JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 3199), the "USA PATRIOT Improvement and Reauthorization Act of 2005," submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment to the text of the bill struck all of the House bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to House bill with an amendment that is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

Section 1. Short Title. Table of Contents.

The House receded to the Senate on the short title of the Act. The short title is the "USA PATRIOT Improvement and Reauthorization Act of 2005."

TITLE I – USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT

Section 101. References to, and modification of short title for, USA PATRIOT Act.

Section 101 of the conference report is identical to section 101 of the House bill and similar to section 9(d) of the Senate amendment. Section 101 states that references contained within the conference report to the USA PATRIOT Act shall be deemed a reference to Pub. Law No. 107-56, the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001."

Section 102. USA PATRIOT Act Sunset Provisions.

Section 102 of the conference report adopts a 4-year sunset on sections 206 and 215 of the USA PATRIOT Act, and makes permanent the other provisions, all of which were set to expire on December 31, 2005. Sections 206 and 215 relate to Foreign Intelligence Court orders for multipoint, or "roving," wiretaps and for business records requested under the Foreign Intelligence Surveillance Act (FISA).

Section 103. Extension of Sunset Relating to Individual Terrorists as Agents of Foreign Powers.

Section 103 of the conference report extends the sunset of section 6001(b) of the Intelligence Reform and Terrorism Prevention Act (IRTPA) by 4 years so the provision is set to expire on December 31, 2009. Section 6001(b) applied the USA PATRIOT Act sunset to the new

definition of "Agent of a Foreign Power" under section 6001 of IRTPA. Section 6001 states that an "Agent of a foreign power" for any person other than a United States person, includes a person who "engages in international terrorism or activities in preparation thereof." This definition reaches "lone wolf" terrorists engaged in international terrorism.

Section 104. Section 2332b and the Material Support Sections of Title 18, United States Code.

Section 104 of the conference report is identical to section 104 of the House bill and substantively similar to section 9(c) of the Senate amendment. This section makes section 6603 of the IRTPA permanent by repealing the sunset contained in section 6603(g) of the IRTPA. This sunset would have allowed a criminal offense, and not a law enforcement tool, to expire. Furthermore, this sunset effectively made the underlying provision unconstitutional. Section 6603 of the IRTPA amended the law to address court concerns on the constitutionality of the prohibition of providing material support to terrorists.

Section 105. Duration of FISA Surveillance of Non-United States Persons under Section 207 of the USA PATRIOT Act.

Section 105 of the conference report is substantively similar to section 106 of the House bill and section 3 of the Senate amendment. This section further extends the maximum duration of orders for electronic surveillance and physical searches targeted against all agents of foreign powers who are not U.S. persons. Initial orders authorizing searches and electronic surveillance will be for periods of up to 120 days and renewal orders will extend for periods of up to one year. Section 105 also extends the maximum duration for both the initial and renewal orders for pen register/trap and trace surveillance to a period of one year in cases where the government certified that the information likely to be obtained is foreign intelligence information not concerning a U.S. person.

Section 106. Access to Certain Business Records Under Section 215 of the USA PATRIOT Act.

Section 106 of the conference report is a compromise between section 107 of the House bill and section 7 of the Senate amendment. This section of the conference report amends section 215 of the USA PATRIOT Act to clarify that the tangible things sought by a section 215 FISA order ("215 order") must be "relevant" to an authorized preliminary or full investigation to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities. The provision also requires a statement of facts to be included in the application that shows there are reasonable grounds to believe the tangible things sought are relevant, and, if such facts show reasonable grounds to believe that certain specified connections to a foreign power or an agent of a foreign power are present, the tangible things sought are presumptively relevant. Congress does not intend to prevent the FBI from obtaining tangible items that it currently can obtain under section 215.

The provision also clarifies that a recipient of a FISA section 215 production order may challenge that order, and may disclose receipt to a lawyer, other persons necessary to comply with the order, and additional persons approved by the FBI. This provision allows the FBI to request the

recipient to identify the individuals to whom disclosure has been or will be made. The provision also makes clear that a judge should approve an application only "if the judge finds that the [applicable] requirements [of the section] have been met." The provision also expressly provides for a judicial review process that authorizes a specified pool of FISA court judges to review a 215 order that has been challenged. The provision requires high-level approval, and specific congressional reporting, of requests for certain sensitive categories of records, such as library, bookstore, tax return, firearms sales, educational, and medical records. The provision requires promulgation and application of minimization procedures governing the retention and dissemination by the FBI of any tangible thing obtained under this section and requires restrictions on the use of information obtained with an order under this section.

In addition, Section 106 directs the Attorney General to draft minimization procedures that apply to information obtained under a FISA "business records" order. In the application for the order, the applicant must enumerate the minimization procedures applicable to the retention and dissemination of the tangible things sought by the FBI in the application. Such enumerated procedures should meet the requirements set forth in the definition of minimization procedures found in new subsection (g) of section 501. If the court finds that the enumerated procedures fail to meet the requirements of subsection (g), the Conferees expect that the court will direct that other procedures adopted by the Attorney General be applied to the information sought, consistent with the authority of the court specified in section 501(c)(1), as amended.

Under subsection (g)(1), as amended, the Attorney General is required to adopt minimization procedures within 180 days of the enactment of this Act. Until the Attorney General complies, the Conferees expect that the requirements of subsections (b)(2)(B), (c)(1), and (h) that relate to the adoption of minimization procedures will be viewed as ineffective and, thus, not prevent the use of section 501 to acquire tangible things.

Sec. 106A. Audit on Access to Certain Business Records for Foreign Intelligence Purposes.

Section 106A of the conference report is a new provision. This section requires that the Department of Justice Inspector General conduct an audit on the effectiveness and use of section 215 and submit an unclassified report of the audit to the House and Senate Committees on the Judiciary and Intelligence.

Section 107. Enhanced Oversight of Good-Faith Emergency Disclosures under Section 212 of the USA PATRIOT Act.

Section 107 of the conference report is virtually identical to section 4 of the Senate amendment, but includes some technical corrections to title 18 of the United States Code. Section 108 of the House bill is substantively similar. Section 107 of the conference report amends 18 U.S.C. § 2702, as amended by section 212 of the USA PATRIOT Act. Section 212 allows Internet service providers to disclose voluntarily the contents of electronic communications, as well as subscriber information, in emergencies involving immediate danger of death or serious physical injury. To address concerns that this authority, in certain circumstances, is not subject to adequate congressional, judicial, or public oversight (particularly in situations where the authority is used

but criminal charges do not result) the conference report requires the Attorney General to report annually to the Judiciary Committees of the House and Senate and to set forth the number of accounts subject to section 212 disclosures. The report also must summarize the basis for disclosure in certain circumstances. The Conferees believe this will strengthen oversight on the use of this authority without undermining important law enforcement prerogatives and without alerting perpetrators, while simultaneously preserving the vitality of this life-saving authority.

Section 108. Multipoint Electronic Surveillance Under Section 206 of the USA PATRIOT Act.

Section 108 of the conference report is a compromise between section 109 of the House bill and section 2 of the Senate amendment. Section 206 of the USA PATRIOT Act enabled the use of multipoint, or "roving," wiretaps in FISA investigations. The conference report clarifies that the FISA court must find that the possibility of the target thwarting surveillance is based on specific facts in the application. This is reflected in language contained in section 109(a) of the House bill and for which the Senate amendment did not have a comparable provision. In language derived from section 2(a) of the Senate amendment and for which the House bill had no comparable provision, the conference report also requires that the order describe the specific target in detail when authorizing a roving wiretap for a target whose identity is not known. The conference report requires that in the event the government begins directing surveillance at a new facility or place where the nature and location of each of the facilities or places was unknown at the time the surveillance order was issued, the government must notify the issuing FISA court on an ongoing basis for all multipoint surveillance authority, which addresses concerns of some that the open-ended authorization to surveil new locations could be abused. The conference report provisions provide further protections by including an extra layer of judicial review and to ensure that intelligence investigators will not abuse the multipoint authority. This approach is superior in the FISA context (where surveillance is often long-running and subject to extensive and sophisticated counter-surveillance measures) to a proximity test or ascertainment requirement, both of which could potentially endanger an investigation or field agents conducting the investigation.

Section 109. Enhanced Congressional Oversight.

Section 109 of the conference report is similar to section 10 of the Senate amendment, but with an additional new provision. Section 109 of the conference report is identical to section 10 of the Senate amendment and requires: (1) the FISA court to publish its rules; and (2) reporting to the House and Senate Judiciary Committees of the use of the emergency employments of electronic surveillance, physical searches, and pen register and trap and trace devices. Section 109(c) of the conference report also requires that the Secretary of the Department of Homeland Security submit a written report providing a description of internal affairs operations at U.S. Citizenship & Immigration Services to the Judiciary Committees of the House and the Senate.

Section 110. Attacks Against Railroad Carriers and Mass Transportation Systems.

The conference report is substantively similar to sections 110, 115, and 304 of the House bill. There are no equivalent provisions in the Senate amendment, but section 110 of the conference

report is substantively similar to S. 629, the "Railroad Carriers and Mass Transportation Act of 2005," which was reported favorably by the Senate Judiciary Committee. Section 110 of the conference report amends 18 U.S.C. § 1993, which was created by the USA PATRIOT Act to protect against terrorist attacks and other acts of violence against mass transportation systems. However, current law does not cover the planning for such attacks. The conference report closes this loophole to make it a crime to "surveil, photograph, videotape, diagram, or to otherwise collect information with the intent to plan or assist in planning any of the acts described" in paragraphs (1)-(5) of section 1993(a). It also harmonizes section 1993 with 18 U.S.C. § 1992 (which criminalizes the "wrecking of trains"), in order to eliminate the inconsistency between the intent standard in the mass transportation statute and the intent standard in the wrecking trains statute. It also strengthens the protection of mass transportation and railroad systems by: expanding the types of railroad property and equipment that are explicitly protected by Federal law; updating the definition of "dangerous weapons" to cover box cutters and other previously unrecognized weapons; and expanding the types of prohibited attacks to include causing the release of a hazardous material, a biological agent, or toxin near the property of a railroad carrier or mass transportation system. The conference report restricts the death penalty against inchoate offenses, but retains the death penalty for aggravated offenses. The section also expands coverage of the criminal offense to include passenger vessels (as defined in 46 U.S.C. § 2101(22)).

Section 111. Forfeiture.

Section 111 of the conference report is identical to section 111 of the House bill. There is no comparable section in the Senate amendment. The USA PATRIOT Act amended 18 U.S.C. § 981 to expressly provide that any property used to commit or facilitate the commission of, derived from, or otherwise involved in a Federal crime of terrorism (as defined in 18 U.S.C. § 2331) is subject to civil forfeiture provisions. Prior to the USA PATRIOT Act, only the "proceeds" of a crime of terrorism were subject to civil forfeiture provisions. This section extends forfeiture to include property used in or derived from "trafficking in nuclear, chemical, biological, or radiological weapons technology or material."

Section 112. Section 2332b(g)(5)(B) Amendments Relating to the Definition of Federal Crime of Terrorism.

Section 112 of the conference report is substantively similar to section 112 of the House bill but includes an additional offense. There is no comparable provision in the Senate amendment. This section amends the current definition of "Federal crime of terrorism," to include new predicate offenses. It also includes a clerical correction to 18 U.S.C. § 2332b(g)(5)(B).

Section 113. Amendments to Section 2516(1) of Title 18, United States Code.

Section 113 of the conference report is substantively similar to sections 113 and 122 of the House bill, but includes additions. 18 U.S.C. §§ 2510-2522 require the government, unless otherwise permitted, to obtain an order of a court before conducting electronic surveillance. The government is permitted to seek such orders only in connection with the investigation of the

criminal offenses enumerated in 18 U.S.C. § 2516. The USA PATRIOT Act added new wiretap offenses related to terrorism. Section 113 adds new "wiretap predicates" under 18 U.S.C. § 2516, which relate to crimes of terrorism. Those predicates include 18 U.S.C. §§ 37 (violence at international airports); 43 (animal enterprise terrorism); 81 (arson within special maritime and territorial jurisdiction); 175b (biological agents); 832 (nuclear and weapons of mass destruction threats); 842 (explosive materials); 930 (possession of weapons in Federal facilities); 956 (conspiracy to harm persons or property overseas); 1028A (aggravated identity theft); 1114 (killing Federal employees); 1116 (killing certain foreign officials); 1993 (attacks of mass transit); 2340A (torture); 2339 (harboring terrorists); 2339D (terrorist military training); and 5324 (structuring transactions to evade reporting requirements). In addition to these sections, new predicates are added under 49 U.S.C. §§: 46504 (assault on a flight crew member with a dangerous weapon); and 46505(b)(3) or (c) (certain weapons offenses aboard an aircraft).

Section 114. Delayed Notice Search Warrants.

Section 114 of the conference report is a compromise between sections 114 and 121 of the House bill and section 5 of the Senate amendment. Contrary to reports, the USA PATRIOT Act did not create delayed notice search warrants, but rather codified existing case law governing delayed notices for search warrants. Delayed notice simply means that a court has expressly authorized investigators to delay temporarily notifying a subject that a search warrant has been executed (*i.e.*, a court-ordered search has occurred). The search warrant itself is the same regardless of when the subject receives notice. Thus, before a search warrant is issued, whether notice is or is not delayed, a Federal judge must find that there is probable cause to believe that a crime has been or is about to be committed and that evidence of that crime or the fruits or instrumentalities of that crime will be found at the location to be searched. As the Department of Justice explained in an August 29, 2005 letter (p. A-5), "Delayed notice search warrants have been available for decades and were in use long before the USA PATRIOT Act was enacted. Section 213 of the USA PATRIOT Act merely created a nationally uniform process and standard for obtaining them."

Section 213 codified the established standard of reasonableness for delayed notice search warrants, which previously had been the cause for some to express concern about this indefinite term. Both the House bill in section 114, and the Senate amendment in section 5, placed a maximum specified limit on the length of time in which a judge could authorize law enforcement to delay notice to the subject that a search has been conducted. The House provision provided that the court maintains the discretion to delay notice for up to 180 days with extensions of up to 90 days. The Senate amendment limited the delay to "not later than 7 days after the date of its execution, or on a later date certain if the facts of the case justify a longer period of delay, with extensions of up to 90 days unless the facts justify longer." The conference report reflects a compromise between the House and Senate provisions to define a reasonable delay as up to 30 days for an initial request, or on a later date certain if the facts justify, and extensions of up to 90 days unless the facts justify longer.

Section 115. Judicial Review of National Security Letters.

Section 115 of the conference report is substantively similar to section 116 of the House bill and section 8 of the Senate amendment. This section makes explicit that the recipient of a national security letter (NSL) may consult with an attorney and challenge the NSL in court. This section of the conference report amends NSL authority under 18 U.S.C. § 2709, 15 U.S.C. § 1681u, 15 U.S.C. § 1861v, 12 U.S.C. § 3414, and 50 U.S.C. § 436, in a similar manner to the House bill. The Senate amendment only modified 18 U.S.C. § 2709. The conference report: provides that the recipient of an NSL may petition for an order modifying or setting aside the request in the U.S. district court for the district in which that person or entity does business or resides; allows the government to move for judicial enforcement of the NSL in the event of non-compliance by recipients; and allows the court to impose sanctions for contempt of court if a recipient fails to comply with a court order to enforce an NSL.

Section 116. Confidentiality of National Security Letters.

Section 116 of the conference report is substantively similar to section 117 of the House bill and section 8 of the Senate amendment. This section provides that upon certification by an individual authorized to issue an NSL, should the disclosure endanger any individual or national security, or interfere with diplomatic relations or a criminal or intelligence investigation, then the disclosure of the NSL is prohibited. This section allows for the disclosure to those necessary to comply with an NSL or obtain legal advice or assistance with respect to an NSL. If the recipient makes this further disclosure as authorized by law, the recipient must then notify the person or persons of all applicable nondisclosure requirements. At the request of the Director of National Intelligence, the conference report includes language that allows the Director of the Federal Bureau of Investigation, or the designee of the Director, to request from any person making or intending to make a disclosure to comply with or to receive legal advice or legal assistance, to identify to whom such disclosure will be made. The language does not allow the FBI Director or designee of the Director to request the recipient of an NSL disclose the name of an attorney to whom such disclosure will be made. The provision, however, does allow the FBI Director or designee of the Director to make such a request for the name of an attorney to whom disclosure has already been made. The conference report clarifies that a recipient of an NSL may challenge any nondisclosure requirement in court. If a petition is filed within 1 year of issuance of an NSL, the court may modify or set aside such a nondisclosure requirement if it finds that there is no reason to believe that disclosure may harm national security; interfere with criminal, counterintelligence, or counterterrorism investigations; interfere with diplomatic relations; or endanger the life or physical safety of a person. If, upon filing the petition, a high-ranking official re-certifies that disclosure may endanger national security or interfere with diplomatic relations, the court must treat the re-certification as conclusive unless there is a showing of bad faith. If a petition is filed after a year, a specific official, within 90 days of the filing of the petition, shall either terminate the nondisclosure requirement or re-certify that nondisclosure may: result in danger to the national security of the U.S.; interfere with a criminal, counterterrorism, or counterintelligence investigation; interfere with diplomatic relations; or endanger the life or physical safety of any person. In the event of re-certification, the court again may modify or set aside such a nondisclosure requirement only upon a finding of bad faith. The petitioner is barred from seeking review of the nondisclosure requirement for one year if the petition was denied, but can continue to petition every year. This provision recognizes that the

Executive branch is both constitutionally and practically better suited to make national security and diplomatic relations judgments than the judiciary.

Section 117. Violations of Nondisclosure Provisions of National Security Letters.

This section of the conference report is similar to section 118 of the House bill. There is no comparable provision in the Senate amendment. This section provides for a felony charge against an individual who was notified of an applicable nondisclosure requirement and nonetheless knowingly and with intent to obstruct an investigation or judicial proceeding, violates that nondisclosure order. The criminal penalties under 18 U.S.C. § 1510 include up to five years imprisonment, a fine, or both. Current law contains no penalties for such violations.

Section 118. Reports on National Security Letters.

Section 118 of the conference report is similar to section 119 of the House bill, with some additional reporting requirements that are similar to provisions contained in the Senate amendment. This section requires reporting to the House and Senate Judiciary Committees on all NSLs, similar to reporting that the Intelligence Committees receive. This section also requires that the Attorney General submit to Congress the annual aggregate number of requests made concerning different U.S. persons. Such reporting will permit the public to see some of the same data Congress sees in conducting its oversight responsibilities of the DOJ. Due to the manner in which this data is currently collected, Congress understands that current reporting may somewhat overstate the number of different U.S. persons about whom requests for information are made, because NSLs seeking information on a particular person may be served at different times and from different FBI field offices. In order to report a number to Congress that is as meaningful as possible, Congress anticipates that the DOJ will undertake reasonable efforts to modify its data collection. Congress, however, does not anticipate that the DOJ will undertake costly or bureaucratically difficult steps to prepare this report.

Section 119. Enhanced Oversight of National Security Letters.

Section 119 is a new section that requires the Inspector General of DOJ to conduct an audit of the effectiveness and the use of the NSL authority. The report will detail the specific functions and particular characteristics of the NSLs issued and comment on the necessity of this law enforcement tool. This report will be submitted to the House and Senate Committees on the Judiciary and Intelligence one year after the enactment of the conference report.

Section 120. Definition for Forfeiture Provisions under Section 806 of the USA PATRIOT Act.

Section 120 of the conference report is substantively similar to section 120 of the House bill. There is no comparable provision in the Senate amendment. This provision replaces the reference to the broad definition under 18 U.S.C. § 2331 with the definition of a Federal crime of terrorism for asset forfeiture under 18 U.S.C. § 981(a)(1)(G).

Section 121. Penal Provisions Regarding Trafficking in Contraband Cigarettes or Smokeless

Tobacco.

Section 121 of the conference report is substantively similar to section 123 of the House bill. There is no comparable provision in the Senate amendment. This section of the conference report amends the Contraband Cigarette Trafficking Act ("CCTA," 18 U.S.C. §§ 2341 *et seq.)*, which makes it unlawful for any person knowingly to ship, possess, sell, distribute or purchase contraband cigarettes. This section amends the CCTA by: (1) extending its provisions to cover contraband smokeless tobacco; (2) reducing the number of cigarettes that trigger application of the CCTA from 60,000 to 10,000; (3) imposing reporting requirements on persons, except for tribal governments, who engage in delivery sales of more than 10,000 cigarettes or 500 single-unit cans or packages of smokeless tobacco in a single month; (4) requiring the destruction of cigarettes and smokeless tobacco seized and forfeited under the CCTA; and (5) authorizing State and local governments, and certain persons who hold Federal tobacco permits, to bring causes of action against violators of the CCTA. It also amends section 2344(c), the contraband cigarette forfeiture provisions, by adding "contraband smokeless tobacco" to items subject to forfeiture and by removing the reference to the Internal Revenue Code, which became outdated after the enactment of the Civil Asset Forfeiture Reform Act of 2000.

Section 122. Prohibition of Narco-Terrorism.

Section 122 of the conference report is substantively similar to section 124 of the House bill. There is no comparable provision in the Senate amendment. This section adds new section 1010A to Part A of the Controlled Substance Import and Export Act, (21 U.S.C. §§ 951 *et seq.)*, making it a Federal crime to engage in drug trafficking to benefit terrorists. The conference report changes the mandatory minimum penalty from the 20 years provided in the House bill to simply twice the minimum under 21 U.S.C. § 841(b). Finally, the conference report modifies the proof requirements of the House-passed bill to clarify that a person must have knowledge that the person or organization has engaged or engages in terrorist activity or terrorism.

Section 123. Interfering with the Operation of an Aircraft.

Section 123 of the conference report is substantively similar to section 125 of the House bill. There is no comparable provision in the Senate amendment. This section amends 18 U.S.C. § 32, which prohibits the destruction of aircraft or aircraft facilities, to address the increasing number of reports to the Federal Aviation Administration of the intentional aiming of lasers into airplane cockpits. The amendment makes it illegal to interfere with or disable a pilot or air navigation facility operator with the intent to endanger the safety of any person or with reckless disregard for the safety of human life.

Section 124. Sense of Congress Relating to Lawful Political Activity.

Section 124 of the conference report is substantively similar to section 126 of the House bill. There is no comparable provision in the Senate amendment. This sense of the Congress articulates that no American citizen should be the target of a criminal investigation solely as a result of that person's lawful political activity or membership in a non-violent political

organization. During the many congressional hearings held on the PATRIOT Act, both in open and classified settings, there has been absolutely no evidence adduced that the Department of Justice or the FBI has used the powers conferred by law to investigate anyone based on his or her participation in the political process.

Section 125. Removal of Civil Liability Barriers that Discourage the Donation of Fire Equipment to Volunteer Fire Companies.

Section 125 of the conference report is substantively similar to section 131 of the House bill. There is no comparable provision in the Senate amendment. This section establishes immunity from civil liability (other than for gross negligence or intentional misconduct) for anyone other than a fire equipment manufacturer who donates fire equipment to volunteer fire companies.

Section 126. Report on Data-Mining Activities.

Section 126 of the conference report is similar to section 132 of the House bill. There is no comparable provision in the Senate amendment. This section instructs the Attorney General to report to Congress on Department of Justice use or development of pattern-based data-mining technology.

Section 127. Sense of Congress.

Section 127 of the conference report is substantively similar to section 133 of the House bill. There is no comparable provision in the Senate amendment. This section is a sense of the Congress that the victims of terrorist attacks should have access to the assets of terrorists.

Section 128. PATRIOT Section 214; Authority for Disclosure of Additional Information in Connection with Orders for Pen Register and Trap and Trace Authority under FISA.

Section 128 of the conference report is substantively identical to section 6 of the Senate amendment. There is no comparable provision in the House bill. This section requires: (1) an *ex parte* order for a pen register or trap and trace device for foreign intelligence purposes to direct the provider, upon the applicant's request, to disclose specified information to the Federal officer using the device; and (2) the Attorney General to fully inform the House and Senate Judiciary Committees regarding the use of such devices.

TITLE II – TERRORIST DEATH PENALTY ENHANCEMENT

Sec. 201. Short Title.

The short title is the "Terrorist Death Penalty Enhancement Act of 2005.'' Section 201 of the conference report is identical to section 201 of the House bill. There is no comparable provision in the Senate amendment.

Subtitle A—Terrorist Penalties Enhancement Act.

Sec. 211. Death Penalty Procedures for Certain Air Piracy Cases Occurring Before Enactment of the Federal Death Penalty Act of 1994.

This section is the same as section 213 of the House bill, except for the addition of a severability clause. There is no comparable provision in the Senate amendment. Section 211 of the conference report provides procedures for death penalty prosecutions for air piracy crimes occurring before the 1994 Federal Death Penalty Act, provided that the government establishes the existence of one or more factors under former 49 U.S.C. § 46503(c)(2), or its predecessor, and that the defendant has not established by a preponderance of the evidence the existence of any of the factors set forth in former 49 U.S.C. § 46503(c)(1), or its predecessor. This section makes the 1994 procedures applicable to post-1974, and pre-1994 air piracy murder cases.

Section 211 of the conference report would permit the imposition of the death penalty upon an individual convicted of air piracy offenses resulting in death where those offenses occurred after enactment of the Antihijacking Act of 1974 but before the enactment of the Federal Death Penalty Act of 1994. This provision would cover a small, but important category of defendants, including those responsible for the December 1984 hijacking of Kuwait Airways flight 221 and the murder of two American United States Agency for International Development employees, William Stanford and Charles Hegna; the June 1985 hijacking of TWA flight 847 and the murder of Navy diver Robert Stethem; the November 1985 hijacking of Egyptair flight 648 and the murder of American servicewoman Scarlett Rogenkamp as well as 56 other passengers; and the September 1986 hijacking of Pan Am flight 73 and the murder of American citizens Rajesh Kumar and Surendra Patel, as well as at least 19 other passengers and crew.

Section 211 is important to reaffirm the intent of Congress to have available the ultimate penalty to use against aircraft hijackers whose criminal actions result in death. In 1974, Congress enacted the Antihijacking Act, making the crime of air piracy the one and only crime under Federal law for which Congress passed comprehensive procedures, in response to Furman v. Georgia, 408 U.S. 238 (1972), to ensure that the death penalty could be constitutionally enforced. Over the years after the passage of the Antihijacking Act of 1974, the crime of air piracy was repeatedly cited by Members of Congress and the Executive Branch as an example of a crime for which Congress had enacted the necessary constitutional provisions to enforce the death penalty. In 1994, in an effort to make the death penalty widely available for numerous Federal offenses, and to enact uniform procedures to apply to all Federal capital offenses, Congress passed the Federal Death Penalty Act of 1994 ("FDPA"), explicitly including air piracy procedures among the list of crimes to which it applied, at the same time repealing the former death penalty procedures of the Antihijacking Act of 1974.

The problem with this legal development is that there is a perceived gap in legislative intent to maintain the option of a death penalty for those who committed air piracy resulting in death before enactment of the FDPA. On September 29, 2001, the United States obtained custody of Zaid Hassan Abd Latif Safarini, the operational leader of the deadly attempted hijacking of Pan Am flight 73, a crime which occurred on September 5, 1986, in Karachi, Pakistan, and which resulted in the death of at least 20 people, including two United States citizens, and the injury of more than 100 others. Safarini personally executed the first United States citizen and after a 16-

hour stand-off, he and his fellow hijackers opened fire on approximately 380 passengers and crew on board Pan Am 73, attempting to kill all of them with grenades and assault rifles. Safarini and his co-defendants had been indicted by a grand jury in the District of Columbia in 1991, and after his capture in 2001, the prosecutors filed papers stating the government's intention to seek the death penalty against Safarini. The district court, however, ruled that the government could not seek the death penalty in this case or, by implication, in any other air piracy case from the pre-FDPA period, essentially because Congress had not made clear which procedures should apply to such a prosecution. In its ruling, the court noted that, at the time it passed the FDPA in 1994, Congress did not state any intention as to whether the new capital sentencing procedures should be applied to air piracy offenses occurring before enactment of the FDPA. A further complication exists, in that there are two provisions of the Antihijacking Act of 1974 that, if taken away from pre-FDPA air piracy defendants, could pose *ex post facto* concerns in light of Ring v. Arizona, 536 U.S. 584 (2002). Safarini has since pled guilty to the charged offenses and was sentenced, pursuant to a plea agreement, to three life terms plus twenty-five years imprisonment.

Section 211 addresses the issues identified by the district court in the Safarini case by explicitly stating that Congress intends for the provisions of the FDPA to apply to this category of defendants, while also explicitly preserving for such defendants the two provisions of the Antihijacking Act to which they are arguably constitutionally entitled, concerning the statutory aggravating and mitigating circumstances set forth in the Antihijacking Act.

This provision is particularly important for several other reasons. In the absence of a death penalty that could be implemented for pre-FDPA hijacking offenses resulting in death that also occurred before the effective date of the Sentencing Guidelines on November 1, 1987, the maximum penalty available would be life imprisonment. Under the pre-Sentencing Guidelines structure, even prisoners sentenced to life imprisonment were eligible for a parole hearing after serving only ten years. While there is a split in the Circuit Courts of Appeals as to whether a sentencing judge can impose a sentence that could avert the 10-year parole hearing requirement, the current position of the Bureau of Prisons is that a prisoner is eligible for a parole hearing after serving ten years of a life sentence. Even if parole is denied on that first occasion, such prisoners are entitled to have regularly scheduled parole hearings every two years thereafter. Moreover, in addition to parole eligibility after ten years, the old sentencing and parole laws incorporated a presumption that even persons sentenced to life imprisonment would be released after no more than 30 years.

In the context of the individuals responsible for the hijacking incidents described above, most of the perpetrators were no older than in their twenties when they committed their crimes. The imposition of a pre-Guidelines sentence of life imprisonment for these defendants means that many, if not all of them, could be expected to be released from prison well within their lifetime. Given the gravity of these offenses, coupled with the longstanding Congressional intent to have a death penalty available for the offense of air piracy resulting in death, such a result would be at odds with the clear directive of Congress.

Section 211 includes a severability clause that would establish that if any provision of the Act or

the application thereof to any person or circumstance is held invalid by a court of law, the remainder of Section 211 and the application of such provision to other persons or circumstances shall not be affected by that declaration of invalidity. The inclusion of this severability clause means that the unaffected portions of the law would remain operable.

Sec. 212. Postrelease Supervision of Terrorists.

This section is substantively similar to section 215 of the House bill. There is no comparable provision in the Senate amendment. Section 212 of the conference report expands the scope of the individuals covered by the post-release supervision provisions for terrorists.

Subtitle B—Federal Death Penalty Procedures.

Sec. 221. Elimination of Procedures Applicable Only to Certain Controlled Substances Act Cases.

This section retains a portion of section 231 of the House bill. There is no comparable provision in the Senate amendment. The conference report eliminates duplicative death procedures under title 21 of the United States Code, and consolidates procedures governing all Federal death penalty prosecutions in existing title 18 of the United States Code, thereby eliminating confusing requirements that trial courts provide two separate sets of jury instructions in certain Federal death penalty prosecutions.

Sec. 222. Counsel for Financially Unable Defendants.

Section 222 of the conference report is a new provision. This section transfers existing statutes from the death penalty procedures contained in title 21 of the United States Code to the death penalty procedures in title 18 of the United States Code. This section requires that any death-penalty eligible defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services will be entitled to the appointment of one or more attorneys and the furnishing of such other services.

TITLE III – REDUCING CRIME AND TERRORISM AT AMERICA'S SEAPORTS

Sec. 301. Short Title.

This section designates the short title as the "Reducing Crime and Terrorism at America's Seaports Act of 2005." Section 301 of the conference report is identical to section 301 of the House bill. There is no comparable provision in the Senate amendment, but this section is similar to S. 378, the "Reducing Crime and Terrorism at America's Seaports Act of 2005," which was reported favorably by the Senate Committee on the Judiciary on April 21, 2005.

Sec. 302. Entry by False Pretenses to any Seaport.

Section 302 of the conference report is substantively similar to section 302 of the House bill and

the parallel section in S. 378. There is no comparable provision in the Senate amendment. According to the Report of the Interagency Commission on Crime and Security at U.S. Seaports (hereinafter "Interagency Commission Report"), "[c]ontrol of access to the seaport or sensitive areas within the seaport is often lacking." Such unauthorized access is especially problematic, because inappropriate controls may result in the theft of cargo and, more dangerously, undetected admission of terrorists. In addition to establishing appropriate physical, procedural, and personnel security for seaports, it is important that U.S. criminal law adequately reflect the seriousness of the offense. This section clarifies that 18 U.S.C. § 1036 (fraudulent access to transport facilities) includes seaports and waterfronts within its scope, and increases the penalties for violating these provisions from a maximum of 5 years to 10 years.

Sec. 303. Criminal Sanctions for Failure to Heave to, Obstruction of Boarding, or Providing False Information.

Section 303 of the conference report is substantively similar to section 303 of the House bill and the parallel section in S. 378. A core function of the United States Coast Guard is law enforcement at sea, especially in the aftermath of the tragic events of September 11, 2001. While the Coast Guard has authority to use whatever force is reasonably necessary to require a vessel to stop or be boarded, "refusal to stop," by itself, is not currently a crime. This section amends title 18 of the United States Code to make it a crime: (1) for a vessel operator knowingly to fail to slow or stop a ship once ordered to do so by a Federal law enforcement officer; (2) for any person on board a vessel to impede boarding or other law enforcement action authorized by Federal law; or (3) for any person on board a vessel to provide false information to a Federal law enforcement officer. Any violation of this section will be punishable by a fine and/or imprisonment for a maximum term of 5 years.

Sec. 304. Criminal Sanctions for Violence against Maritime Navigation, Placement of Destructive Devices.

Section 304 of the conference report is substantively similar to section 305 of the House bill, and excludes the malicious dumping provisions contained in S. 378. The Coast Guard maintains over 50,000 navigational aids on more than 25,000 miles of waterways. These aids, which are relied upon by all commercial, military, and recreational mariners, are essential for safe navigation and, therefore, are inviting targets for terrorists. To deter any such intentional interference, this section amends 18 U.S.C. § 2280(a) (violence against maritime navigation) to make it a crime to intentionally damage or tamper with any maritime navigational aid maintained by the Coast Guard or under its authority, if such act endangers the safe navigation of a ship. In addition, this section amends title 18 of the United States Code to make it a crime to knowingly place in waters any device that is likely to damage a vessel or its cargo, interfere with a vessel's safe navigation, or interfere with maritime commerce. Any violation of this provision will be punishable by a fine and/or a maximum term of imprisonment for life, and if death results, an offense could be punishable by a sentence of death.

Sec. 305. Transportation of Dangerous Materials and Terrorists.

Section 305 of the conference report is substantively similar to section 306 of the House bill and the parallel provision in S. 378, but adopts the intent requirements as specified in S. 378. The section makes it a crime to knowingly and intentionally transport aboard any vessel an explosive, biological agent, chemical weapon, or radioactive or nuclear materials, knowing that the item is intended to be used to commit a terrorist act. Any violation of this provision will be punishable by a fine and a maximum prison term of life and, if death results, the offense could be punished by a sentence of death.

Sec. 306. Destruction of, or Interference with, Vessels or Maritime Facilities.

Section 306 of the conference report is substantively similar to section 307 of the House bill and the parallel provision in S. 378. This section makes it a crime to: (1) damage or destroy a vessel or its parts, a maritime facility, or any apparatus used to store, load or unload cargo and passengers; (2) perform an act of violence against or incapacitate any individual on a vessel, or at or near a facility; or (3) knowingly communicate false information that endangers the safety of a vessel. Any violation of this section (including attempts and conspiracies) will be punished by a fine and/or imprisonment for a maximum of 20 years; if death results, the offense could be punished by a sentence of death. If an individual threatens to carry out the above-described offense, and has the apparent will and determination to carry out the threat, that threat is punishable by a fine and/or imprisonment for a maximum of 5 years. The offender also will be liable for all costs incurred as a result of the threat. This section also subjects any individual who knowingly conveys false information about the offenses described above (or other named offenses) to a civil penalty up to $5,000. In addition, knowingly conveying false information concerning an attempted violation of this section or of chapter 11 of title 18 will be punishable by a maximum of 5 years imprisonment. This section harmonizes the somewhat outdated maritime provisions with the existing criminal sanctions for destruction or interference with an aircraft or aircraft facilities in 18 U.S.C. §§ 32, 34, and 35.

Sec. 307. Theft of Interstate or Foreign Shipments or Vessels.

This section is similar to section 308 of the House bill and the parallel provision in S. 378, except the conference report does not maintain the increased criminal penalties that were included in the House bill. The Interagency Commission Report found that certain existing statutes, regulations, and sentencing guidelines do not provide sufficient sanctions to deter criminal or civil violations related to a range of offenses, including theft of interstate or foreign shipments. In an effort to close statutory gaps and increase the criminal penalty, this section expands the scope of section 18 U.S.C. § 659 (theft of interstate or foreign shipments) to include theft of goods from additional transportation facilities or instruments, including trailers, cargo containers, and warehouses. In addition, the section increases the penalties for theft of goods from a maximum of 10 years to a maximum of 15 years imprisonment, and for amounts less than $1000, the punishment will be increased from a maximum of 1 year to a maximum of 3 years imprisonment. The section clarifies that, under 18 U.S.C. § 659, the determination of whether goods are "moving as an interstate or foreign shipment" is made by considering the entire cargo route, regardless of any temporary stop between the point of origin and final destination. Finally, the section requires an annual report of law enforcement activities relating to cargo theft and requires

collection and reporting by the FBI of cargo theft crimes.

Sec. 308. Stowaways on Vessels or Aircraft.

Section 308 of the conference report is similar to section 310 of the House bill. It is similar to the parallel provision in S. 378, though the conference report includes a death penalty that was not part of the Senate amendment. The section increases the maximum penalty for a violation of 18 U.S.C. § 2199 (stowaways on vessels or aircraft) from 1 year to 5 years imprisonment. If the act is committed with the intent to commit serious bodily injury and serious bodily injury occurs, it will be punishable by a fine and a maximum of 20 years imprisonment. If death results, it will be punishable by death or life imprisonment.

Sec. 309. Bribery Affecting Port Security.

This section is substantively similar to section 311 of the House bill and the parallel provision of S. 378. Section 309 of the conference report makes it a crime to knowingly, and with the intent to commit international or domestic terrorism, bribe a public official to affect port security; or to receive a bribe in return for being influenced in public duties affecting port security, knowing that such influence will be used to commit, or plan to commit, an act of terrorism. A violation of this section is punishable by a maximum term of 15 years imprisonment.

Sec. 310. Penalties for Smuggling Goods into the United States.

Section 310 of the conference report is substantively identical to section 312 of the House bill. There is no comparable provision in the Senate amendment. This section increases the penalty for violations of 18 U.S.C. § 545 (smuggling) from imprisonment for not more than 5 years to imprisonment for not more than 20 years.

Sec. 311. Smuggling Goods from the United States.

Section 311 of the conference report is substantively identical to section 313 of the House bill. There is no comparable provision in the Senate amendment. This section creates a new criminal offense for illegally smuggling goods from the United States and establishes a maximum penalty of 10 years imprisonment.

TITLE IV – COMBATING TERRORISM FINANCING.

Sec. 401. Short Title.

The short title is "Combating Terrorism Financing Act of 2005." Section 401 of the conference report is identical to section 401 of the House bill. There is no comparable provision in the Senate amendment.

Sec. 402. Increased Penalties for Terrorism Financing.

Section 402 of the conference report is substantively similar to section 402 of the House bill. There is no comparable provision in the Senate amendment. Currently, penalties for violating the International Emergency Economic Powers Act (IEEPA) are not commensurate with terrorist financing violations. This section amends section 206 of IEEPA (50 U.S.C. § 1705) to increase the civil penalty from $10,000 to $50,000 per violation and to increase the criminal penalty from 10 years imprisonment to 20 years imprisonment with the maximum criminal fine remaining the same.

Sec. 403. Terrorism-Related Specified Activities for Money Laundering.

Section 403 of the conference report is substantively similar to section 403 of the House bill. There is no comparable provision in the Senate amendment. Under current law, a number of activities that terrorist financiers undertake are not predicates for purposes of the Federal money laundering statute, 18 U.S.C. § 1956. Key among those activities is operating an illegal money transmitting business, including "hawala" networks, which terrorists and their sympathizers often use to transfer funds to terrorist organizations abroad. This section adds three terrorism-related provisions to the list of specified unlawful activities that serve as predicates for the money laundering statute. Subsection (a) adds as a RICO predicate the offense in 18 U.S.C. § 1960 (relating to illegal money transmitting businesses), which has the effect of making this offense a money laundering predicate through the cross-reference in 18 U.S.C. § 1956(c)(7)(A). Subsection (b) directly adds as money laundering predicates the new terrorist-financing offense in 18 U.S.C. § 2339C.

Sec. 404. Assets of Persons Committing Terrorist Acts against Foreign Countries or International Organizations.

Section 404 of the conference report is substantively similar to section 404 of the House bill. There is no comparable provision in the Senate amendment. The USA PATRIOT Act enacted a new forfeiture provision codified at 18 U.S.C. § 981(a)(1)(G) pertaining to the assets of any person planning or perpetrating an act of terrorism against the United States. Section 404 of the conference report adds a parallel provision pertaining to the assets of any person planning or perpetrating an act of terrorism against a foreign state or international organization. Where the property sought for forfeiture is located outside the United States, an act in furtherance of planning or perpetrating the terrorist act must have occurred within the jurisdiction of the United States.

Sec. 405. Money Laundering through Hawalas.

Section 405 of the conference report is substantively similar to section 405 of the House bill. There is no comparable provision in the Senate amendment. This section outlaws any "dependent transactions" relating to a money laundering transaction. Terrorist financing and money laundering can be mutually exclusive, but many times they go hand-in-hand. As reported in the National Money Laundering Strategy (NMLS), "both depend on the lack of transparency and vigilance in the financial system. Money laundering requires the existence of an underlying crime, while terrorist financing does not. Methods for raising funds to support terrorist activities

may be legal or illegal. Also, the objective of money laundering investigations is prosecution and forfeiture. Terrorist financing investigations share these objectives; however, the ultimate goal is to identify, disrupt, and cut off the flow of funds to terrorists, whether or not the investigation results in prosecutions."

Many steps have been taken by Congress, law enforcement, and the private sector to address the issue of terrorist financing. The USA PATRIOT Act codified money laundering statutes and provided authority improving the flow of financial information regarding terrorist financing. The Bank Secrecy Act has been amended to require financial institutions to report suspicious activities. Enforcement and enhanced regulations make it more difficult for terrorist organizations to compromise U.S. financial institutions. However, these terrorists continue to seek the path of least resistance, utilizing alternative financing systems and foreign banking systems that lack sufficient standards and regulations.

Alternative remittance systems are utilized by terrorists to move and launder large amounts of money around the globe quickly and secretly. These remittance systems, also referred to as "hawala" networks, are used throughout the world, including the Middle East, Europe, North America and South Asia. These systems are desirable to criminals and non-criminals alike because of the anonymity, low cost, efficiency, and access to underdeveloped regions. The United States has taken steps to combat the "hawala" networks by requiring all money transmitters, informal or formal, to register as money services businesses.

Under current Federal law, a financial transaction constitutes a money laundering offense only if the funds involved in the transaction represent the proceeds of some criminal offense. *See* 18 U.S.C. § 1956(a)(1) ("represents the proceeds of some form of unlawful activity"); and 18 U.S.C. § 1957(f)(2) ("property constituting, or derived from, proceeds obtained from a criminal offense"). There is some uncertainty, however, as to whether the "proceeds element" is satisfied with regard to each transaction in a money laundering scheme that involves two or more transactions conducted in parallel, only one of which directly makes use of the proceeds from unlawful activity. For example, consider the following transaction: A sends drug proceeds to B, who deposits the money in Bank Account 1. Simultaneously or subsequently, B takes an equal amount of money from Bank Account 2 and sends it to A, or to a person designated by A. The first transaction from A to B clearly satisfies the proceeds element of the money laundering statute, but there is some question as to whether the second transaction—the one that involves only funds withdrawn from Bank Account 2 does so as well. The question has become increasingly important because such parallel transactions are the technique used to launder money through the Black Market Peso Exchange and "hawala" network. Section 405 of the conference report is intended to remove all uncertainty on this point by providing that *all* constituent parts of a set of parallel or dependent transactions involve criminal proceeds if one such transaction does so. The conference report modifies the hawala provision to require that it be part of plan or arrangement.

Sec 406. Technical and Conforming Amendments Relating to the USA PATRIOT Act.

Section 406 of the conference report is substantively similar to section 406 of the House bill.

There is no comparable provision in the Senate amendment. This section makes a number of corrections relating to provisions of the USA PATRIOT Act, mostly affecting money laundering or asset forfeiture. While essentially technical in nature, these corrections are critical because typographical and other errors in the USA PATRIOT Act provisions are preventing prosecutors from fully utilizing that Act's tools. For example, certain new forfeiture authorities enacted by that Act refer to a nonexistent statute, 31 U.S.C. § 5333, where 31 U.S.C. § 5331 is intended.

Subsection (a) makes technical corrections to a number of provisions in the USA PATRIOT Act. Subsection (b) codifies section 316(a)-(c) of that Act as 18 U.S.C. § 987. Subsection (c) adds explicit language covering conspiracies to carry out two offenses likely to be committed by terrorists (18 U.S.C. §§ 33(a) and 1366), thereby conforming these provisions to various crimes modified by section 811 of the USA PATRIOT Act, which added conspiracy language to other terrorism offense.

Sec. 407. Cross Reference Correction.

Section 407 of the conference report is substantively identical to section 408 of the House bill. There is no comparable provision in the Senate amendment. This section corrects a cross-reference, replacing the "National Intelligence Reform Act of 2004" with the correct title, the "Intelligence Reform and Terrorism Prevention Act of 2004."

Sec. 408. Amendment to Amendatory Language.

Section 408 of the conference report is substantively identical to section 409 of the House bill. There is no comparable provision in the Senate amendment. This section amends an incorrect citation.

Sec. 409 . Designation of Additional Money Laundering Predicate.

Section 409 of the conference report is substantively identical to section 410 of the House bill. There is no comparable provision in the Senate amendment. This section adds 18 U.S.C. § 2339D (relating to receiving military-type training from a foreign terrorist organization) as a money laundering predicate.

TITLE V – MISCELLANEOUS.

Sec. 501. Residence of United States Attorneys and Assistant United States Attorneys.

Section 501 is a new section and addresses an unintentional effect of the residency requirement for United States Attorneys and Assistant United States Attorneys. Section 501 of the conference report provides that the Attorney General can order that residency requirements be waived when a United States Attorney or Assistant United States Attorney is assigned dual or additional responsibilities. This provision will enable activities such as participation by United States Attorneys in legal activities in Iraq.

Sec. 502. Interim Appointment of United States Attorneys.

Section 502 is a new section and addresses an inconsistency in the appointment process of United States Attorneys.

Sec. 503. Secretary of Homeland Security in Presidential Line of Succession.

Section 503 of the conference report is a new section and fills a gap in the Presidential line of succession by including the Secretary of Homeland Security.

Sec. 504. Bureau of Alcohol, Tobacco, and Firearms to the Department of Justice.

Section 504 of the conference report is a new section. This provision modifies the appointment procedure for the Director of the Bureau of Alcohol, Tobacco, and Firearms by providing that the President, with the advice and consent of the Senate, shall appoint the Director.

Sec. 505. Qualifications of United States Marshals.

Section 505 of the conference report is a new section. This section clarifies the qualifications individuals should have before joining the United States Marshals.

Sec. 506. Department of Justice Intelligence Matters.

Section 506 is a new section that establishes a National Security Division (NSD) within the DOJ, headed by an Assistant Attorney General for National Security (AAGNS). This section is consistent with a recommendation by the WMD Commission that the "Department of Justice's primary national security elements – the Office of Intelligence Policy and Review, and the Counterterrorism and Counterespionage sections – should be placed under a new Assistant Attorney General for National Security." A version of this section was included in S. 1803, the "Intelligence Reauthorization bill for fiscal year 2006," which was reported favorably by the Senate Select Committee on Intelligence on September 29, 2005.

Sec. 507. Review by Attorney General.

Section 507 is a new section. It modifies the process by which States can opt in to the expedited habeas procedures for capital cases under chapter 154 of title 28 of the United States Code by shifting responsibility to the Attorney General for certifying when a State has qualified. This section also allows for *de novo* review in the U.S. Court of Appeals for the District of Columbia Circuit of the Attorney General's certification. It relaxes the time constraints imposed on judges for deciding habeas cases under chapter 154. This section also clarifies when a habeas proceeding is 'pending' for purposes of 28 U.S.C. 2251, which controls the circumstances under which a federal court hearing a habeas petition may stay a State court action. Overruling *McFarland v. Scott*, 512 U.S. 849 (1994), this section provides that a habeas proceeding is not 'pending' until the habeas application itself is filed. For prisoners who have applied for counsel pursuant to 18 U.S.C. 3599(a)(2), there is a limited exception allowing the court to stay

execution of a death sentence until after the attorney has been appointed or the application withdrawn or denied.

TITLE VI – SECRET SERVICE.

Sec. 601. Short Title.

The short title is "Secret Service Authorization and Technical Modification Act of 2005." Section 601 of the conference report is new.

Sec. 602. Interference with National Special Security Events.

Section 602 of the conference report is a new section. 18 U.S.C. § 1752 authorizes the Secret Service to charge individuals who breach established security perimeters or engage in other disruptive or potentially dangerous conduct at National Special Security Events (NSSEs) if a Secret Service protectee is attending the designated event. Section 602 of the conference report expands 18 U.S.C. § 1752 to criminalize such security breaches at NSSEs that occur when the Secret Service protectee is not in attendance. Additionally, it doubles the statutory penalties (from 6 months to 1 year) for violations of § 1752, to make the penalty consistent with the prescribed penalty under 18 U.S.C. § 3056(d) (interference with Secret Service law enforcement personnel generally). The conference report makes punishable by up to 10 years the thwarting of security procedures by individuals in possession of dangerous or deadly weapons.

Sec. 603. False Credentials to National Special Security Events.

Section 603 of the conference report is a new section. This section amends 18 U.S.C. § 1028 to make it a Federal crime to knowingly produce, possess, or transfer a false identification document that could be used to gain unlawful and unauthorized access to any restricted area of a building or grounds in conjunction with a NSSE. Such actions were a problem during the 2002 Winter Olympics, and the conference report will allow for Federal prosecution against such criminal violations at future NSSEs.

Sec. 604. Forensic and Investigative Support of Missing and Exploited Children Cases.

Section 604 of the conference report is a new section. On April 30, 2003, President Bush signed into law the Child Abduction Prevention Act (Pub. Law No. 108-21), which authorizes the Secret Service to provide, upon request, forensic and investigative assistance to the National Center for Missing and Exploited Children or local law enforcement agencies. The current statute states that "officers and agents" of the Secret Service may provide this assistance. Section 604 of the conference report clarifies that forensic and other civilian personnel, such as fingerprint specialists, polygraph examiners, and handwriting analysts, are authorized to provide such assistance.

Sec. 605. The Uniformed Division, United States Secret Service.

Section 605 of the conference report is a new section. This section places all authorities of the Uniformed Division, which are currently authorized under title 3, in a newly created 18 U.S.C. § 3056A, following the core authorizing statute of the Secret Service (18 U.S.C. § 3056), thereby organizing the Uniformed Division under title 18 of the United States Code with other Federal law enforcement agencies.

Sec. 606. Savings Provisions.

Section 606 of the conference report is a new section. This section makes clear that the transfer of the Uniformed Division from title 3 of the United States Code to title 18 of the United States Code shall have no impact on the retirement benefits of current employees or annuitants and others necessary to reimburse State and local government organizations for support provided in connection with a visit of a foreign government official.

Sec. 607. Maintenance as Distinct Entity.

Section 607 of the conference report is a new section. This section provides a clear operational and organizational framework for the Secret Service that maintains the Secret Service as a distinct component of the Department of Homeland Security while providing the Service with necessary operational latitude. It allows for the Director of the Secret Service to report directly to the Secretary of the Department of Homeland Security. Finally, the conference report provides that the assets, agents, officers, and other personnel of the Secret Service shall remain at all times under the command and control of the Director.

Sec. 608. Exemptions from the Federal Advisory Committee Act.

Section 608 of the conference report is a new section. This section exempts the functions of the Secret Service's Electronic Crime Task Forces and the candidate protection committee from the Federal Advisory Committee Act (5 U.S.C. App. 2), which imposes a series of requirements on committees established or utilized by Federal agencies to provide advice or recommendations to any agency or Federal officer. Committees that wholly consist of full-time officers or employees of the Federal Government are not covered by the Act. If the advisory committee is subject to the Act, it must, among other requirements, open its meetings to the public, publish notice of meetings in the Federal Register, and make its minutes available to the public. There are current exemptions from these requirements, such as committees established by the CIA and the Federal Reserve. This amendment eliminates any doubt and confirms that the Act does not apply to the Electronic Crime Task Forces or the candidate protection committee.

TITLE VII – COMBAT METHAMPHETAMINE EPIDEMIC ACT OF 2005.

Sec. 701. Short Title.

The short title is the "Combat Methamphetamine Epidemic Act of 2005." Section 701 of the conference report is a new section.

Subtitle A—Domestic Regulation of Precursor Chemicals

Sec. 711. Scheduled Listed Chemical Products; Restrictions on Sale Quantity, Behind-the-Counter Access, and Other Safeguards.

This section of the conference report is new. Section 711 reclassifies pseudoephedrine, phenylpropanolamine, and ephedrine as Schedule Listed Chemicals; reduces the Federal per-transaction sales limit for SLCs from 9 grams to 3.6 grams (the amount recently proposed by the Administration); requires behind-the-counter storage or locked cabinet storage of SLCs; requires that regulated sellers (retail distributors and pharmacies) maintain a written log of purchases; restricts monthly sales to no more than 9.0 grams per purchaser; imposes similar requirements on Internet sellers and mobile retail vendors; and requires each regulated seller to submit a certification that it is in compliance with these requirements, that its employees have been trained as to these requirements, and that records relating to such training are maintained at the retailers location. Such certifications are to be made available by the Attorney General to State and local law enforcement.

Sec. 712. Regulated Transactions.

This section of the conference report is new and repeals the Federal "blister pack" exemption, and clarifies the law to include derivatives of each of these chemicals. It makes conforming amendments to the current law, to accommodate the new sales restrictions, and makes another technical correction to make it clear that these sales limitations apply to drug combinations containing derivatives of pseudoephedrine, ephedrine, or phenylpropanolamine.

Sec. 713. Authority to Establish Production Quotas.

This section of the conference report is new and extends the Attorney General's existing authority to set production quotas for certain controlled substances (*see* 21 U.S.C. § 826) to pseudoephedrine, ephedrine, and phenylpropanolamine. Currently, domestic production of these chemicals is not very high, as most of our country's supply is imported. With the adoption of the import quotas in section 715 of this Act (see below), however, the Attorney General would require corresponding authority within the U.S. if domestic production were to increase. Current law (as amended) would allow manufacturers to apply for increases in their production quotas (*see* 21 U.S.C. § 826(e)).

Sec. 714. Penalties; Authority for Manufacturing; Quota.

This section of the conference report is new and expands the existing penalty for illegal production beyond established quotas (*see* 21 U.S.C. § 842(b)) to take into account the Attorney General's new authority to set quotas for methamphetamine precursors.

Sec. 715. Restrictions on Importation; Authority To Permit Imports for Medical, Scientific, or Other Legitimate Purposes.

Section 715 of the conference report is a new provision and extends the Attorney General's existing authority to set import quotas for controlled substances (*see* 21 U.S.C. § 952) to pseudoephedrine, ephedrine, and phenylpropanolamine. This section allows registered importers to apply for temporary or permanent increases in a quota to meet legitimate needs. The Attorney General is required to act on all such applications within 60 days.

Sec. 716. Notice of Importation or Exportation; Approval of Sale or Transfer by Importer or Exporter.

Section 716 of the conference report is new and closes a loophole in the current regulatory system for imports and exports of precursor chemicals for methamphetamine and other synthetic drugs. Under current law, a company that wants to import or export pseudoephedrine or another precursor chemical must either: (1) notify the Department of Justice 15 days in advance of the import or export; or (2) be a company that has previously imported or exported a precursor and is proposing to sell the chemicals to a customer with whom the company has previously dealt. (*See* 21 U.S.C. § 971(a), (b).)

A problem can arise, however, when the sale that the importer or exporter originally planned falls through. When this happens, the importer or exporter must quickly find a new buyer for the chemicals on what is called the "spot market" – a wholesale market. Sellers are often under pressure to find a buyer in a short amount of time, meaning that they may be tempted to entertain bids from companies without a strong record of preventing diversion. More importantly, the Department of Justice has no opportunity to review such transactions in advance and suspend them if there is a danger of diversion to illegal drug production.

This section extends the current reporting requirements – as well as the current exemption for regular importers and customers – to post-import or export transactions. If an importer or exporter were required to file an initial advance notice with the Department of Justice 15 days before the shipment of chemicals, and the originally planned sale fell through, the importer or exporter would be required to file a second advance notice with DOJ identifying the new proposed purchaser. DOJ would then have 15 days to review the new transaction and decide whether it presents enough of a risk of diversion to warrant suspension. As is the case under existing law, a suspension can be appealed through an administrative process. (*See* 21 U.S.C. 971(c)(2)).

If, however, the new proposed purchaser qualifies as a "regular" customer under existing law, the importer or exporter would not be required to file a second advance notice. (Note that under current law, DOJ does receive a record of these transactions after the fact, *see* 21 U.S.C. § 971(b)(1)).

Sec. 717. Enforcement of Restrictions on Importation and of Requirement of Notice of Transfer.

This section of the conference report is new and makes a conforming amendment to current law to extend existing penalties for illegal imports or exports to the new regulatory requirements added by sections 715 and 716 of the conference report.

Sec. 718. Coordination with United States Trade Representative.

This section of the conference report is new and requires coordination by the Attorney General with the United States Trade Representative.

Subtitle B – International Regulation of Precursor Chemicals

Sec. 721. Information of Foreign Chain of Distribution; Import Restrictions Regarding Failure of Distributors to Cooperate.

This section of the conference report is new and further amends the reporting requirements for importers of meth precursor chemicals, by requiring them to file with Federal regulators the detailed information about the chain of distribution of imported chemicals (from the manufacturer to the shores of the U.S.). This provision will assist U.S. law enforcement agencies to better track where meth precursors come from, and how they get to the U.S. At present, very little information exists about the international "chain of distribution" for these chemicals, hindering effective controls.

Sec. 722. Requirements Relating To The Largest Exporting And Importing Countries Of Certain Precursor Chemicals.

This section of the conference report is new, and was originally introduced by Rep. Mark Kennedy in the House and was adopted by the House as part of the State Department reauthorization legislation for FY 2006-07 (H.R. 2601). It mandates a separate section of the current State Department report on major drug producing and transit countries (*see* 22 U.S.C. § 2291h), identifying the five largest exporters of major methamphetamine precursor chemicals, and the five largest importers that also have the highest rate of methamphetamine production or diversion of these chemicals to the production of methamphetamine. If any of those countries was not fully cooperating with U.S. law enforcement in implementing their responsibilities under international drug control treaties, there would be consequences for their eligibility for U.S. aid, similar to those faced by the major drug trafficking nations under current law.

The conference report adds a provision clarifying the original intent of this amendment, to apply the "fully cooperates" standard (and not the lesser standard under another, separate provision of law). The provision also includes an authorization of one million dollars for implementation. The House recently passed an amendment to the State Department's appropriations bill for FY '06, adding $5 million for the State Department to implement anti-methamphetamine measures; this $1 million could be derived from that amount.

Sec. 723. Prevention Of Smuggling Of Methamphetamine Into The United States From Mexico.

This section of the conference report is new and requires the State Department's Bureau for International Narcotics and Law Enforcement Affairs (INL) to provide assistance to Mexico to prevent the production of methamphetamine in that country, and to encourage Mexico to stop the

illegal diversion of methamphetamine precursor chemicals. The conference report authorizes the use of $4 million of the $5 million recently approved by the House for these purposes. (The remaining funds would be available to help the State Department implement Sec. 722, as described above.)

Subtitle C – Enhanced Criminal Penalties for Methamphetamine Production and Tracking

Sec. 731. Smuggling Methamphetamine or Methamphetamine Precursor Chemicals into the United States While Using Facilitated Entry Programs.

This section of the conference report is new. Even as more methamphetamine is being smuggled across the border, increased legitimate international traffic has forced the bureau of Customs and Border Protection (CBP) to rely on facilitated entry programs – so-called "fastpass" systems like SENTRI (for passenger traffic on the Southwest border), FAST (for commercial truck traffic), and NEXUS (for passenger traffic on the Northern border). These systems allow pre-screened individuals to use dedicated lanes at border crossings, subject only to occasional searches to test compliance with customs and immigration laws. This section of the conference report creates an added deterrent for anyone who misuses a facilitated entry program to smuggle methamphetamine or its precursor chemicals. An additional penalty of up to 15 years imprisonment is added to the punishment for the base offense. If convicted, an individual would also be permanently barred from using a fastpass system.

Sec. 732. Manufacturing Controlled Substances on Federal Property.

This section of the conference report is new. This section clarifies that current penalties for cultivating illegal drugs on Federal property also apply to manufacturing synthetic drugs (such as methamphetamine). Methamphetamine "cooks" frequently move their operations to parks, national forests, and other public lands, causing serious environmental damage. This criminal penalty can help deter such destructive conduct.

Sec. 733. Increased Punishment for Methamphetamine Kingpins.

This provision of the conference report is new, and allows for easier application of the enhanced penalties of the "continuing criminal enterprise" section of the Controlled Substances Act (21 U.S.C. § 848). That section (commonly referred to as the "kingpin" statute) imposes life imprisonment on a leader of a drug trafficking organization convicted of trafficking in very large quantities of a drug, and receiving very large profits from that activity. This new provision reduces the threshold amount of methamphetamine (from 300 to 200 times the threshold for base violations) and profits from methamphetamine (from $10 million to $5 million), while still applying the life imprisonment penalty only to true "kingpins" – the ringleaders of methamphetamine trafficking organizations.

Sec. 734. New Child-Protection Criminal Enhancement.

This provision of the conference report, which is new, punishes an offender who manufactures

methamphetamine at a location where a child resides or is present, and imposes a consecutive sentence of up to an additional 20 years imprisonment.

Sec. 735. Amendments to Certain Sentencing Court Reporting Requirements.

This provision of the conference report is new and authorizes the United States Sentencing Commission to establish a form to be used by United States District Judges when imposing criminal sentences in order to facilitate data gathering and reporting by the Sentencing Commission.

Sec. 736. Semiannual Reports to Congress.

This provision, which is new to the conference report, requires the Attorney General to report to Congress on investigations and prosecutions relating to methamphetamine production.

Subtitle D – Enhanced Environmental Regulation of Methamphetamine Byproducts

Sec. 741. Biennial Report to Congress on Agency Designations of By-Products on Methamphetamine Laboratories as Hazardous Materials.

This provision of the conference report is new, and requires the Department of Transportation to report to Congress every two years whether then-existing statutes and regulations cover methamphetamine by-products as hazardous materials.

Sec. 742. Methamphetamine Production Report.

This provision of the conference report is new, and requires the Environmental Protection Agency (EPA) to report to Congress every two years on whether then-existing statutes and regulations cover methamphetamine by-products as hazardous materials.

Sec. 743. Cleanup Costs.

This provision of the conference report is new, and clarifies existing law imposing the obligation of restitution for environmental cleanup costs on persons involved in meth production and trafficking. The recent decision of the Eighth Circuit Court of Appeals in *United States v. Lachowski* (405 F.3d 696, 8th Cir. 2005) has undermined the ability of the Federal government to seek cleanup costs from methamphetamine traffickers who are convicted only of methamphetamine possession – even when the methamphetamine lab in question was on the defendant's own property. This provision would ensure that any person convicted of a methamphetamine-related offense can be held liable for clean-up costs for methamphetamine production that took place on the defendant's own property, or in his or her place of business or residence.

Subtitle E – Additional Programs and Activities

Sec. 751. Improvements to Department of Justice Drug Courts Program.

This section of the conference report is new, and revises the Drug Court program statute to clarify the requirement for periodic testing, graduated sanctions when an offender tests positive, and a list of potential sanctions when a positive test occurs.

Sec. 752. Drug Courts Funding.

This provision of the conference report is new and authorizes appropriations for drug courts.

Sec. 753. Feasibility Study on Federal Drug Courts.

This provision of the conference report, which is new, directs the Attorney General to conduct a study on the feasibility of Federal drug courts.

Sec. 754. Grants to Hot Spot Areas to Reduce Availability of Methamphetamine.

This section, which is new to the conference report, authorizes $99 million for fiscal years 2006 to 2010 for grants to State and local law enforcement agencies to assist in the investigation of methamphetamine traffickers and to reimburse the DEA for assistance in cleaning up methamphetamine laboratories.

Sec. 755. Grants for Programs for Drug-Endangered Children.

This section of the conference report, which is new, authorizes grants to States to assist in treatment of children who have been endangered by living at a residence where methamphetamine has been manufactured or distributed.

Sec. 756. Authority to Award Competitive Grants to Address Methamphetamine Use by Pregnant and Parenting Women Offenders.

Section 756 is a new provision and authorizes the Attorney General to award grants to address the use of methamphetamine among pregnant and parenting women offenders to promote public safety, public health, family permanence and well being.