amount not to exceed $10,000 for each such violation.

(b) Income and net assets

The income and net assets of an individual shall not be relevant to the determination whether to assess a civil penalty under this section or to prosecute the individual criminally. However, in determining the amount of a penalty under this section, the income and net assets of an individual shall be considered.

(c) Prior conviction

A civil penalty may not be assessed under this section if the individual previously was convicted of a Federal or State offense relating to a controlled substance.

(d) Limitation on number of assessments

A civil penalty may not be assessed on an individual under this section on more than two separate occasions.

(e) Assessment

A civil penalty under this section may be assessed by the Attorney General only by an order made on the record after opportunity for a hearing in accordance with section 554 of title 5. The Attorney General shall provide written notice to the individual who is the subject of the proposed order informing the individual of the opportunity to receive such a hearing with respect to the proposed order. The hearing may be held only if the individual makes a request for the hearing before the expiration of the 30-day period beginning on the date such notice is issued.

(f) Compromise

The Attorney General may compromise, modify, or remit, with or without conditions, any civil penalty imposed under this section.

(g) Judicial review

If the Attorney General issues an order pursuant to subsection (e) of this section after a hearing described in such subsection, the individual who is the subject of the order may, before the expiration of the 30-day period beginning on the date the order is issued, bring a civil action in the appropriate district court of the United States. In such action, the law and the facts of the violation and the assessment of the civil penalty shall be determined de novo, and shall include the right of a trial by jury, the right to counsel, and the right to confront witnesses. The facts of the violation shall be proved beyond a reasonable doubt.

(h) Civil action

If an individual does not request a hearing pursuant to subsection (e) of this section and the Attorney General issues an order pursuant to such subsection, or if an individual does not under subsection (g) of this section seek judicial review of such an order, the Attorney General may commence a civil action in any appropriate district court of the United States for the purpose of recovering the amount assessed and an amount representing interest at a rate computed in accordance with section 1961 of title 28. Such interest shall accrue from the expiration of the 30-day period described in subsection (g) of this section. In such an action, the decision of the Attorney General to issue the order, and the amount of the penalty assessed by the Attorney General, shall not be subject to review.

(i) Limitation

The Attorney General may not under this subsection (FOOTNOTE 1) commence proceeding against an individual after the expiration of the 5-year period beginning on the date on which the individual allegedly violated subsection (a) of this section. (FOOTNOTE 1) So in original. Probably should be "section".

(j) Expungement procedures

The Attorney General shall dismiss the proceedings under this section against an individual upon application of such individual at any time after the expiration of 3 years if -

(1) the individual has not previously been assessed a civil penalty under this section;

(2) the individual has paid the assessment;

(3) the individual has complied with any conditions imposed by the Attorney General;

(4) the individual has not been convicted of a Federal or State offense relating to a controlled substance; and

(5) the individual agrees to submit to a drug test, and such test shows the individual to be drug free.

A nonpublic record of a disposition under this subsection shall be retained by the Department of Justice solely for the purpose of determining in any subsequent proceeding whether the person qualified for a civil penalty or expungement under this section. If a record is expunged under this subsection, an individual concerning whom such an expungement has been made shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge a proceeding under this section or the results thereof in response to an inquiry made of him for any purpose.

§ 845 to 845b. Transferred.

§ 846. Attempt and conspiracy.

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

§ 847. Additional penalties.

Any penalty imposed for violation of this subchapter shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

§ 848. Continuing criminal enterprise.

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an

individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

(b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section, if -

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)

(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if -

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter -

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(d) Suspension of sentence and probation prohibited

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C. Code, secs. 24-203 - 24-207), shall not apply.

(e) Death penalty

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

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

(2) As used in paragraph (1)(b), (FOOTNOTE 1) the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions. (FOOTNOTE 1) So in original. Probably

should be paragraph "(1)(B),". (g) (FOOTNOTE 2) Hearing required with respect to death penalty (FOOTNOTE 2) So in original. Section does not contain a subsec.

(f), see 1988 Amendment note below.

(g) Hearing required with respect to the death penalty.

A person shall be subjected to the penalty of death for any offense under this section only if a hearing is held in accordance with this section.

(h) Notice by Government in death penalty cases

(1) Whenever the Government intends to seek the death penalty for an offense under this section for which one of the sentences provided is death, the attorney for the Government, a reasonable time before trial or acceptance by the court of a plea of guilty, shall sign and file with the court, and serve upon the defendant, a notice -

(A) that the Government in the event of conviction will seek the sentence of death; and

(B) setting forth the aggravating factors enumerated in subsection (n) of this section and any other aggravating factors which the Government will seek to prove as the basis for the death penalty.

(2) The court may permit the attorney for the Government to amend this notice for good cause shown.

(i) Hearing before court or jury

(1) When the attorney for the Government has filed a notice as required under subsection (h) of this section and the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge if the judge who presided at the trial or before whom the guilty plea was entered is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted -

(A) before the jury which determined the defendant's guilt;

(B) before a jury impaneled for the purpose of the hearing if -

(i) the defendant was convicted upon a plea of guilty;

(ii) the defendant was convicted after a trial before the court sitting without a jury;

(iii) the jury which determined the defendant's guilt has been discharged for good cause; or

(iv) after initial imposition of a sentence under this section, redetermination of the sentence under this section is necessary; or

(C) before the court alone, upon the motion of the defendant and with the approval of the Government.

(2) A jury impaneled under paragraph (1)(B) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate with the approval of the court that it shall consist of any number less than 12.

(j) Proof of aggravating and mitigating factors

Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, no presentence report shall be prepared. In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in subsections (m) and (n) of this section, or any other mitigating factor or any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Where information is presented relating to any of the aggravating factors set forth in subsection (n) of this section, information may be presented relating to any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. Any other information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The Government and 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 of the aggravating or mitigating factors and as to appropriateness in that case of imposing a sentence of death. The Government shall open the argument. The defendant shall be permitted to reply. The

Government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

(k) Return of findings

The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist. If one of the aggravating factors set forth in subsection (n)(1) of this section and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) of this section is found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If an aggravating factor set forth in subsection (n)(1) of this section is not found to exist or an aggravating factor set forth in subsection (n)(1) of this section is found to exist but no other aggravating factor set forth in subsection (n) of this section is found to exist, the court shall impose a sentence, other than death, authorized by law. If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in subsection (n) of this section are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence. The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.

(l) Imposition of sentence

Upon the recommendation that the 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. A sentence of death shall not be carried out upon a person who is under 18 years of age at the time the crime was committed. A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability -

(1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or

(2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

(m) Mitigating factors

In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors, including the following:

(1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) The defendant is punishable as a principal (as defined in section 2 of title 18) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.

(5) The defendant was youthful, although not under the age of 18.

(6) The defendant did not have a significant prior criminal record.

(7) The defendant committed the offense under severe mental or emotional disturbance.

(8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(9) The victim consented to the criminal conduct that resulted in the victim's death.

(10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

(n) Aggravating factors for homicide

If the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the following aggravating factors are the only aggravating factors that shall be considered, unless notice of additional aggravating factors is provided under subsection (h)(1)(B) of this section:

(1) The defendant -

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;

(C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;

(D) intentionally engaged in conduct which -

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim.

(2) The defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(3) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person.

(4) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(5) In the commission of the offense or in escaping apprehension for a violation of subsection (e) of this section, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.

(6) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(7) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(8) The defendant committed the offense after substantial planning and premeditation.

(9) The victim was particularly vulnerable due to old age, youth, or infirmity.

(10) The defendant had previously been convicted of violating this subchapter or subchapter II of this chapter for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(11) The violation of this subchapter in relation to which the conduct described in subsection (e) of this section occurred was a violation of section 859 of this title.

(12) 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.

(o) Right of defendant to justice without discrimination

(1) In any hearing held before a jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or the 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 the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be. The jury shall return to the court a certificate signed by each juror that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be.

(2) Not later than one year from November 18, 1988, the Comptroller General shall conduct a study of the various procedures used by the several States for determining whether or not to impose the death penalty in particular cases, and shall report to the Congress on whether or not any or all of the various procedures create a significant risk that the race of a defendant, or the race of a victim against whom a crime was committed, influence the likelihood that defendants in those States will be sentenced to death. In conducting the study required by this paragraph, the General Accounting Office shall -

(A) use ordinary methods of statistical analysis, including methods comparable to those ruled admissible by the courts in race discrimination cases under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.);

(B) study only crimes occurring after January 1, 1976; and

(C) determine what, if any, other factors, including any relation between any aggravating or mitigating factors and the race of the victim or the defendant, may account for any evidence that the race of the defendant, or the race of the victim, influences the likelihood that defendants will be sentenced to death. In addition, the General Accounting Office shall examine separately and include in the report, death penalty cases involving crimes similar to those covered under this section.

(p) Sentencing in capital cases in which death penalty is not sought or imposed

If a person is convicted for an offense under subsection (e) of this section and the court does not impose the penalty of death, the court may impose a sentence of life imprisonment without the possibility of parole.

(q) Appeal in capital cases; counsel for financially unable defendants

(1) In any case in which the sentence of death is imposed under this section, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time prescribed for appeal of judgment in section 2107 of title 28. An appeal under this section may be consolidated with an appeal of the judgment of conviction. Such review shall have priority over all other cases.

(2) On review of the sentence, the court of appeals shall consider the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.

(3) The court shall affirm the sentence if it determines that -

(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section. In all other cases the court shall remand the case for reconsideration under this section. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

(4)

(A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either -

(i) before judgment; or

(ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment; shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(B) In any post conviction proceeding under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

(r) Refusal to participate by State and Federal correctional employees

No employee of any State department of corrections or the Federal Bureau of Prisons and no employee providing services to that department 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 "participation in executions" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

§ 849. Transportation safety offenses.

(a) Definitions In this section -

"safety rest area" means a roadside facility with parking facilities for the rest or other needs of motorists.

"truck stop" means a facility (including any parking lot appurtenant thereto) that -

(A) has the capacity to provide fuel or service, or both, to any commercial motor vehicle (as defined in section 31301 of title 49), operating in commerce (as defined in that section); and

(B) is located within 2,500 feet of the National System of Interstate and Defense Highways or the Federal-Aid Primary System.

(b) First offense

A person who violates section 841(a)(1) of this title or section 856 of this title by distributing or possessing with intent to distribute a controlled substance in or on, or within 1,000 feet of, a truck stop or safety rest area is (except as provided in subsection (b) (FOOTNOTE 1) of this section) subject to - (FOOTNOTE 1) So in original. Probably should be subsection "(c)".

(1) twice the maximum punishment authorized by section 841(b) of this title; and

(2) twice any term of supervised release authorized by section 841(b) of this title for a first offense.

(c) Subsequent offense

A person who violates section 841(a)(1) of this title or section 856 of this title by distributing or possessing with intent to distribute a controlled substance in or on, or within 1,000 feet of, a truck stop or a safety rest area after a prior conviction or convictions under subsection (a)

(FOOTNOTE 2) of this section have become final is subject to - (FOOTNOTE 2) So in original. Probably should be subsection "(b)".

(1) 3 times the maximum punishment authorized by section 841(b) of this title; and

(2) 3 times any term of supervised release authorized by section 841(b) of this title for a first offense.

§ 850. Information for sentencing.

Except as otherwise provided in this subchapter or section 242a(a) of title 42, no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence under this subchapter or subchapter II of this chapter.

§ 851. Proceedings to establish prior convictions.

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise

not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

§ 852. Application of treaties and other international agreements.

Nothing in the Single Convention on Narcotic Drugs, the Convention on Psychotropic Substances, or other treaties or international agreements shall be construed to limit the provision of treatment, education, or rehabilitation as alternatives to conviction or criminal penalty for offenses involving any drug or other substance subject to control under any such treaty or agreement.

§ 853. Criminal forfeitures.

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law -

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

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes -

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that -

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section -

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that -

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which

are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to -

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may -

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that -

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant -

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 853a. Transferred.

§ 854. Investment of illicit drug profits.

(a) Prohibition

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year in which such person has participated as a principal within the meaning of section 2 of title 18, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this section if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any violation of this subchapter or subchapter II of this chapter after such purchase do not amount in the aggregate to 1 per centum of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) Penalty

Whoever violates this section shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

(c) "Enterprise" defined

As used in this section, the term "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

(d) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

§ 855. Alternative fine.

In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

§ 856. Establishment of manufacturing operations.

(a) Except as authorized by this subchapter, it shall be unlawful to -

(1) knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance;

(2) manage or control any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

(b) Any person who violates subsection (a) of this section shall be sentenced to a term of imprisonment of not more than 20 years or a fine of not more than $500,000, or both, or a fine of $2,000,000 for a person other than an individual.

§ 857. Repealed.

Repealed. Pub. L. 101-647, title XXIV, Sec. 2401(d), Nov. 29, 1990, 104 Stat. 4859

§ 858. Endangering human life while illegally manufacturing controlled substance.

Whoever, while manufacturing a controlled substance in violation of this subchapter, or attempting to do so, or transporting or causing to be transported materials, including chemicals, to do so, creates a substantial risk of harm to human life shall be fined in accordance with title 18 or imprisoned not more than 10 years, or both.

§ 859. Distribution to persons under age twenty-one.

(a) First offense

Except as provided in section 860 of this title, any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age is (except as provided in subsection (b) of this section) subject to (1) twice the maximum punishment authorized by section 841(b) of this title, and (2) at least twice any term of supervised release authorized by section 841(b) of this title, for a first offense involving the same controlled substance and schedule. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a term of imprisonment under this subsection shall be not less than one year. The mandatory minimum sentencing provisions of this subsection shall not apply to offenses involving 5 grams or less of marihuana.

(b) Second offense

Except as provided in section 860 of this title, any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age after a prior conviction under subsection (a) of this section (or under section 333(b) of this title as in effect prior to May 1, 1971) has become final, is subject to (1) three times the maximum punishment authorized by section 841(b) of this title, and (2) at least

three times any term of supervised release authorized by section 841(b) of this title, for a second or subsequent offense involving the same controlled substance and schedule. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a term of imprisonment under this subsection shall be not less than one year. Penalties for third and subsequent convictions shall be governed by section 841(b)(1)(A) of this title.

§ 860. Distribution or manufacturing in or near schools and colleges.

(a) Penalty

Any person who violates section 841(a)(1) of this title or section 856 of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is (except as provided in subsection (b) of this section) subject to (1) twice the maximum punishment authorized by section 841(b) of this title; and (2) at least twice any term of supervised release authorized by section 841(b) of this title for a first offense. A fine up to twice that authorized by section 841(b) of this title may be imposed in addition to any term of imprisonment authorized by this subsection. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a person shall be sentenced under this subsection to a term of imprisonment of not less than one year. The mandatory minimum sentencing provisions of this paragraph shall not apply to offenses involving 5 grams or less of marihuana.

(b) Second offenders

Any person who violates section 841(a)(1) of this title or section 856 of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, after a prior conviction under subsection (a) of this section has become final is punishable (1) by the greater of (A) a term of

imprisonment of not less than three years and not more than life imprisonment or (B) three times the maximum punishment authorized by section 841(b) of this title for a first offense, and (2) at least three times any term of supervised release authorized by section 841(b) of this title for a first offense. A fine up to three times that authorized by section 841(b) of this title may be imposed in addition to any term of imprisonment authorized by this subsection. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a person shall be sentenced under this subsection to a term of imprisonment of not less than three years. Penalties for third and subsequent convictions shall be governed by section 841(b)(1)(A) of this title.

(c) Employing children to distribute drugs near schools or playgrounds

Notwithstanding any other law, any person at least 21 years of age who knowingly and intentionally -

(1) employs, hires, uses, persuades, induces, entices, or coerces a person under 18 years of age to violate this section; or

(2) employs, hires, uses, persuades, induces, entices, or coerces a person under 18 years of age to assist in avoiding detection or apprehension for any offense under this section by any Federal, State, or local law enforcement official, is punishable by a term of imprisonment, a fine, or both, up to triple those authorized by section 841 of this title.

(d) Suspension of sentence; probation; parole

In the case of any mandatory minimum sentence imposed under this section, imposition or execution of such sentence shall not be suspended and probation shall not be granted. An individual convicted under this section shall not be eligible for parole until the individual has served the mandatory minimum term of imprisonment as provided by this section.

(e) Definitions

For the purposes of this section -

(1) The term "playground" means any outdoor facility (including any parking lot appurtenant thereto) intended for recreation, open to the public, and with any portion thereof containing three or more separate apparatus intended for the recreation of children including, but not limited to, sliding boards, swingsets, and teeterboards.

(2) The term "youth center" means any recreational facility and/or gymnasium (including any parking lot appurtenant thereto), intended primarily for use by persons under 18 years of age, which regularly provides athletic, civic, or cultural activities.

(3) The term "video arcade facility" means any facility, legally accessible to persons under 18 years of age, intended primarily for the use of pinball and video machines for amusement containing a minimum of ten pinball and/or video machines.

(4) The term "swimming pool" includes any parking lot appurtenant thereto.

§ 861. Employment or use of persons under 18 years of age in drug operations.

(a) Unlawful acts

It shall be unlawful for any person at least eighteen years of age to knowingly and intentionally -

(1) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to violate any provision of this subchapter or subchapter II of this chapter;

(2) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to assist in avoiding detection or apprehension for any offense of this subchapter or subchapter II of this chapter by any Federal, State, or local law enforcement official; or

(3) receive a controlled substance from a person under 18 years of age, other than an immediate family member, in violation of this subchapter or subchapter II of this chapter.

(b) Penalty for first offense

Any person who violates subsection (a) of this section is subject to twice the maximum punishment otherwise authorized and at least twice any term of supervised release otherwise authorized for a first offense. Except to the extent a greater minimum sentence is otherwise provided, a term of imprisonment under this subsection shall not be less than one year.

(c) Penalty for subsequent offenses

Any person who violates subsection (a) of this section after a prior conviction under subsection (a) of this section has become final, is subject to three times the maximum punishment otherwise authorized and at least three times any term of supervised release otherwise authorized for a first offense. Except to the extent a greater minimum sentence is otherwise provided, a term of imprisonment under this subsection shall not be less than one year. Penalties for third and subsequent convictions shall be governed by section 841(b)(1)(A) of this title.

(d) Penalty for providing or distributing controlled substance to underage person

Any person who violates subsection (a)(1) or (2) of this section (FOOTNOTE 1) (FOOTNOTE 1) So in original. Probably should be followed by a dash.

(1) by knowingly providing or distributing a controlled substance or a controlled substance analogue to any person under eighteen years of age; or

(2) if the person employed, hired, or used is fourteen years of age or younger, shall be subject to a term of imprisonment for not more than five years or a fine of not more than $50,000, or both, in addition to any other punishment authorized by this section.

(e) Suspension of sentence; probation; parole In any case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended and probation shall not be granted. An individual convicted under this section of an offense for which a mandatory minimum term of imprisonment is applicable shall not be eligible for parole under section 4202 of title 18 (FOOTNOTE 2) until the individual has served the mandatory term of imprisonment as enhanced by this section.

(FOOTNOTE 2) Section 4202 of title 18, referred to in subsec. (e), which, as originally enacted in Title 18, Crimes and Criminal Procedure, related to eligibility of prisoners for parole, was repealed and a new section 4202 enacted as part of the repeal and enactment of a new chapter 311 (Sec. 4201 et seq.) of Title 18, by Pub. L. 94-233, Sec. 2, Mar. 15, 1976, 90 Stat. 219. For provisions relating to the eligibility of prisoners for parole, see section 4205 of Title 18. Pub. L. 98-473, title II, Sec. 218(a)(5), 235(a)(1), (b)(1), Oct. 12, 1984, 98 Stat. 2027, 2031, 2032, as amended, provided that, effective on the first day of the first calendar month beginning 36 months after Oct. 12, 1984 (Nov. 1, 1987), chapter 311 of Title 18 is repealed, subject to remaining effective for five years after Nov. 1, 1987, in certain circumstances.

(f) Distribution of controlled substance to pregnant individual

Except as authorized by this subchapter, it shall be unlawful for any person to knowingly or intentionally provide or distribute any controlled substance to a pregnant individual in violation of any provision of this subchapter. Any person who violates this subsection shall be subject to the provisions of subsections (b), (c), and (e) of this section.

§ 862. Denial of Federal benefits to drug traffickers and possessors.

(a) Drug traffickers

(1) Any individual who is convicted of any Federal or State offense consisting of the distribution of controlled substances shall -

(A) at the discretion of the court, upon the first conviction for such an offense be ineligible for any or all Federal benefits for up to 5 years after such conviction;

(B) at the discretion of the court, upon a second conviction for such an offense be ineligible for any or all Federal benefits for up to 10 years after such conviction; and

(C) upon a third or subsequent conviction for such an offense be permanently ineligible for all Federal benefits.

(2) The benefits which are denied under this subsection shall not include benefits relating to long-term drug treatment programs for addiction for any person who, if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits

himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services.

(b) Drug possessors

(1) Any individual who is convicted of any Federal or State offense involving the possession of a controlled substance (as such term is defined for purposes of this subchapter) shall -

(A) upon the first conviction for such an offense and at the discretion of the court -

(i) be ineligible for any or all Federal benefits for up to one year;

(ii) be required to successfully complete an approved drug treatment program which includes periodic testing to insure that the individual remains drug free;

(iii) be required to perform appropriate community service; or

(iv) any combination of clause (i), (ii), or (iii); and

(B) upon a second or subsequent conviction for such an offense be ineligible for all Federal benefits for up to 5 years after such conviction as determined by the court. The court shall continue to have the discretion in subparagraph (A) above. In imposing penalties and conditions under subparagraph (A), the court may require that the completion of the conditions imposed by clause (ii) or (iii) be a requirement for the reinstatement of benefits under clause (i).

(2) The penalties and conditions which may be imposed under this subsection shall be waived in the case of a person who, if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services.

(c) Suspension of period of ineligibility

The period of ineligibility referred to in subsections (a) and (b) of this section shall be suspended if the individual -

(A) completes a supervised drug rehabilitation program after becoming ineligible under this section;

(B) has otherwise been rehabilitated; or

(C) has made a good faith effort to gain admission to a supervised drug rehabilitation program, but is unable to do so because of inaccessibility or unavailability of such a program, or the inability of the individual to pay for such a program.

(d) Definitions

As used in this section -

(1) the term "Federal benefit" -

(A) means the issuance of any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

(B) does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility; and

(2) the term "veterans benefit" means all benefits provided to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States.

(e) Inapplicability of this section to Government witnesses

The penalties provided by this section shall not apply to any individual who cooperates or testifies with the Government in the prosecution of a Federal or State offense or who is in a Government witness protection program.

(f) Indian provision

Nothing in this section shall be construed to affect the obligation of the United States to any Indian or Indian tribe arising out of any treaty, statute, Executive order, or the trust responsibility of the United States owing to such Indian or Indian tribe. Nothing in this subsection shall exempt any individual Indian from the sanctions provided for in this section, provided that no individual Indian shall be denied any benefit under Federal Indian programs comparable to those described in subsection (d)(1)(B) or (d)(2) of this section.

(g) Presidential report

(1) On or before May 1, 1989, the President shall transmit to the Congress a report -

(A) delineating the role of State courts in implementing this section;

(B) describing the manner in which Federal agencies will implement and enforce the requirements of this section;

(C) detailing the means by which Federal and State agencies, courts, and law enforcement agencies will exchange and share the data and information necessary to implement and enforce the withholding of Federal benefits; and

(D) recommending any modifications to improve the administration of this section or otherwise achieve the goal of discouraging the trafficking and possession of controlled substances.

(2) No later than September 1, 1989, the Congress shall consider the report of the President and enact such changes as it deems appropriate to further the goals of this section.

(h) Effective date

The denial of Federal benefits set forth in this section shall take effect for convictions occurring after September 1, 1989.

§ 863. Drug paraphernalia.

(a) In general

It is unlawful for any person -

(1) to sell or offer for sale drug paraphernalia;

(2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or

(3) to import or export drug paraphernalia.

(b) Penalties

Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined under title 18.

(c) Seizure and forfeiture

Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture upon the conviction of a person for such violation. Any such paraphernalia shall be delivered to the Administrator of General Services, General Services Administration, who may order such paraphernalia destroyed or may authorize its use for law enforcement or educational purposes by Federal, State, or local authorities.

(d) "Drug paraphernalia" defined

The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, (FOOTNOTE 1) cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as - (FOOTNOTE 1) So in original. Probably should be "marihuana,".

(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;

(7) chamber pipes;

(8) carburetor pipes;

(9) electric pipes;

(10) air-driven pipes;

(11) chillums;

(12) bongs;

(13) ice pipes or chillers;

(14) wired cigarette papers; or

(15) cocaine freebase kits.

(e) Matters considered in determination of what constitutes drug paraphernalia

In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning its use;

(2) descriptive materials accompanying the item which explain or depict its use;

(3) national and local advertising concerning its use;

(4) the manner in which the item is displayed for sale;

(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;

(7) the existence and scope of legitimate uses of the item in the community; and

(8) expert testimony concerning its use.

(f) Exemptions

This section shall not apply to -

(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or

(2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

Return to top

PART E - ADMINISTRATIVE AND ENFORCEMENT PROVISIONS

§ 871. Attorney General.

(a) Delegation of functions

The Attorney General may delegate any of his functions under this subchapter to any officer or employee of the Department of Justice.

(b) Rules and regulations

The Attorney General may promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter.

(c) Acceptance of devices, bequests, gifts, and donations

The Attorney General may accept in the name of the Department of Justice any form of device, bequest, gift, or donation where the donor intends to donate property for the purpose of preventing or controlling the abuse of controlled substances. He may take all appropriate steps to secure possession of such property and may sell, assign, transfer, or convey any such property other than moneys.

§ 872. Education and research programs of Attorney General.

(a) Authorization

The Attorney General is authorized to carry out educational and research programs directly related to enforcement of the laws under his jurisdiction concerning drugs or other substances which are or may be subject to control under this subchapter. Such programs may include -

(1) educational and training programs on drug abuse and controlled substances law enforcement for local, State, and Federal personnel;

(2) studies or special projects designed to compare the deterrent effects of various enforcement strategies on drug use and abuse;

(3) studies or special projects designed to assess and detect accurately the presence in the human body of drugs or other substances which are or may be subject to control under this subchapter, including the development of rapid field identification methods which would enable agents to detect microquantities of such drugs or other substances;

(4) studies or special projects designed to evaluate the nature and sources of the supply of illegal drugs throughout the country;

(5) studies or special projects to develop more effective methods to prevent diversion of controlled substances into illegal channels; and

(6) studies or special projects to develop information necessary to carry out his functions under section 811 of this title.

(b) Contracts

The Attorney General may enter into contracts for such educational and research activities without performance bonds and without regard to section 5 of title 41.

(c) Identification of research populations; authorization to withhold

The Attorney General may authorize persons engaged in research to withhold the names and other identifying characteristics of persons who are the subjects of such research. Persons who obtain this authorization may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceeding to identify the subjects of research for which such authorization was obtained.

(d) Affect of treaties and other international agreements on confidentiality

Nothing in the Single Convention on Narcotic Drugs, the Convention on Psychotropic Substances, or other treaties or international agreements shall be construed to limit, modify, or prevent the protection of the confidentiality of patient records or of the names and other identifying characteristics of research subjects as provided by any Federal, State, or local law or regulation.

(e) Use of controlled substances in research

The Attorney General, on his own motion or at the request of the Secretary, may authorize the possession, distribution, and dispensing of controlled substances by persons engaged in research. Persons who obtain this authorization shall be exempt from State or Federal prosecution for possession, distribution, and dispensing of controlled substances to the extent authorized by the Attorney General.

(f) Program to curtail diversion of precursor and essential chemicals

The Attorney General shall maintain an active program, both domestic and international, to curtail the diversion of precursor chemicals and essential chemicals used in the illicit manufacture of controlled substances.

§ 873. Cooperative arrangements.

(a) Cooperation of Attorney General with local, State, and Federal agencies

The Attorney General shall cooperate with local, State, and Federal agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, he is authorized to -

(1) arrange for the exchange of information between governmental officials concerning the use and abuse of controlled substances;

(2) cooperate in the institution and prosecution of cases in the courts of the United States and before the licensing boards and courts of the several States;

(3) conduct training programs on controlled substance law enforcement for local, State, and Federal personnel;

(4) maintain in the Department of Justice a unit which will accept, catalog, file, and otherwise utilize all information and statistics, including records of controlled substance abusers and other controlled substance law offenders, which may be received from Federal, State, and local agencies, and make such information available for Federal, State, and local law enforcement purposes;

(5) conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted;

(6) assist State and local governments in suppressing the diversion of controlled substances from legitimate medical, scientific, and commercial channels by -

(A) making periodic assessments of the capabilities of State and local governments to adequately control the diversion of controlled substances;

(B) providing advice and counsel to State and local governments on the methods by which such governments may strengthen their controls against diversion; and

(C) establishing cooperative investigative efforts to control diversion; and

(7) notwithstanding any other provision of law, enter into contractual agreements with State and local law enforcement agencies to provide for cooperative enforcement and regulatory activities under this chapter. (FOOTNOTE 1)

(FOOTNOTE 1) This chapter, referred to in subsec. (a)(7), was in the original as added by Pub. L. 99-646 "this Act", meaning Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1236, as amended. In the subsec. (a)(7) added by Pub. L. 99-570, the reference was "this title", meaning title II of Pub. L. 91-513 which is popularly known as the "Controlled Substances Act" and is classified principally to this subchapter. For complete classification of this Act and title II to the Code, see Short Title note set out under section 801 of this title and Tables.

Schedule II, referred to in subsec. (c), is set out in section 812(c) of this title.

(b) Requests by Attorney General for assistance from Federal agencies or instrumentalities

When requested by the Attorney General, it shall be the duty of any agency or instrumentality of the Federal Government to furnish assistance, including technical advice, to him for carrying out his functions under this subchapter; except that no such agency or instrumentality shall be

required to furnish the name of, or other identifying information about, a patient or research subject whose identity it has undertaken to keep confidential.

(c) Descriptive and analytic reports by Attorney General to State agencies of distribution patterns of schedule II substances having highest rates of abuse

The Attorney General shall annually (1) select the controlled substances (or controlled substances) contained in schedule II which, in the Attorney General's discretion, is determined to have the highest rate of abuse, and (2) prepare and make available to regulatory, licensing, and law enforcement agencies of States descriptive and analytic reports on the actual distribution patterns in such States of each such controlled substance.

(d) Grants by Attorney General

(1) The Attorney General may make grants, in accordance with paragraph (2), to State and local governments to assist in meeting the costs of -

(A) collecting and analyzing data on the diversion of controlled substances,

(B) conducting investigations and prosecutions of such diversions,

(C) improving regulatory controls and other authorities to control such diversions,

(D) programs to prevent such diversions,

(E) preventing and detecting forged prescriptions, and

(F) training law enforcement and regulatory personnel to improve the control of such diversions.

(2) No grant may be made under paragraph (1) unless an application therefor is submitted to the Attorney General in such form and manner as the Attorney General may prescribe. No grant may exceed 80 per centum of the costs for which the grant is made, and no grant may be made unless the recipient of the grant provides assurances satisfactory to the Attorney General that it will obligate funds to meet the remaining 20 per centum of such costs. The Attorney General shall review the activities carried out with grants under paragraph (1) and shall report annually to Congress on such activities.

(3) To carry out this subsection there is authorized to be appropriated $6,000,000 for fiscal year 1985 and $6,000,000 for fiscal year 1986.

§ 874. Advisory committees.

The Attorney General may from time to time appoint committees to advise him with respect to preventing and controlling the abuse of controlled substances. Members of the committees may be entitled to receive compensation at the rate of $100 for each day (including traveltime) during which they are engaged in the actual performance of duties. While traveling on official business in the performance of duties for the committees, members of the committees shall be allowed expenses of travel, including per diem instead of subsistence, in accordance with subchapter I of chapter 57 of title 5.

§ 875. Administrative hearings.

(a) Power of Attorney General

In carrying out his functions under this subchapter, the Attorney General may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States.

(b) Procedures applicable

Except as otherwise provided in this subchapter, notice shall be given and hearings shall be conducted under appropriate procedures of subchapter II of chapter 5 of title 5.

§ 876. Subpenas.

(a) Authorization of use by Attorney General

In any investigation relating to his functions under this subchapter with respect to controlled substances, listed chemicals, tableting machines, or encapsulating machines, the Attorney General may subpena witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation. The attendance of witnesses and the production of records may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place of hearing; except that a witness shall not be required to appear at any hearing more than 500 miles distant from the place where he was served with a subpena. Witnesses summoned under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(b) Service

A subpena issued under this section may be served by any person designated in the subpena to serve it. Service upon a natural person may be made by personal delivery of the subpena to him. Service may be made upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpena to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. The affidavit of the person serving the subpena entered a true copy thereof by the person serving it shall be proof of service.

(c) Enforcement

In the case of contumacy by or refusal to obey a subpena issued to any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on or of which the subpenaed person is an inhabitant, or in which he carries on business or may be found, to compel compliance with the subpena. The court may issue an order requiring the subpenaed person to appear before the Attorney General to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in any judicial district in which such person may be found.

§ 877. Judicial review.

All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.

§ 878. Powers of enforcement personnel.

(a) Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may -

(1) carry firearms;

(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpenas, and summonses issued under the authority of the United States;

(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

(4) make seizures of property pursuant to the provisions of this subchapter; and

(5) perform such other law enforcement duties as the Attorney General may designate.

(b) State and local law enforcement officers performing functions under this section shall not be deemed Federal employees and shall not be subject to provisions of law relating to Federal employees, except that such officers shall be subject to section 3374(c) of title 5.

§ 879. Search warrants.

A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate judge issuing the warrant is satisfied

that there is probable cause to believe that grounds exist for the warrant and for its service at such time.

§ 880. Administrative inspections and warrants.

(a) "Controlled premises" defined

As used in this section, the term "controlled premises" means -

(1) places where original or other records or documents required under this subchapter are kept or required to be kept, and

(2) places, including factories, warehouses, and other establishments, and conveyances, where persons registered under section 823 of this title (or exempt from registration under section 822(d) of this title or by regulation of the Attorney General) or regulated persons may lawfully hold, manufacture, distribute, dispense, administer, or otherwise dispose of controlled substances or listed chemicals or where records relating to those activities are maintained.

(b) Grant of authority; scope of inspections

(1) For the purpose of inspecting, copying, and verifying the correctness of records, reports, or other documents required to be kept or made under this subchapter and otherwise facilitating the carrying out of his functions under this subchapter, the Attorney General is authorized, in accordance with this section, to enter controlled premises and to conduct administrative inspections thereof, and of the things specified in this section, relevant to those functions.

(2) Such entries and inspections shall be carried out through officers or employees (hereinafter referred to as "inspectors") designated by the Attorney General. Any such inspector, upon stating his purpose and presenting to the owner, operator, or agent in charge of such premises (A) appropriate credentials and (B) a written notice of his inspection authority (which notice in the case of an inspection requiring, or in fact supported by, an administrative inspection warrant shall consist of such warrant), shall have the right to enter such premises and conduct such inspection at reasonable times.

(3) Except as may otherwise be indicated in an applicable inspection warrant, the inspector shall have the right -

(A) to inspect and copy records, reports, and other documents required to be kept or made under this subchapter;

(B) to inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished drugs, listed chemicals, and other substances or materials, containers, and labeling found therein, and, except as provided in paragraph (4) of this subsection, all other things therein (including records, files, papers, processes, controls, and facilities) appropriate for verification of the records, reports, and documents referred to in clause (A) or otherwise bearing on the provisions of this subchapter; and

(C) to inventory any stock of any controlled substance or listed chemical therein and obtain samples of any such substance or chemical.

(4) Except when the owner, operator, or agent in charge of the controlled premises so consents in writing, no inspection authorized by this section shall extend to -

(A) financial data;

(B) sales data other than shipment data; or

(C) pricing data.

(c) Situations not requiring warrants

A warrant under this section shall not be required for the inspection of books and records pursuant to an administrative subpena issued in accordance with section 876 of this title, nor for entries and administrative inspections (including seizures of property) -

(1) with the consent of the owner, operator, or agent in charge of the controlled premises;

(2) in situations presenting imminent danger to health or safety;

(3) in situations involving inspection of conveyances where there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;

(4) in any other exceptional or emergency circumstance where time or opportunity to apply for a warrant is lacking; or

(5) in any other situations where a warrant is not constitutionally required.

(d) Administrative inspection warrants; issuance; execution; probable cause

Issuance and execution of administrative inspection warrants shall be as follows:

(1) Any judge of the United States or of a State court of record, or any United States magistrate judge, may, within his territorial jurisdiction, and upon proper oath or affirmation showing probable cause, issue warrants for the purpose of conducting administrative inspections authorized by this subchapter or regulations thereunder, and seizures of property appropriate to such inspections. For the purposes of this section, the term "probable cause" means a valid public interest in the effective enforcement of this subchapter or regulations thereunder sufficient to justify administrative inspections of the area, premises, building, or conveyance, or contents thereof, in the circumstances specified in the application for the warrant.

(2) A warrant shall issue only upon an affidavit of an officer or employee having knowledge of the facts alleged, sworn to before the judge or magistrate judge and establishing the grounds for issuing the warrant. If the judge or magistrate judge is satisfied that grounds for the application exist or that there is probable cause to believe they exist, he shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of such inspection, and, where appropriate, the type of property to be inspected, if any. The warrant shall identify the items or types of property to be seized, if any. The warrant shall be directed to a person authorized under subsection (b)(2) of this section to execute it. The warrant shall state the grounds for its issuance and the name of the person or persons whose affidavit has been taken in support thereof. It shall command the person to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified, and, where appropriate, shall direct the seizure of the property specified. The warrant shall direct that it be served during normal business hours. It shall designate the judge or magistrate judge to whom it shall be returned.

(3) A warrant issued pursuant to this section must be executed and returned within ten days of its date unless, upon a showing by the United States of a need therefor, the judge or magistrate judge allows additional time in the warrant. If property is seized pursuant to a warrant, the person executing the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return of the warrant shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person executing the warrant and of the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the person making such inventory, and shall be verified by the

person executing the warrant. The judge or magistrate judge, upon request, shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and the applicant for the warrant.

(4) The judge or magistrate judge who has issued a warrant under this section shall attach to the warrant a copy of the return and all papers filed in connection therewith and shall file them with the clerk of the district court of the United States for the judicial district in which the inspection was made.

§ 881. Forfeitures.

(a) Subject property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that -

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a

person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

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

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 1822 of the Mail Order Drug Paraphernalia Control Act). (FOOTNOTE 1)

(FOOTNOTE 1) Section 1822 of the Mail Order Drug Paraphernalia Control Act, referred to in subsec. (a)(10), is section 1822 of Pub. L. 99-570, title I, Oct. 27, 1986, 100 Stat. 3207-51, which was repealed by Pub. L. 101-647, title XXIV, Sec. 2401(d), Nov. 29, 1990, 104 Stat. 4859. Prior to repeal, subsec. (d) of section 1822 of Pub. L. 99-570, which defined "drug

paraphernalia", was transferred to subsec. (d) of section 422 of title II of Pub. L. 91-513, the Controlled Substances Act. Section 422 of Pub. L. 91-513 is classified to section 863 of this title.

(11) Any firearm (as defined in section 921 of title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when -

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly. The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

(c) Custody of Attorney General

Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may -

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable

The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) Disposition of forfeited property

(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may -

(A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer -

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 2291j(b) of title 22.

(2)

(A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this subchapter shall be used to pay -

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent. Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of title 28, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A), except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of title 39, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A) -

(A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

(4)

(A) With respect to real property described in subparagraph (B), if the chief executive officer of the State involved submits to the Attorney General a request for purposes of such subparagraph, the authority established in such subparagraph is in lieu of the authority established in paragraph (1)(B).

(B) In the case of property described in paragraph (1)(B) that is civilly or criminally forfeited under this subchapter, if the property is real property that is appropriate for use as a public area reserved for recreational or historic purposes or for the preservation of natural conditions, the Attorney General, upon the request of the chief executive officer of the State in which the property is located, may transfer title to the property to the State, either without charge or for a nominal charge, through a legal instrument providing that -

(i) such use will be the principal use of the property; and

(ii) title to the property reverts to the United States in the event that the property is used otherwise.

(f) Forfeiture and destruction of schedule I and II substances

(1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such raw materials or products shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be

separated safely from such raw materials or products under such circumstances as the Attorney General may deem necessary.

(g) Plants

(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

(h) Vesting of title in United States

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

(i) Stay of civil forfeiture proceedings

The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or local law that could have been charged under this subchapter or subchapter II of this chapter, which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue

In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought. (l) (FOOTNOTE 2) Agreement between Attorney General and Postal Service for performance of functions (FOOTNOTE 2) So in original. No subsec. (k) has been enacted. The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

§ 881-1, 881a. Transferred.

§ 882. Injunctions.

(a) Jurisdiction

The district courts of the United States and all courts exercising general jurisdiction in the territories and possessions of the United States shall have jurisdiction in proceedings in accordance with the Federal Rules of Civil Procedure to enjoin violations of this subchapter.

(b) Jury trial

In case of an alleged violation of an injunction or restraining order issued under this section, trial shall, upon demand of the accused, be by a jury in accordance with the Federal Rules of Civil Procedure.

§ 883. Enforcement proceedings.

Before any violation of this subchapter is reported by the Administrator of the Drug Enforcement Administration to any United States attorney for institution of a criminal proceeding, the Administrator may require that the person against whom such proceeding is contemplated is given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.

§ 884. Immunity and privilege.

(a) Refusal to testify

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before a court or grand jury of the United States, involving a violation of this subchapter, and the person presiding over the proceeding communicates to the witness an order issued under this section, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. But no testimony or other information compelled under the order issued under subsection (b) of this section or any information obtained by the exploitation of such testimony or other information, may be used against the witness in any criminal case, including any criminal case brought in a court of a State, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

(b) Order of United States district court

In the case of any individual who has been or may be called to testify or provide other information at any proceeding before a court or grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, upon the request of the United States attorney for such district, an order requiring such individual to give any testimony or provide any other information which he refuses to give or provide on the basis of his privilege against self-incrimination.

(c) Request by United States attorney

A United States attorney may, with the approval of the Attorney General or the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General designated by the Attorney General, request an order under subsection (b) of this section when in his judgment -

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

§ 885. Burden of proof; liabilities.

(a) Exemptions and exceptions; presumption in simple possession offenses

(1) It shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this subchapter, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

(2) In the case of a person charged under section 844(a) of this title with the possession of a controlled substance, any label identifying such substance for purposes of section 353(b)(2) of this title shall be admissible in evidence and shall be prima facie evidence that such substance was obtained pursuant to a valid prescription from a practitioner while acting in the course of his professional practice.

(b) Registration and order forms

In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under this subchapter, he shall be presumed not to be the holder of such registration or form, and the burden of going forward with the evidence with respect to such registration or form shall be upon him.

(c) Use of vehicles, vessels, and aircraft

The burden of going forward with the evidence to establish that a vehicle, vessel, or aircraft used in connection with controlled substances in schedule I was used in accordance with the provisions of this subchapter shall be on the persons engaged in such use.

(d) Immunity of Federal, State, local and other officials

Except as provided in section 2234 and 2235 of title 18, no civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

§ 886. Payments and advances.

(a) Payment to informers

The Attorney General is authorized to pay any person, from funds appropriated for the Drug Enforcement Administration, for information concerning a violation of this subchapter, such sum or sums of money as he may deem appropriate, without reference to any moieties or rewards to which such person may otherwise be entitled by law.

(b) Reimbursement for purchase of controlled substances

Moneys expended from appropriations of the Drug Enforcement Administration for purchase of controlled substances and subsequently recovered shall be reimbursed to the current appropriation for the Administration. (FOOTNOTE 1)

(FOOTNOTE 1) In subsec. (b), "Administration" substituted for "Bureau" as the probable intent of Congress in view of amendment by Pub. L. 96-132, which substituted references to the Drug Enforcement Administration for references to the Bureau of Narcotics and Dangerous Drugs wherever appearing in text.

(c) Advance of funds for enforcement purposes

The Attorney General is authorized to direct the advance of funds by the Treasury Department in connection with the enforcement of this subchapter.

(d) Drug Pollution Fund

(1) There is established in the Treasury a trust fund to be known as the "Drug Pollution Fund" (hereinafter referred to in this subsection as the "Fund"), consisting of amounts appropriated or credited to such Fund under section 841(b)(6) of this title.

(2) There are hereby appropriated to the Fund amounts equivalent to the fines imposed under section 841(b)(6) of this title.

(3) Amounts in the Fund shall be available, as provided in appropriations Acts, for the purpose of making payments in accordance with paragraph (4) for the clean up of certain pollution resulting from the actions referred to in section 841(b)(6) of this title.

(4)

(A) The Secretary of the Treasury, after consultation with the Attorney General, shall make payments under paragraph (3), in such amounts as the Secretary determines appropriate, to the heads of executive agencies or departments that meet the requirements of subparagraph (B).

(B) In order to receive a payment under paragraph (3), the head of an executive agency or department shall submit an application in such form and containing such information as the Secretary of the Treasury shall by regulation require. Such application shall contain a description of the fine imposed under section 841(b)(6) of this title, the circumstances surrounding the imposition of such fine, and the type and severity of pollution that resulted from the actions to which such fine applies.

(5) For purposes of subchapter B of chapter 98 of title 26, the Fund established under this paragraph shall be treated in the same manner as a trust fund established under subchapter A of such chapter.

§ 886a. Diversion Control Fee Account.

There is established in the general fund of the Treasury a separate account which shall be known as the Diversion Control Fee Account. For fiscal year 1993 and thereafter:

(1) There shall be deposited as offsetting receipts into that account all fees collected by the Drug Enforcement Administration, in excess of $15,000,000, for the operation of its diversion control program.

(2) Such amounts as are deposited into the Diversion Control Fee Account shall remain available until expended and shall be refunded out of that account by the Secretary of the Treasury, at least on a quarterly basis, to reimburse the Drug Enforcement Administration for expenses incurred in the operation of the diversion control program.

(3) Fees charged by the Drug Enforcement Administration under its diversion control program shall be set at a level that ensures the recovery of the full costs of operating the various aspects of that program.

(4) The amount required to be refunded from the Diversion Control Fee Account for fiscal year 1994 and thereafter shall be refunded in accordance with estimates made in the budget request of the Attorney General for those fiscal years. Any proposed changes in the amounts designated in said budget requests shall only be made after notification to the Committees on Appropriations of the House of Representatives and the Senate fifteen days in advance.

(5) The Attorney General shall prepare and submit annually to the Congress, statements of financial condition of the account, including the beginning balance, receipts, refunds to appropriations, transfers to the general fund, and the ending balance.

§ 887. Coordination and consolidation of post-seizure administration.

The Attorney General and the Secretary of the Treasury shall take such action as may be necessary to develop and maintain a joint plan to coordinate and consolidate post-seizure administration of property seized under this subchapter, subchapter II of this chapter, or provisions of the customs laws relating to controlled substances.

§ 888. Expedited procedures for seized conveyances.

(a) Petition for expedited decision; determination

(1) The owner of a conveyance may petition the Attorney General for an expedited decision with respect to the conveyance, if the conveyance is seized for a drug-related offense and the owner has filed the requisite claim and cost bond in the manner provided in section 1608 of title 19. The Attorney General shall make a determination on a petition under this section expeditiously, including a determination of any rights or defenses available to the petitioner. If the Attorney General does not grant or deny a petition under this section within 20 days after the date on which the petition is filed, the conveyance shall be returned to the owner pending further forfeiture proceedings.

(2) With respect to a petition under this section, the Attorney General may -

(A) deny the petition and retain possession of the conveyance;

(B) grant the petition, move to dismiss the forfeiture action, if filed, and promptly release the conveyance to the owner; or

(C) advise the petitioner that there is not adequate information available to determine the petition and promptly release the conveyance to the owner.

(3) Release of a conveyance under subsection (a)(1) or (a)(2)(C) of this section does not affect any forfeiture action with respect to the conveyance.

(4) The Attorney General shall prescribe regulations to carry out this section.

(b) Written notice of procedures

At the time of seizure, the officer making the seizure shall furnish to any person in possession of the conveyance a written notice specifying the procedures under this section. At the earliest practicable opportunity after determining ownership of the seized conveyance, the head of the department or agency that seizes the conveyance shall furnish a written notice to the owner and other interested parties (including lienholders) of the legal and factual basis of the seizure.

(c) Complaint for forfeiture

Not later than 60 days after a claim and cost bond have been filed under section 1608 of title 19 regarding a conveyance seized for a drug-related offense, the Attorney General shall file a complaint for forfeiture in the appropriate district court, except that the court may extend the period for filing for good cause shown or on agreement of the parties. If the Attorney General does not file a complaint as specified in the preceding sentence, the court shall order the return of the conveyance to the owner and the forfeiture may not take place.

(d) Bond for release of conveyance

Any owner of a conveyance seized for a drug-related offense may obtain release of the conveyance by providing security in the form of a bond to the Attorney General in an amount equal to the value of the conveyance unless the Attorney General determines the conveyance should be retained (1) as contraband, (2) as evidence of a violation of law, or (3) because, by reason of design or other characteristic, the conveyance is particularly suited for use in illegal activities.

§ 889. Production control of controlled substances.

(a) Definitions

As used in this section:

(1) The term "controlled substance" has the same meaning given such term in section 802(6) of this title.

(2) The term "Secretary" means the Secretary of Agriculture.

(3) The term "State" means each of the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(b) Persons ineligible for Federal agricultural program benefits

Notwithstanding any other provision of law, following December 23, 1985, any person who is convicted under Federal or State law of planting, cultivation, growing, producing, harvesting, or storing a controlled substance in any crop year shall be ineligible for -

(1) as to any commodity produced during that crop year, and the four succeeding crop years, by such person -

(A) any price support or payment made available under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), the Commodity Credit Corporation Charter Act (15 U.S.C. 714 et seq.), or any other Act;

(B) a farm storage facility loan made under section 4(h) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b(h));

(C) crop insurance under the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.);

(D) a disaster payment made under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.); or

(E) a loan made, insured or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) or any other provision of law administered by the Farmers Home Administration; or

(2) a payment made under section 4 or 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b or 714c) for the storage of an agricultural commodity that is -

(A) produced during that crop year, or any of the four succeeding crop years, by such person; and

(B) acquired by the Commodity Credit Corporation.

(c) Regulations

Not later than 180 days after December 23, 1985, the Secretary shall issue such regulations as the Secretary determines are necessary to carry out this section, including regulations that -

(1) define the term "person";

(2) govern the determination of persons who shall be ineligible for program benefits under this section; and

(3) protect the interests of tenants and sharecroppers.

Return to top

PART F Advisory Commission

(a) There is established a commission to be known as the Commission on Marihuana and Drug Abuse (hereafter in this section referred to as the 'Commission'). The Commission shall be composed of -

(1) two Members of the Senate appointed by the President of the Senate;

(2) two Members of the House of Representatives appointed by the Speaker of the House of Representatives; and

(3) nine members appointed by the President of the United States. At no time shall more than one of the members appointed under paragraph (1), or more than one of the members appointed under paragraph (2), or more than five of the members appointed under paragraph (3) be members of the same political party.

(b) (Chairman; Vice Chairman; compensation of members; meetings)

(1) The President shall designate one of the members of the Commission as Chairman and one as Vice Chairman. Seven members of the Commission shall constitute a quorum, but a lesser number may conduct hearings.

(2) Members of the Commission who are Members of Congress or full-time officers or employees of the United States shall serve without additional compensation but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of the duties vested in the Commission. Members of the Commission from private life shall receive $100 per diem while engaged in the actual performance of the duties vested in the Commission,

plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties.

(3) The Commission shall meet at the call of the Chairman or at the call of a majority of the members thereof.

(c) (Personnel; experts; information from departments and agencies)

(1) The Commission shall have the power to appoint and fix the compensation of such personnel as it deems advisable, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates.

(2) The Commission may procure, in accordance with the provisions of section 3109 of title 5, United States Code, the temporary or intermittent services of experts or consultants. Persons so employed shall receive compensation at a rate to be fixed by the Commission, but not in excess of $75 per diem, including traveltime. While away from his home or regular place of business in the performance of services for the Commission, any such person may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703(b) of title 5, United States Code, for persons in the Government service employed intermittently.

(3) The Commission may secure directly from any department or agency of the United States information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Commission, such department or agency shall furnish such information to the Commission.

(d) (Marihuana study; report to the President and the Congress)

(1) The Commission shall conduct a study of marihuana including, but not limited to, the following areas:

(A) the extent of use of marihuana in the United States to include its various sources of users, number of arrests, number of convictions, amount of marihuana seized, type of user, nature of use;

(B) an evaluation of the efficacy of existing marihuana laws;

(C) a study of the pharmacology of marihuana and its immediate and long-term effects, both physiological and psychological;

(D) the relationship of marihuana use to aggressive behavior and crime;

(E) the relationship between marihuana and the use of other drugs; and

(F) the international control of marihuana.

(2) Within one year after the date on which funds first become available to carry out this section, the Commission shall submit to the President and the Congress a comprehensive report on its study and investigation under this subsection which shall include its recommendations and such proposals for legislation and administrative action as may be necessary to carry out its recommendations.

(e) (Study and investigation of causes of drug abuse; report to the President and the Congress; termination of Commission)

The Commission shall conduct a comprehensive study and investigation of the causes of drug abuse and their relative significance. The Commission shall submit to the President and the Congress such interim reports as it deems advisable and shall within two years after the date on which funds first become available to carry out this section submit to the President and the Congress a final report which shall contain a detailed statement of its findings and conclusions and also such recommendations for legislation and administrative actions as it deems appropriate. The Commission shall cease to exist sixty days after the final report is submitted under this subsection.

(f) (Limitation on expenditures)

Total expenditures of the Commission shall not exceed $4,000,000."

Return to top

Part G - Conforming, Transitional and Effective Date, and General Provisions

§ 701 Repeals and Conforming Amendments

(a) Sections 201(v), 301(q), and 511 of the Federal Food, Drug and Cosmetic Act (21 USC 321(v), 331(q), 360(a)) are repealed.

(b) Subsections (a) and (b) of section 303 of the Federal Food, Drug and Cosmetic Act (21 USC 333) are amended to read as follows:

Federal Food, Drug and Cosmetic Act (21 USC 333)

(a) Violation of section 331 of this title; second violation; intent to defraud or mislead

(1) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.

(2) Notwithstanding the provisions of paragraph (1) of this section, (FOOTNOTE 1) if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000, or both.

(FOOTNOTE 1) So in original. Words "of this section" probably should not appear.

(c) Section 304(a)(2) of the Federal Food, Drug and Cosmetic Act (21 USC 334) amended in 1970 - Subsec. (a)(2). Pub. L. 91-513, Sec. 701(c), struck out cls. (A) and (D) which dealt with depressant or stimulant drugs, struck out reference to depressant or stimulant drugs in cl. (C), and redesignated cls. (B), (C), and (E) as cls. (A), (B), and (C), respectively.

(d) Section 304(d)(3)(iii). of the Federal Food, Drug and Cosmetic Act (21 USC 334(d)(3)(iii)) Pub. L. 91-513, Sec. 701(d), struck out reference to depressant or stimulant drugs.

(e) Section 510 of the Federal Food, Drug and Cosmetic Act (21 USC 360) is amended (1) in Subsec. (a) by striking out paragraph (2), and by inserting "and" at the end of paragraph (1), and by redesignating paragraph (3) as paragraph (2); (2) Subsec. (b). Pub. L. 91-513 struck out provisions covering establishments engaged in the wholesaling, jobbing, or distributing of depressant or stimulant drugs and the inclusion of the fact of such activity in the annual registration; (3) by striking out the last sentence of subsection (b); (4) Subsec. (c). Pub. L. 91-513

struck out provisions covering new registrations of persons first engaging in the wholesaling, jobbing, or distributing of depressant or stimulant drugs and the inclusion of the fact of such activity in the registration; (5) by striking out the last sentence of subsection (c); (6) by striking out "1)" in subsection (d) and by inserting a period after "drug or drugs" in that subsection and deleting the remainder of that subsection; and (7) by striking out "and certain wholesalers" in the section heading.

(f) Sec 702 of the Federal Food, Drug and Cosmetic Act (21 USC 372) is amended 1970 - Subsec. (e). Pub. L. 91-513 struck out reference to depressant or stimulant drugs.

(g) Section 201(a)(2) of the Federal Food, Drug and Cosmetic Act (21 USC 321(a)(2)) is amended by inserting a period after "Canal Zone" the first time these words appear and deleting all thereafter in such section 201(a)(2).

(h) The last sentence of Section 801(a) of the Federal Food, Drug and Cosmetic Act (21 USC 381(a) is amended (1) by striking out "This paragraph" and inserting in lieu thereof "Clause (2) of the third sentence of this paragraph," and (2) by striking out "section 2 of the Act of May 26, 1922, as amended (USC 1934, edition, title 21, sec 173)" and inserting in lieu thereof "the Controlled Substances Import and Export Act."

(i)

(1) Section 1114 of title 18, United States Code, is amended by striking out "the Bureau of Narcotics" and inserting in lieu thereof "the Bureau of Narcotics and Dangerous Drugs".

(2) Section 1952 of such title is amended-

(A) by inserting in subsection (b)(1) "or controlled substances (as defined in section 102(6) of the Controlled Substances Act)" immediately following "narcotics"; and

(B) by striking out "or narcotics" in subsection (c).

(j) Subsection (a) of section 302 of the Public Health Service Act (42 USC 242(a)) is amended to read as follows:

(a) In carrying out the purposes of section 241 of this title with respect to drugs the use or misuse of which might result in drug abuse or dependency, the studies and investigations authorized therein shall include the use and misuse of narcotic drugs and other drugs. Such studies and investigations shall further include the quantities of crude opium, coca leaves, and their salts, derivatives, and preparations, and other drugs subject to control under the Controlled Substances Act (21 U.S.C. 801 et seq.) and Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), together with reserves thereof, necessary to supply the normal and emergency medicinal and scientific requirements of the United States. The results of studies and investigations of the quantities of narcotic drugs or other drugs subject to control under such Acts, together with reserves of such drugs, that are necessary to supply the normal and emergency medicinal and scientific requirements of the United States, shall be reported not later than the first day of April of each year to the Attorney General, to be used at his discretion in determining manufacturing quotas or importation requirements under such Acts.

§ 702 [321 note] Pending Proceedings

(a) Prosecutions for any violation of law occurring prior to the effective date (see Effective Date of 1970 Amendment note above) of section 701 (repealing section 360a of this title, and amending sections 321, 331, 333, 334, 360, 372, and 381 of this title, sections 1114 and 1952 of Title 18, Crimes and Criminal Procedure, and section 242 of Title 42, The Public Health and Welfare) shall not be affected by the repeals or amendments made by such section, or abated by reason thereof.

(b) Civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of section 701 shall not be affected by the repeals or amendments made by such section, or abated by reason thereof.

(c) All administrative proceedings pending before the Bureau of Narcotics and Dangerous Drugs (now the Drug Enforcement Administration) on the date of enactment of this Act (Oct. 27, 1970) shall be continued and brought to final determination in accord with laws and regulations in effect prior to such date of enactment. Where a drug is finally determined under such proceedings to be a depressant or stimulant drug, as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act (par. (v) of this section), such drug shall automatically be controlled under this title (subchapter I of chapter 13 of this title) by the Attorney General

without further proceedings and listed in the appropriate schedule after he has obtained the recommendation of the Secretary. Any drug with respect to which such a final determination has been made prior to the date of enactment of this Act which is not listed in section 202 (section 812 of this title) within schedules I through V shall automatically be controlled under this title (subchapter I of chapter 13 of this title) by the Attorney General without further proceedings, and be listed in the appropriate schedule, after he has obtained the recommendations of the Secretary.

(d) Notwithstanding subsection (a) of this section or section 1103 (of Pub. L. 91-513, set out as a note under sections 171 to 174 of this title), section 4202 of title 18, United States Code, shall apply to any individual convicted under any of the laws repealed by this title or title III (subchapter I or subchapter II of chapter 13 of this title) without regard to the terms of any sentence imposed on such individual under such law.

§ 703 [822 note] Provisional Proceedings

(a)

(1) Any person who -

(A) is engaged in manufacturing, distributing, or dispensing any controlled substance on the day before the effective date of section 302 (this section), and

(B) is registered on such day under section 510 of the Federal Food, Drug, and Cosmetic Act (section 360 of this title) or under section 4722 of the Internal Revenue Code of 1986 (formerly I.R.C. 1954, section 4722 of Title 26),

shall, with respect to each establishment for which such registration is in effect under any such section, be deemed to have a provisional registration under section 303 (section 823 of this title) for the manufacture, distribution, or dispensing (as the case may be) of controlled substances.

(2) During the period his provisional registration is in effect under this section, the registration number assigned such person under such section 510 (section 360 of this title) or under such section 4722 (section 4722 of Title 26) (as the case may be) shall be his registration number for purposes of section 303 of this title (section 823 of this title).

(b) The provisions of section 304 (section 824 of this title), relating to suspension and revocation of registration, shall apply to a provisional registration under this section.

(c) Unless sooner suspended or revoked under subsection (b), a provisional registration of a person under subsection (a)(1) of this section shall be in effect until -

(1) the date on which such person has registered with the Attorney General under section 303 (section 823 of this title) or has had his registration denied under such section, or

(2) such date as may be prescribed by the Attorney General for registration of manufacturers, distributors, or dispensers, as the case may be, whichever occurs first.

§ 704 [801 note] Effective Dates and Other Transitional Provisions.

(a) Except as otherwise provided in this section, this title (see Short Title note below) shall become effective on the first day of the seventh calendar month that begins after the day immediately preceding the date of enactment (Oct. 27, 1970).

(b) Parts A, B, E, and F of this title (Parts A, B, E, and F of this subchapter), section 702 (set out as a note under section 321 of this title), this section, and sections 705 through 709 (sections 901 to 904 of this title and note set out below), shall become effective upon enactment (Oct. 27, 1970).

(c) Sections 305 (relating to labels and labeling) (section 825 of this title), and 306 (relating to manufacturing quotas) (section 826 of this title) shall become effective on the date specified in subsection (a) of this section, except that the Attorney General may by order published in the Federal Register postpone the effective date of either or both of these sections for such period as he may determine to be necessary for the efficient administration of this title (see Short Title note below).

§ 705 [801 note] Continuation of Regulations.

Any orders, rules, and regulations which have been promulgated under any law affected by this title (see Short Title note above) and which are in effect on the day preceding enactment of this title (Oct. 27, 1970) shall continue in effect until modified, superseded, or repealed.

§ 706 [901] Severability

If a provision of this chapter is held invalid, all valid provisions that are severable shall remain in effect. If a provision of this chapter is held invalid in one or more of its applications, the provision shall remain in effect in all its valid applications that are severable.

§ 707 [902] Savings Provision

Nothing in this chapter, except this part and, to the extent of any inconsistency, sections 827(e) and 829 of this title, shall be construed as in any way affecting, modifying, repealing, or superseding the provisions of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 301 et seq.).

§ 708 [903] Application of State Law

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

§ 709 [904] Payment of Tort Claims

Notwithstanding section 2680(k) of title 28, the Attorney General, in carrying out the functions of the Department of Justice under this subchapter, is authorized to pay tort claims in the manner

authorized by section 2672 of title 28, when such claims arise in a foreign country in connection with the operations of the Drug Enforcement Administration abroad.