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**ANALYSIS OF SENTENCING-RELATED PROVISIONS OF S. 2305  
AND H.R. 3371 CONFERENCE REPORT CRIME BILLS**

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**U.S. Department of Justice  
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TABLE OF CONTENTS

	<u>Page</u>
<b>FIREARMS AND RELATED AMENDMENTS</b> (Title IV, S. 2305; Title V, H.R. 3371) .....	1
1. Increased Mandatory Minimum Sentences for Criminals Using Firearms. ....	1
2. Increased Penalty for Second Offense of Using an Explosive to Commit a Felony. ....	6
3. Prohibition Against Theft of Firearms or Explosives. ....	7
4. Enhanced Penalties for Use of a Firearm in the Commission of Counterfeiting or Forgery. ....	8
5. Mandatory Penalties for Firearms Possession by Violent Felons and Serious Drug Offenders. ....	9
<b>JUVENILES AND GANGS (Title V, S. 2305)</b> <b>YOUTH VIOLENCE (Title VII, H.R. 3371)</b> .....	11
6. Criminal Street Gangs. ....	11
<b>TERRORISM AND INTERNATIONAL MATTERS (Title VI, S. 2305)</b> <b>TERRORISM (Title VIII, H.R. 3371)</b> .....	12
7. Sentencing Guidelines Increase for Terrorist Crimes. ....	12
<b>SEXUAL VIOLENCE, CHILD ABUSE, AND VICTIMS' RIGHTS</b> (Title VII, S. 2305) .....	13
8. HIV Testing and Penalty Enhancement in Sex Abuse Cases. ....	13
9. Mandatory Restitution and Other Provisions. ....	14
10. Inducement of Minor to Commit an Offense. ....	15
<b>ILLEGAL DRUGS (Title X, S. 2305)</b> <b>DRUG CONTROL (Title XVI, H.R. 3371)</b> .....	16
11. Management of Listed Chemicals. ....	16
12. Strengthened Federal Penalties Relating to Crystalline Methamphetamine. ....	18
13. Increased Penalties for Distribution of Controlled Substances at Truck Stops and Rest Areas. ....	19
14. Enhancement of Penalties for Drug Trafficking in Prisons; Mandatory Penalties for Illegal Drug Use in Federal Prisons. ....	21

15.	Conforming Provision Punishing a Second Offense of Distributing Drugs to a Minor; Longer Prison Sentences for Those Who Sell Illegal Drugs to Minors or for Use of Minors in Drug Trafficking Activities. ....	23
16.	Life Imprisonment Without Release for Criminals Convicted a Third Time. ....	25
17.	Drug Distribution to Pregnant Women. ....	27
18.	Penalties for Drug Dealing in Public Housing Authority Facilities; Increased Penalties for Drug Dealing in "Drug-Free" Zones. ....	28
<b>GENERAL PROVISIONS (Title XII, S. 2305)</b>		
<b>PROTECTIONS FOR THE ELDERLY (Title XXI, H.R. 3371) .....</b>		<b>30</b>
19.	Violent Offenses Against the Elderly. ....	30
<b>PRISONS (Title XIV, H.R. 3371) .....</b>		<b>32</b>
20.	Substance Abuse Treatment. ....	32
21.	Boot Camps. ....	34
<b>ADDITIONAL ISSUES .....</b>		<b>36</b>
22.	Revocation of Probation and Supervised Release. ....	36
23.	Increase in Maximum Statutory Penalties for Provisions That Inhibit Guideline Operation. ....	36
24.	Extended Service of Sentencing Commissioners. ....	36
25.	Miscellaneous Sentencing Provisions. ....	36

**ANALYSIS OF SENTENCING-RELATED PROVISIONS OF S. 2305  
-AND H.R. 3371 CONFERENCE REPORT CRIME BILLS**

**FIREARMS AND RELATED AMENDMENTS  
(Title IV, S. 2305; Title V, H.R. 3371)**

**1. Increased Mandatory Minimum Sentences for Criminals Using Firearms.**

**EXPLANATION OF PROVISIONS**

The proposal embodied in section 401 of S. 2305 would amend 18 U.S.C. § 924(c)(1) to increase and modify the mandatory minimum penalties for certain firearms conduct that occurs "during and in relation to any crime of violence or drug trafficking crime." In addition, the proposal would make all other penalties under § 924(c) concurrent instead of consecutive. For example, it would increase the mandatory penalty for carrying a firearm during drug trafficking from five to ten years but would also provide that the penalty run concurrently with any penalty imposed for the underlying conduct.

The proposal in section 511 of H.R. 3371 would retain the existing structure of 18 U.S.C. § 924(c) but would add semiautomatic firearms to the list of firearms subject to a 10-year mandatory consecutive penalty, instead of the current 5-year penalty.

**COMPARISON OF EXISTING § 924(c)(1) LAW, SEC. 401  
OF S. 2305, AND H.R. 3371 CONFERENCE REPORT**

	Existing Law	S. 2305	Conference Report (H.R. 3371)
BASIC OFFENSE	18 U.S.C. § 924(c). Prohibits the use or carrying of a firearm during and in relation to a crime of violence or drug trafficking crime. Provides a penalty of 5 years for first conviction.	Section 401. Increased Mandatory Minimum Sentences for Criminals Using Firearms. Increases the penalty to 10 years. Amends the statute to include possession of a firearm. Defines "possession of a firearm" to include "the person has a firearm readily available at the scene of the crime during the commission of the crime."	Existing law unchanged.

	Existing Law	S. 2305	Conference Bill (H.R. 3371)
ENHANCED-DANGER FIREARMS	Provides a penalty of 10 years for first conviction if the firearm is a short-barreled shotgun or rifle.	Eliminates the distinction for short-barreled firearms; hence, these weapons would be subject to the same penalty of 10 years that the bill would make to most firearms.	Section 511. Enhanced Penalty for Use of a Semiautomatic Firearm During a Crime of Violence or a Drug Trafficking Crime. Adds possession of a semi-automatic firearm to list of firearms requiring 10-year penalty.
ENHANCED-DANGER FIREARMS	Provides a penalty of 30 years for first conviction if the firearm is a destructive device, machinegun, or equipped with silencer or muffler.	Existing law unchanged, except that the penalty is made concurrent.	Existing law unchanged.
SUBSEQUENT CONVICTIONS	Provides a penalty of 20 years for second or subsequent conviction for basic offense, and if the firearm is a short-barreled shotgun or rifle.	Provides a concurrent penalty of 20 years for a second conviction for basic offense.	Existing law unchanged.
	Provides a penalty of life for second or subsequent conviction if the firearm is a destructive device, machinegun, or equipped with silencer or muffler.	Existing law unchanged.	Existing law unchanged.
	No similar provision.	Provides an enhanced penalty of life upon a third or subsequent conviction for any subsection.	Existing law unchanged.

	Existing Law	S. 2305	Conference Bill (H.R. 3371)
INTENT TO INJURE	No similar provision.	Provides an enhanced penalty of 20 years if the firearm is discharged with intent to injure another person, an enhanced penalty of 30 years upon a second conviction, and an enhanced penalty of life if the discharge results in the death of another person.	Existing law unchanged.
CONSECUTIVE/ CONCURRENT	Mandates that any penalty imposed must be <u>consecutive</u> to any penalty imposed following conviction of the underlying crime of violence or drug trafficking crime.	Mandates any penalty imposed must be <u>concurrent</u> to any penalty imposed for the underlying crime.	Existing law unchanged.

### OPERATION OF THE GUIDFLINES

Under existing law, the penalty for a violation of § 924(c)(1) runs consecutive to any penalty under the sentencing guidelines for the underlying crime of violence or drug trafficking offense. In order to avoid "double punishment" for the same conduct, when there is a conviction for § 924(c)(1), the guidelines instruct that any firearm enhancement in the guidelines for the underlying offense is not applied. Detailed rules apply for cases in which the use of the guideline firearm enhancement for the underlying crime provides a penalty that exceeds the mandatory consecutive penalty under § 924(c).

From a structural standpoint of guideline compatibility, mandatory concurrent sentences, such as embodied in section 401 of S. 2305, arguably offer some advantage over mandatory consecutive sentences, such as those retained by H.R. 3371. Under the concurrent approach, the guidelines, including enhancements for firearm use in connection with underlying crimes, would be applied in their entirety. The mandatory minimum, if applicable, would operate to "increase" the sentence called for under the guidelines if less than the statutory minimum. In contrast, when the statute mandates mandatory consecutive penalties, the guidelines, as described above, must provide mechanisms to avoid double punishment for the same aggravating conduct.

On the other hand, the mandatory concurrent approach has the effect of mandating the greatest increase in sentences for underlying offenses that, under the guidelines, are considered least serious.<sup>1</sup> For cases in which the guideline sentencing

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<sup>1</sup>Additionally, the proposed concurrent approach under section 401 of S. 2305 would generally increase (for most cases, double) the sentence for defendants convicted only of the § 924(c) offense.

range for the underlying crime is greater than the proposed penalty for the § 924(c)(1) conviction, the guideline sentence subsumes the § 924(c)(1) conviction because the proposed § 924(c)(1) penalty is concurrent. Consequently, those persons convicted of the least serious underlying crimes (i.e., resulting in a guideline maximum of less than five years) would be most impacted by having their sentences increased to the applicable ten-year § 924(c)(1) mandatory sentence. Conversely, those persons convicted of more serious underlying crimes (for example, large-scale drug traffickers whose guideline minimum was over ten years) would find that the § 924(c)(1) penalty would have no effect on the term of imprisonment to which they are sentenced.

### OTHER POLICY AND TECHNICAL ISSUES

Proposed section 401 of S. 2305 also raises a number of additional issues that should be addressed:

1. Does § 924(c) constitute a "second conviction" or a "third or subsequent conviction" under the proposed legislation? Is it the intent that the second and subsequent conviction(s) be based on conduct that occurred after the earlier conviction has become final, as is the case under 21 U.S.C. § 841(b) and other recidivist provisions? Alternatively, is a second § 924(c) count in the same indictment (for a second weapon involving the same underlying offense, or for the same or different weapon in a second underlying offense) deemed to constitute a second conviction? This is an issue of statutory interpretation that has divided the appellate courts (in respect to parallel language in the existing § 924(c) provision). Because of the substantial difference in sentence length and sentencing disparity resulting from these conflicting interpretations, it is imperative that any rewrite of § 924(c) clearly reflect congressional intent on this issue.
2. Is it intended that multiple counts of § 924(c) run concurrently or consecutive to one another? Proposed subsection (c)(1)(C) would mandate that the sentence on a § 924(c) count run concurrent with any sentence for the underlying count but fails to address the relationship among multiple counts of § 924(c) in the same indictment. This issue is related to, but distinct from, that raised above.
3. The use of the phrase "in addition to the punishment for the underlying crime" is at least facially inconsistent with the mandatory concurrent language in subsection (c)(1)(C). The apparent intent of the phrase is to express congressional intent that a defendant can be convicted of both an underlying offense (which may itself carry a higher statutory penalty for firearm use) and a § 924(c) offense. If that is correct, it could be expressed in a more straightforward statement to the effect that a person may be convicted of an offense under this section whether or not also convicted of an underlying crime. (In this regard, the entire § 924(c) subsection should be more clearly written to distinguish it as a separate offense of conviction rather than a sentence enhancement statute (such as 18 U.S.C. § 4(e)).
4. Under current law, 18 U.S.C. § 844(h) provides roughly parallel penalties for use of or carrying explosives in connection with an underlying felony offense to those

set forth in § 924(c) for firearm use. If § 924(c) is amended as proposed by section 401 of S. 2305, consideration should be given to making parallel changes in § 844(h). In this regard, note the apparent inconsistency between the amendments to § 924(c) proposed under section 401 of S. 2305 and that proposed to § 844(h) by section 402 of S. 2305 (which increases the mandatory sentence for a second conviction from 10 to 20 years while making no change in the mandatory consecutive nature of the sentence).

In addition, proposed section 511 of H.R. 3371 raises the issue of potential prison impact. The Commission notes that based on available sentencing data, approximately 53 percent of cases previously sentenced to five years imprisonment under 18 U.S.C. § 924(c) would be subject to this 10-year consecutive sentence because the offense involved a semiautomatic firearm.

### RECOMMENDATION

In its August 1991 Special Report to the Congress on mandatory minimums, the Commission pointed out both the structural and inconsistent application problems of the 18 U.S.C. § 924(c) offense. As indicated, supra, the alternative, mandatory concurrent approach proposed in section 401 of S. 2305 alleviates, to some degree, problems of structural inconsistency. The Commission has not had an opportunity, however, to thoroughly examine the advantages and disadvantages of the proposal in section 401. With respect to the proposed change in section 511 of H.R. 3371, as an alternative approach to increasing the fixed mandatory enhancement for use of a semiautomatic firearm in connection with a crime of violence or drug trafficking offense, Congress could direct the Sentencing Commission to provide an appropriate enhancement in the sentencing guidelines applicable to crimes of violence or drug trafficking if the offense involved a semiautomatic firearm or any of the other more dangerous firearms for which penalties greater than five years are presently provided under 18 U.S.C. § 924(c) (i.e., short-barreled rifle or short-barreled shotgun, machinegun, destructive device, firearm equipped with a silencer or muffler).



2. **Increased Penalty for Second Offense of Using an Explosive to Commit a Felony.**

Existing Law	S. 2305	Conference Report (H.R. 3371)
18 U.S.C. § 844(h) provides ten-year mandatory minimum for second offense of using explosive to commit a felony.	<b>Section 402. Increased Penalty for Second Offense of Using an Explosive to Commit a Felony.</b> Increases the mandatory minimum sentence for a second offense of using an explosive to commit a federal felony from ten years to twenty years. (The penalty for a first offense would remain at five years.)	<b>Section 512. Increased Penalty for Second Offense of Using an Explosive to Commit a Felony.</b> Same as S. 2305.

**OPERATION OF GUIDELINES**

Section 2K1.7 of the guidelines provides for a term of imprisonment as required by 18 U.S.C. § 844(h). The mandatory minimum penalty established by the proposed provision thus would become the guideline sentence.

**DISCUSSION**

The Commission notes that the proposed treatment of a second offense of using an explosive to commit a federal felony differs from the proposed treatment of a second offense of carrying a firearm in connection with a violent or drug offense under section 401 of S. 2305. See discussion supra. Section 401 provides for mandatory sentences that run concurrent with the underlying offense, not consecutive, as provided under section 402 of S. 2305.

**RECOMMENDATION**

As an alternative approach to increasing the fixed mandatory sentence for a subsequent conviction of a defendant who uses an explosive to commit a felony, Congress could enact a directive to the Commission to amend existing guidelines to assure that the punishment for such offenses is appropriately enhanced.

### 3. Prohibition Against Theft of Firearms or Explosives.

Existing Law	S. 2305	Conference Report (H.R. 3371)
Current law makes it unlawful to <u>ship</u> stolen firearms (18 U.S.C. § 922(i)); to <u>receive</u> stolen firearms (18 U.S.C. § 922(j)); or to <u>receive or ship</u> stolen explosive materials (18 U.S.C. § 842(h)). The penalty for these similar stolen firearms offenses is a maximum of ten years with no mandatory minimum.	<b>Section 404. Prohibition Against Theft of Firearms or Explosives.</b> Creates the offense of <u>theft</u> of firearms or explosives that have moved in, or are moving in, interstate commerce. Makes the offense punishable by <u>at least two years</u> and no more than ten years.	<b>Section 514. Theft of Firearms and Explosives.</b> Same as S. 2305.

#### OPERATION OF GUIDELINES

The Commission amended its firearms guideline (§2K2.1) effective November 1, 1991, to provide that a first offender who ships or receives stolen firearms will be subject to at least a level 12 (a range of 10-16 months), assuming no more than two firearms are stolen. In fact, the typical stolen firearms offense involves multiple firearms and additional levels are added where multiple firearms are involved. The explosives guideline (§2K1.3) (also amended effective November 1, 1991) gives a first offender who receives stolen explosives a level 12.

#### DISCUSSION

The Commission notes that (1) conduct involving stolen firearms is subject to an increasingly confusing array of statutory provisions, and (2) the minimum penalty provisions for this new offense are inconsistent with those existing similar offenses, as well as with the proposed similar offense in section 412 of S. 2305 and section 527 of H.R. 3371 (theft from a licensed dealer), and the apparently more serious new offense in section 403 of S. 2305 and section 513 of H.R. 3371 (smuggling firearms into the United States with intent to use in drug trafficking or violence). Neither of the latter two proposed offenses carry the contemplated mandatory minimum contained in this section.

#### RECOMMENDATION

As an alternative to the mandatory minimum provision, an appropriate instruction to the Commission along the following lines should be considered:

"Promulgation of Guidelines. -- Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines, or shall amend existing guidelines, to provide that a defendant convicted under 18 U.S.C. §§ 842(h), 844(k), 922(i) or (j), or 924(j), of an offense involving a stolen firearm or stolen explosives, shall be assigned an offense level under Chapter Two of the sentencing guidelines that is not less than level 12."

4. **Enhanced Penalties for Use of a Firearm in the Commission of Counterfeiting or Forgery.**

Existing Law	S. 2305	Conference Report (H.R. 3371)
18 U.S.C. § 924(c) does not enhance the penalty for use of a firearm in connection with the commission of counterfeiting or forgery.	Section 408. Enhanced Penalties for Use of a Firearm in the Commission of Counterfeiting or Forgery. Extends 18 U.S.C. § 924(c), as amended, to cover the use of a firearm during and in relation to a counterfeiting or forgery offense.	Section 522. Using a Firearm in the Commission of Counterfeiting or Forgery. Same as S. 2305.

**OPERATION OF GUIDELINES**

Effective November 1, 1991, the Commission extensively amended the guidelines for firearms offenses (§2K2.1) to provide substantial penalty levels and enhancement, including enhanced penalties for offenders who use or possess a firearm in connection with any felony offense. The conduct that is penalized under the proposed provisions would be subject to at least an offense level of 18 or a minimum of 27 to 33 months for a first offender.

**RECOMMENDATION**

As an alternative to extending 18 U.S.C. § 924(c) to these offenses, Congress could direct the Sentencing Commission to provide an appropriate enhancement in the guidelines applicable to counterfeiting and forgery offenses if the offense conduct involved possession or use of a firearm.

5. **Mandatory Penalties for Firearms Possession by Violent Felons and Serious Drug Offenders.**

Existing Law	S. 2305	Conference Report (H.R. 3371)
<p>Felons with one or two prior convictions for violent felonies or serious controlled substance offenses are subject under 18 U.S.C. § 924(a)(2) to a ten-year statutory maximum and no mandatory minimum. Felons with three such priors are subject under 18 U.S.C. § 924(e) to a statutory maximum of life in prison, and a fifteen-year mandatory minimum.</p>	<p><b>Section 409. Mandatory Penalties for Firearms Possession by Violent Felons and Serious Drug Offenders.</b> Creates (1) a mandatory minimum sentence of five years for any person convicted under 18 U.S.C. § 922(g)(1) (felon in possession of a firearm) who has previously been convicted of one violent felony or serious drug offense as defined under 18 U.S.C. § 924(e)(2); (2) a mandatory minimum sentence of ten years for any person convicted under 18 U.S.C. § 922(g)(1) who has previously been convicted of two such violent felonies or serious drug offenses; and (3) a statutory maximum sentence of twenty years for any person convicted under 18 U.S.C. § 922(g)(1) who has previously been convicted of two such violent felonies or serious drug offenses. Prohibits the court from suspending a sentence of, or granting a probationary sentence to, such a person.</p>	<p><b>Section 523. Mandatory Penalties for Firearms Possession by Violent Felons and Serious Drug Offenders.</b> Same as S. 2305.</p>

**OPERATION OF THE GUIDELINES**

Effective November 1, 1991, the Commission extensively amended the guideline for firearms offenses (§2K2.1) to provide substantial penalty levels and enhancements for, among others, a felon who possesses a firearm after previously being convicted of a crime of violence or drug trafficking offense. Even higher penalties apply if the felon has two or more such prior crimes of violence or drug trafficking offenses.

**DISCUSSION**

The proposed mandatory minimum penalties lack the proportionality and precision that is available under the sentencing guidelines. In addition, unlike the guidelines, the statutory mandatories are subject to disparate prosecutorial use, often can not be used to reach more culpable supervisory offenders, and face the "beyond the reasonable doubt" standard that is significantly more burdensome than the guidelines'

"preponderance of the evidence standard." Under the revised guidelines, defendants convicted under 18 U.S.C. § 924(a)(2) who have a criminal history like that targeted by this legislation, and whose instant offense involves other aggravating factors (such as use of the firearm in another crime or possession of multiple firearms), will typically face guideline sentences equivalent to, or in excess of, the minimums provided in this section. On the other hand, the amended firearms guideline, unlike the proposed mandatory minimums, draws distinctions and punishes less severely the felon whose prior criminal history involved a single bar room assault many years ago. Finally, a prohibition on imposing a suspended sentence is unnecessary because current sentencing law does not authorize imposition of a suspended sentence.

### RECOMMENDATION

Congress should consider the structure, proportionality and relative severity of the recently amended firearms guideline before mandating new statutory minimum sentences for these offenses.

If Congress concludes that the current penalties for defendants with two qualifying prior convictions are inadequate, the Commission recommends that Congress raise the statutory maximum penalty under 18 U.S.C. § 924(a)(2) to permit the Commission the needed flexibility to increase sentence levels for this category of offender, as appropriate.

**JUVENILES AND GANGS (Title V, S. 2305)  
YOUTH VIOLENCE (Title VII, H.R. 3371)**

**6. Criminal Street Gangs.**

Existing Law	S. 2305	Conference Bill (H.R. 3371)
No similar provision.	<p><b>Section 513. Criminal Street Gangs.</b> Creates new offense covering commission of serious violent crimes and drug crimes as part of a street gang. Provides a mandatory consecutive sentence of not more than 10 years.</p>	<p><b>Section 704. Criminal Street Gangs.</b> Creates new offense covering commission of serious violent crimes and drug crimes as part of a street gang. Provides narrower definition of what constitutes a drug crime (only those having a maximum penalty of at least five years) and narrows the definition of criminal street gang by deleting "in association with." Provides a mandatory consecutive sentence of not more than 10 years.</p>

**OPERATION OF GUIDELINES**

The guidelines currently do not provide an enhancement based upon association with a street gang; however, they do provide adjustments for role in the offense when an offense is committed in concert with others.

**DISCUSSION**

The proposed mandatory minimum penalties lack the proportionality and precision available in sentencing guidelines. For instance, a person who is associated with a street gang, but who acts alone and not under the direction of or in concert with that street gang, would receive the same sentence as a person being directed and controlled by a street gang. Guideline enhancement providing for an increased offense level if the appropriate connection to the street gang is proven would provide a more precise and appropriate punishment. Additionally, such an enhancement would probably be applied more broadly to the conduct about which Congress is concerned than a new offense. This is because a sentencing enhancement need only be proven by a "preponderance of the evidence" standard, whereas the street gang offense provided in these bills would have to be (1) charged by the prosecutor and (2) proven "beyond a reasonable doubt."

**RECOMMENDATION**

As an alternative approach to creating a new offense with mandatory consecutive sentences, Congress could direct the Commission to amend the violent crime and serious drug crimes guidelines to reflect an enhancement for this offense characteristic.

**TERRORISM AND INTERNATIONAL MATTERS (Title VI, S. 2305)**  
**TERRORISM (Title VIII, H.R. 3371)**

**7. Sentencing Guidelines Increase for Terrorist Crimes.**

Existing Law	S. 2305	Conference Bill (H.R. 3371)
No similar provision.	<b>Section 611. Sentencing Guidelines Increase for Terrorist Crimes.</b> Directs the Commission to amend the guidelines to provide an increase of at least three levels for any felony that promotes international terrorism (except where such promotion was an element of the crime).	<b>Section 832. Sentencing Guidelines Increase for Terrorist Crimes.</b> Same as S. 2305.

**OPERATION OF GUIDELINES**

The guidelines apply the homicide guidelines (Chapter Two, Part A, Subpart 1) and assault guidelines (Subpart 2) to terrorist offenses subject to penalties under 18 U.S.C. § 2332. A three-level enhancement applies when the object of the terrorist offense was an "official victim" or designated government employee. A departure may apply when the defendant committed the offense in furtherance of a terroristic action (§5K2.15), when national security or public health or safety is significantly endangered (§5K2.14) and when the conduct results in a significant disruption of a governmental function (§5K2.7).

**DISCUSSION**

While the proposed directive to the Commission is consistent with guideline structure, it may not be wise policy. Terrorist crimes are likely to be very infrequently prosecuted, making it difficult to predict in advance how much of an enhancement would be appropriate for the conduct of concern. Incorporating an enhancement of a specific number of offense levels could limit a court's ability to impose a sufficiently severe sentence for egregious conduct (because a court may not depart from the guideline range based upon a factor used to determine the guideline range). The Commission considered such an enhancement in the last amendment cycle and rejected it for those reasons.

SEXUAL VIOLENCE, CHILD ABUSE, AND VICTIMS' RIGHTS (Title VII, S. 2305)

8. HIV Testing and Penalty Enhancement in Sex Abuse Cases.

Existing Law	S. 2305	Conference Bill (H.R. 3371)
No similar provision.	<b>Section 704. HIV Testing and Penalty Enhancement in Sex Abuse Cases.</b> Provides for mandatory HIV testing of offender. Directs Commission to amend appropriate guidelines to provide increased penalty if offender knew or had reason to know the offender was infected except where offender's conduct did not create risk of transmission.	No similar provision.

OPERATION OF GUIDELINES

Currently no guideline expressly provides an enhancement for conduct when the defendant knew s/he was infected. Guidelines §§2A3.1 and 2A3.2 are the principal guidelines applicable to criminal sexual abuse conduct in which the aggravating factors of concern in section 704 could be an issue. Enhancements for the conduct punished under section 704 presently may be considered under §3A1.1 (Vulnerable Victim), and under departure policy statements such as §5K2.1 (Death), §5K2.2 (Physical Injury), §5K2.3 (Extreme Psychological Injury), or §5K2.8 (Extreme Conduct).

RECOMMENDATION

The proposed directive to the Commission is in a form that could be implemented by the Commission consistent with the structure of the guidelines.



9. Mandatory Restitution and Other Provisions.

Existing Statute	S. 2305	Conference Bill (H.R. 3371)
<p>18 U.S.C. § 3663(a) provides that a court <u>may</u> order restitution, and that a court shall consider the financial resources and needs of the defendant as well as the loss to the victim. No order need be entered where to fashion the order would unduly complicate the sentencing process.</p>	<p><b>Section 714. Mandatory Restitution and Other Provisions.</b> Provides that the court <u>shall</u> order restitution in an amount equal to the full loss to the victim, regardless of the economic circumstances of the offender, the extent to which the victim is covered by insurance, or the complication and prolongation of the sentencing process.</p>	<p>No similar provision.</p>

**OPERATION OF GUIDELINES**

The guidelines in §5E1.1 provide that the court shall order restitution except for the limited cases in which the defendant will be unable to pay the restitution, or determination of the amount of restitution would unduly prolong or complicate the sentencing process. The court may order partial restitution if full restitution cannot be imposed. Background commentary to the guideline emphasizes that the court's authority to deny restitution is limited. The Commission is unaware of any evidence demonstrating that the restitution guideline or statutes are inadequate.

**RECOMMENDATION**

Section 714 of S. 2305 should be deleted as unnecessary.

10. Inducement of Minor to Commit an Offense.

Existing Law	S. 2305	Conference Bill (H.R. 3371)
No similar provision.	<b>Section 771. Inducement of Minor to Commit an Offense.</b> Creates new offense of inducing a minor to commit a federal offense. Provides mandatory consecutive minimum penalty of at least three years up to 10 years.	No similar provision.

**OPERATION OF GUIDELINES**

The sentencing guidelines currently do not contain an enhancement of general applicability for this conduct. However, in drug distribution cases involving persons less than 18 years of age, guideline §2D1.2 provides for an offense level of not less than 26 that is further enhanced for larger quantities of drugs.

**DISCUSSION**

The proposed mandatory minimum penalties lack the proportionality and precision that is available under sentencing guidelines were the conduct framed as a sentencing enhancement. For instance, a person who solicits a 15 year old to deliver an opaque package containing a gram of marijuana would receive the same sentence as a person who intimidates a 12 year old into delivering 50 grams of heroin. Additionally, a sentencing enhancement is not as dependent on charge selection by the prosecutor and need only be proven by a "preponderance of the evidence" standard, whereas the conduct that is the subject of the new offense proposed in section 771 must be charged by the prosecutor and proven beyond a reasonable doubt. Consequently, a sentence enhancement likely would be applied more broadly and consistently to the conduct of concern than would a new statutory offense.

**RECOMMENDATION**

As an alternative to section 771, Congress could direct the Commission to provide for an appropriate enhancement for cases in which the defendant induced a minor to commit a felony offense.

**TECHNICAL ISSUE**

The proposed new offense in section 771 provides a minimum consecutive imprisonment term for conduct that also could be punished under 21 U.S.C. § 861, pertaining to employment of persons under age 21 in drug trafficking. If this new offense is enacted, Congress should make clear its relationship to the existing offense in title 21.

**ILLEGAL DRUGS (Title X, S. 2305)  
DRUG CONTROL (Title XVI, H.R. 3371)**

**11. Management of Listed Chemicals.**

Existing Law	S. 2305	Conference Bill (H.R. 3371)
No similar provision.	<p><b>Section 1021. Management of Listed Chemicals.</b> Creates new offense of managing a listed chemical or waste from the manufacture of a controlled substance other than as required by provisions of the Solid Waste Disposal Act (42 U.S.C. §§ 6921-6925). Designates the offense as a Class D felony (Class C in the case of a willful violation). Expresses the sense of the Congress that the guidelines establish a guideline range not less than 60 months (120 months in the case of a willful violation).</p>	<p><b>Section 1621. Management of Listed Chemicals.</b> Same as S. 2305.</p>

**DISCUSSION**

The proposed provisions create a very narrow penalty range. Under 18 U.S.C. § 3581(b)(3), a Class C felony is subject to no more than twelve years imprisonment, and under § 3581(b)(4) a Class D felony is subject to no more than six years imprisonment. Section 1021 also expresses the sense of Congress that the guideline ranges for the two new offenses be no less than 10 years and 5 years, respectively. This is a proposed sentencing range of only 20 percent, which is narrower than the 25 percent variance permitted under 28 U.S.C. § 994(b)(2) and currently employed under the guidelines.

The narrow penalty range (60 to 72 months for the basic offense, 120 to 144 months for a willful violation) suggested by these provisions may not adequately account for the wide variations in seriousness of behavior covered by the Solid Waste Disposal Act. Offense behavior under this Act ranges from minor record-keeping offenses to willful dumping of hazardous waste. Under the proposal, a defendant who possessed a precursor chemical with intent to manufacture a controlled substance would receive at least a ten-year sentence for willfully not following waste disposal record-keeping procedures. Moreover, this sentence must be consecutive to the sentence imposed for the underlying drug offense. Thus, the sentence for the record-keeping offense could be substantially longer than that for the underlying precursor offense itself.

**RECOMMENDATION**

Patterned after language used by Congress in the Major Fraud Act (Pub. L. 100-700, §2(b), November 19, 1988, 102 Stat. 4632), an alternative directive to the

Commission along the following lines is recommended in lieu of the proposed sense of Congress provisions:

"Pursuant to its authority under section 994(p) of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines, or shall amend existing guidelines, to provide for appropriate penalty enhancements for offenses involving violations of the Solid Waste Disposal Act in conjunction with the manufacture of a controlled substance or in conjunction with the possession of a listed chemical with the intent it be used in the illegal manufacture of a controlled substance."

**12. Strengthened Federal Penalties Relating to Crystalline Methamphetamine.**

Existing Law	S. 2305	Conference Bill (H.R. 3371)
<p>21 U.S.C. § 841(b)(1) provides a 10-year mandatory minimum penalty for offenses involving at least 100 grams of actual methamphetamine or at least 1 kilogram of a mixture or substance containing methamphetamine; and provides a 5-year mandatory minimum penalty for offenses involving at least 25 grams (actual) or 100 grams (mixture) of methamphetamine.</p>	<p><b>Section 1071. Strengthened Federal Penalties Relating to Crystalline Methamphetamine.</b> Increases mandatory minimum penalties for offenses involving methamphetamine that is at least 80 percent pure and crystalline in form. Applies a mandatory minimum penalty of 10 years for offenses involving 25 grams or more of such methamphetamine, or a mandatory minimum penalty of 5 years for offenses involving 5 grams or more of such methamphetamine.</p>	<p>No similar provision.</p>

**OPERATION OF GUIDELINES**

Section 2D1.1 of the guidelines bases its sentences on the statutory penalties set forth in section 841. At the direction of Congress in the 1990 crime bill, the Commission has ensured that offense levels for offenses involving "ice" (defined as a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity) are identical to offense levels based on the weight of actual (i.e., pure) methamphetamine. For example, 100 grams of pure methamphetamine and 100 grams of "ice" both receive offense level 32, with a guideline range of 121-151 months for a first offender.

**DISCUSSION**

The proposed mandatory minimum penalties lack the proportionality and precision that is available in sentencing guidelines. The Commission implemented the 1990 crime bill directive regarding enhanced guideline penalties for "ice" and is unaware of any evidence demonstrating that the revised guideline penalties inadequately punish the conduct addressed in this provision.

**RECOMMENDATION**

This provision should be deleted from the bill as unnecessary.

13. **Increased Penalties for Distribution of Controlled Substances at Truck Stops and Rest Areas.**

Existing Law	S. 2305	Conference Bill (H.R. 3371)
<p>21 U.S.C. § 860 provides a mandatory minimum penalty of one year for first offense of drug distribution within protected locations, and three years for second offenses. Truck stops and rest areas are not currently considered protected locations.</p>	<p><b>Section 1073. Increased Penalties for Distribution of Controlled Substances at Truck Stops and Rest Areas.</b> Makes drug distribution within 1,000 feet of a truck stop or safety rest area punishable by up to twice the penalties otherwise available under § 841, and establishes a mandatory minimum penalty of one year (or the relevant § 841 minimum where greater). Second or subsequent offenses are punishable by up to three times the maximum available under § 841, and subject to a three-year mandatory minimum penalty. The mandatory minimum penalties do not apply to offenses involving five grams or less marijuana. The provision directs the Commission to promulgate or amend the guidelines to provide for an offense level that is two levels greater than the level that would have been assigned for the underlying drug offense, and in no event less than level 26. Finally, prohibits suspended sentences and prohibits eligibility for parole before serving the minimum sentence.</p>	<p><b>Section 1521. Drug Free Truck Stops and Safety Rest Areas.</b> Same as S. 2305.</p>

**OPERATION OF GUIDELINES**

Guideline section 2D1.2, pertaining to drug distribution near a protected location, carries a guideline offense level of 13, or two levels greater than the offense level that applies to the quantity of drugs involved in the offense, whichever is greater. The guidelines currently provide minimum sentences that typically exceed the one-year mandatory minimum penalty for first offense drug distribution convictions.

## DISCUSSION

This provision treats trafficking in controlled substances within 1,000 feet of a truck stop or rest area similar to trafficking near schools, colleges, playgrounds, and other locations listed under 21 U.S.C. § 860. Section 860 carries a one-year mandatory minimum sentence. Yet, the instruction to the Commission to assign an offense level of at least level 26 for these offenses (guideline range of 63-78 months for a first offender) would treat offenses involving sales near truck stops and rest areas more harshly than sales near schools, for which offenses the Commission by statute previously has been directed to provide a minimum offense level of 13. In addition, the provision is not proportional to offense seriousness in that the same minimum offense level of 26 is required in all cases, regardless of the amounts and types of controlled substances involved. Under this mandated structure, the sale of three valium tablets would be treated the same as the sale of one gram of cocaine. Finally, the provision purports to prohibit suspended sentences and parole -- neither of which are authorized under applicable sentencing statutes.

## RECOMMENDATION

The provisions prohibiting suspended sentences and parole should be eliminated as unnecessary. The instruction to the Commission should be modified to conform to the existing directive applicable to other protected-location offenses. An alternative instruction to the Commission in this form is provided below:

"(c) Sentencing Guidelines. --

(1) Promulgation of Guidelines. -- Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines, or shall amend existing guidelines, to provide that a defendant convicted of violating section 409 of the Controlled Substances Act, as amended by subsection (b), shall be assigned an offense level under Chapter Two of the sentencing guidelines that is --

(A) two levels greater than the level that would have been assigned for the underlying controlled substance offense; and

(B) in no event less than level 13."

Consideration also should be given to deleting the proposed mandatory minimums in this section of the bills and the existing mandatory minimums in 21 U.S.C. § 860. These mandatory minimums not only are inconsistent with the guidelines' purpose and structure but also arguably are unnecessary in view of the guidelines. Consideration should be given to converting the offenses in 21 U.S.C. § 860 (and § 861) to sentencing enhancements, which would broaden their applicability.

14. Enhancement of Penalties for Drug Trafficking in Prisons; Mandatory Penalties for Illegal Drug Use in Federal Prisons.

Existing Law	S. 2305	Conference Bill (H.R. 3371)
<p>18 U.S.C. § 1791(c) requires that any sentence imposed for providing or possessing contraband in prison run consecutive to the sentence being served by the inmate. The statute does not otherwise require imposition of a mandatory minimum penalty.</p>	<p><b>Section 1074. Enhancement of Penalties for Drug Trafficking in Prisons.</b> Amends current statute to require that the sentence imposed for providing or possessing contraband in prison run consecutively to the sentence for the controlled substance offense (in addition to the existing requirement that the in-prison offense run consecutively to the sentence being served).</p>	<p><b>Section 1633. Enhancement of Penalties for Drug Trafficking in Prisons.</b> Same as S. 2305, except that it adds certain drugs as "prohibited objects."</p>
	<p><b>Section 1088. Mandatory Penalties for Illegal Drug Use in Federal Prisons.</b> Provides a mandatory minimum penalty of one year in prison for simple possession of a controlled substance in a federal prison. Provides a mandatory minimum penalty of ten years for smuggling a controlled substance into a federal prison, or distribution of a controlled substance in a federal prison. Provides that such sentences are to run consecutively to any sentence imposed for the controlled substance offense itself.</p>	<p><b>Section 1644. Mandatory Penalties for Illegal Drug Use in Federal Prisons.</b> Same as S. 2305.</p>

**OPERATION OF GUIDELINES**

The guidelines provide in §5G1.3 that a sentence for an offense committed while in prison must run consecutively to the sentence being served at the time of the offense. Further, §2P1.2 (Providing or Possessing Contraband in Prison) provides an offense level of at least 26 if the inmate is convicted under 18 U.S.C. § 1791 of possessing a narcotic drug, LSD, or phencyclidine, or an offense level of 13 if the offense involved other controlled substances.



## RECOMMENDATION

Mandating that a sentence for the prison contraband offense run consecutively to a sentence for any controlled substance offense raises questions of double punishment for the same conduct and invites large disparity in sentencing for identical conduct depending upon prosecutorial charging and plea practices. A preferable approach that is more consistent with the guidelines and Sentencing Reform Act goals would be to instruct the Sentencing Commission to amend the drug guidelines to provide an appropriate enhancement if the controlled substance offense was committed while the defendant was imprisoned. This would ensure more consistent, incremental punishment for the conduct of concern. In order to retain proportionality in sentencing vis-a-vis the seriousness of the offense, this approach also should be considered in lieu of new mandatory minimum sentences.

15. **Conforming Provision Punishing a Second Offense of Distributing Drugs to a Minor; Longer Prison Sentences for Those Who Sell Illegal Drugs to Minors or for Use of Minors in Drug Trafficking Activities.**

Existing Law	S. 2305	Conference Bill (H.R. 3371)
<p>21 U.S.C. § 859(a) provides a one-year mandatory minimum penalty for a first offense of distributing drugs to a person under <u>21 years old</u>.</p> <p>21 U.S.C. § 859(b) provides a one-year mandatory minimum penalty for the second offense, and a mandatory minimum penalty of life for third and subsequent convictions.</p>	<p><b>Section 1084. Conforming Amendment to Provision Punishing a Second Offense of Distributing Drugs to a Minor.</b> Increases current mandatory minimum penalty under § 859(b) to three years for a second offense of distributing drugs to a person under 21 years old. Penalty for first offense remains at one year.</p>	<p>No similar provision.</p>
	<p><b>Section 1086(a). Longer Prison Sentences for Those Who Sell Illegal Drugs to Minors.</b> Increases mandatory minimum penalty to 10 years if distribution is to a person under <u>18 years old</u>. Increases mandatory penalty to life for second offense.</p>	<p>No similar provision.</p>
<p>21 U.S.C. § 861(b) provides a mandatory minimum penalty of one year for a first offense of using a person under <u>21 years old</u> in drug trafficking activities.</p> <p>21 U.S.C. § 861(c) provides a mandatory minimum penalty of one year for a second offense. The mandatory minimum penalty for a third and subsequent offense is life.</p> <p>21 U.S.C. § 861(d) provides a five-year statutory maximum penalty for distribution to a person under 18 years old or employment of a person under 14 years old.</p>	<p><b>Section 1086(b). Longer Prison Sentences for Use of Minors in Drug Trafficking Activities.</b> Increases the mandatory minimum penalty under § 861 for a first offense to 10 years if the defendant used a person under the age of <u>18 years old</u>. Increases the mandatory minimum penalty to life for a second offense.</p>	<p>No similar provision.</p>

**OPERATION OF GUIDELINES**

In cases involving persons less than 18 years of age, the guidelines (§2D1.2) provide for an offense level of not less than 26 that is further enhanced if the quantity of drugs involved is large. Specifically, the enhanced level is the greater of either a two-level (approximately 25%) increase above the offense level for the specific quantity of drugs distributed to (or otherwise involving) a juvenile; or a one-level increase

(approximately 12.5%) above the offense level from all of the drugs for which the defendant is accountable, if some drugs were distributed to adults. If the final offense level is less than the current mandatory minimum penalty, the mandatory minimum is imposed. The guidelines provide an enhancement for second offenders through an increased criminal history score.

### DISCUSSION

The proposed increase in the mandatory minimum penalty for offenses involving persons under 18 years old will be susceptible to disparate use by prosecutors and will not have the benefits of a consistently applied guideline enhancement for offenses using certain minors. Further, unlike the guidelines, the mandatory minimum penalty is unable to account for the mitigating and aggravating circumstances relevant to the quantity of drugs involved or the criminal record of the offender.

### RECOMMENDATION

If Congress determines that current penalty levels are inadequate, in lieu of raising the mandatory minimum penalties, consideration should be given to directing the Commission to require an enhanced offense level for offenses involving persons under the age of 21, and a greater enhancement for offenses involving persons under the age of 18.

As previously noted, these offenses are infrequently prosecuted relative to the drug trafficking offenses under 21 U.S.C. § 841. For this reason, and because the conduct is by nature an aggravated form of trafficking, consideration should be given to deleting 21 U.S.C. §§ 859-861 as separate offenses and directing the Commission to include appropriate enhancements in the guidelines for drug trafficking.

## 16. Life Imprisonment Without Release for Criminals Convicted a Third Time.

Existing Law	S. 2305	Conference Bill (H.R. 3371)
21 U.S.C. § 841(b)(1)(A) provides a mandatory minimum penalty of life in prison for drug offenders with two or more prior felony drug convictions.	<b>Section 1085. Life Imprisonment Without Release for Criminals Convicted a Third Time.</b> Expands scope of mandatory minimum penalty of life in prison to include drug offenders with any combination of two or more prior felony drug or crime of violence convictions.	No similar provision.

### OPERATION OF GUIDELINES

Under guideline §4B1.1 (Career Offender), an offender who commits a felony that is either a crime of violence or a controlled substance offense and who has two prior felony convictions of either a crime of violence or a controlled substance offense receives the highest criminal history category (Category VI) and the greater of the offense level from the instant offense or an offense level from §4B1.1 that increases depending on the statutory maximum for the instant offense (maximum of life - level 37; maximum of 25 years or more - level 34; 20 years or more - level 32; 15 years or more - level 29; 10 years or more - level 24; 5 years or more - level 17; and 1 year or more - level 12). Section 4B1.1 implements the congressional mandate in 28 U.S.C. § 994(h) to ensure that such offenders receive a sentence "at or near the maximum term authorized." A mandatory life sentence will be imposed if the offender meets the test of 21 U.S.C. § 841(b)(1)(A).

### DISCUSSION

The career offender guideline applies irrespective of any action or inaction by the prosecutor and its determination is based on a preponderance of the evidence. The guideline appropriately differentiates among offenders according to the seriousness of the instant offense (based on the statutory maximum). Proposed section 1085 of S. 2305, on the other hand, may be applied only if the prosecution has filed an information with the court giving notice of the prior convictions to be relied on for purposes of the sentence enhancement. Further, the proposal would apply the same mandatory life sentence regardless of the nature or relative lack of seriousness of the instant controlled substance conduct. Because the current career offender guideline already requires lengthy sentences (approaching life imprisonment) for the most serious offenses, the principal impact of this provision would be on less serious offenses that currently have lower statutory maximum penalties.

## RECOMMENDATION

Congress should consider the advantages of sentencing under 28 U.S.C. § 994(h) and §4B1.1 as an alternative to section 1085. The Commission is not aware of any analysis indicating that sentences imposed under the career offender guideline are inadequate; in fact, many have contended the guideline is too severe.

17. Drug Distribution to Pregnant Women.

Existing Law	S. 2305	Conference Bill (H.R. 3371)
21 U.S.C. § 861(f) provides for a first offense a mandatory minimum penalty of at least one year and a statutory maximum twice that available under § 841(b). Provides for a second offense a mandatory minimum penalty of one year (subject to amendment to three years under section 1084) and a maximum three times that available under § 841(b).	Section 1089. Drug Distribution to Pregnant Women. Creates same offense in 21 U.S.C. § 859 with same penalties.	No similar provision.

**DISCUSSION**

This amendment apparently creates a similar offense and penalty under 21 U.S.C. § 859 as now exist under section 861(f).

**RECOMMENDATION**

The proposed duplicative section should be eliminated.

18. Penalties for Drug Dealing in Public Housing Authority Facilities; Increased Penalties for Drug Dealing in "Drug-Free" Zones.

Existing Law	S. 2305	Conference Bill (H.R. 3371)
<p>21 U.S.C. § 860 provides a mandatory minimum penalty of one year for first drug offenses occurring at protected locations, and three years for second offenses.</p>	<p>Section 1091. Penalties for Drug Dealing in Public Housing Authority Facilities. Adds public housing authority facilities and playgrounds to scope of protected locations.</p> <p>Section 1093. Increased Penalties for Drug Dealing in "Drug-Free" Zones. Increases the mandatory minimum penalty from one year to three years for a first offense, and from three years to five years for a second offense.</p>	<p>Section 1637. Penalties for Drug Dealing in Public Housing Authority Facilities. Same as S. 2305.</p> <p>Section 1641. Increased Penalties for Drug Dealing in "Drug-Free" Zones. Same as S. 2305.</p>

OPERATION OF GUIDELINES

Guideline section 2D1.2 (applying to offenses involving drug distribution in protected locations) currently provides a guideline offense level of 13, or two levels greater than the offense level that applies to the quantity of drugs involved in the offense, whichever is greater. In addition, the guidelines currently provide enhanced penalties based on the defendant's previous criminal history. These enhancements are proportional both to the seriousness and recency of the defendant's criminal history. In most cases, the guidelines currently provide minimum sentences in excess of a one-year mandatory minimum penalty for first offense drug distribution convictions.

DISCUSSION

The proposed legislation would have minimal impact under the guidelines because they currently provide minimum sentences in excess of the proposed one-year mandatory minimum penalty for first offense drug distribution convictions.

Nevertheless, as with other mandatory minimum penalties, the proposed penalty provisions are not necessarily proportional to the seriousness of the offense conduct. At the lower end of the behavior spectrum, this section does not allow sufficient distinction for the type and amount of controlled substance or the particular circumstances of the case. Therefore, a defendant who unlawfully sold three Valium tablets from his/her own legal prescription would be subject to the same three-year minimum penalty (for a second offense) as a defendant who sold a substantially larger quantity of crack.

## RECOMMENDATION

The sentencing guidelines currently provide enhanced penalties for the conduct that is the focus of congressional concern. Thus, an increase in the statutory minimum penalties would appear unnecessary. However, if Congress concludes that the minimum guideline penalties should be raised, it could direct the Commission to raise the minimum base offense level for such offenses from level 13 to level 20, at which level the guideline range for a first offender includes a sentence of three years. Language along these lines might read as follows:

"Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall amend existing guidelines to provide that a defendant convicted of violating section 419 of the Controlled Substances Act (21 U.S.C. § 860) shall be assigned an offense level under Chapter Two of the sentencing guidelines that is no less than level 20."



**GENERAL PROVISIONS (Title XII, S. 2305)  
PROTECTIONS FOR THE ELDERLY (Title XXI, H.R. 3371)**

**19. Violent Offenses Against the Elderly.**

Existing Law	S. 2305	Conference Bill (H.R. 3371)
No similar provision.	<b>Section 1204. Violent Offenses Against the Elderly.</b> For crimes of violence against victims 65 years of age or older: first offense requires at least one-half of the statutory maximum; for the second offense, at least three-fourths of the maximum term. In addition, probation may not be given, the sentence shall be consecutive and the court shall reject a plea agreement requiring a sentence less than the minimum proscribed.	<b>Section 2102. Crimes Against the Elderly.</b> Directs the Sentencing Commission to ensure that the guidelines provide sufficiently stringent punishment for defendants convicted of crimes of violence against persons 65 years of age or older.

**OPERATION OF GUIDELINES**

Under the guidelines, the applicable offense level is not enhanced automatically if the victim is elderly. However, §3A1.1 (Vulnerable Victim) provides a two-level upward adjustment [about a 25% increase] if the defendant knew or should have known that a victim was unusually vulnerable due to age (among other factors). In addition, courts may depart upward in other circumstances that may involve elderly victims, e.g., §5K2.2 (Physical Injury); §5K2.3 (Extreme Psychological Injury); and §5K2.8 (Extreme Conduct, i.e., unusually heinous, cruel, brutal, or degrading conduct).

**DISCUSSION**

Section 1204 of S. 2305 raises several concerns. One is that a statute covering the underlying behavior can apply to a wide range of behavior, creating the potential that the mandatory minimum required by this section will be disproportionately severe in the least egregious cases. For example, 18 U.S.C. § 2111, which covers robberies, has a maximum penalty of fifteen years imprisonment. Under Section 1204, a person who snatched a backpack from a vigorous 65-year-old hiker on federal land, putting him/her in no danger, would have to be sentenced to at least seven and one-half years in prison. An individual who robbed an infirm sixty year old would not be subject to this mandatory statutory sentence, although the offender would face a substantial sentence under the guidelines.

The second problem relates to the definition of "crime of violence" as used in this section. The definition includes the use of physical force against the property of another. Under 18 U.S.C. § 1705, the destruction of a postal letter box is subject to up to three years' imprisonment. Thus, under section 1204, an individual who merely knocked over the mailbox of a 65-year-old person without destroying any contents would be required to serve one and a half years in prison.

Third, the section provides for the sentence enhancement whether or not the defendant intended to target the older victim and whether or not, as in the previous letter box example, the age of the victim had any bearing on the seriousness of the offense.

Finally, it should be noted that the practical effect of the provision is to mandate a substantial increase for the least serious offenses, for which the sentencing guidelines provide a relatively lower sentence, while having no effect in respect to the more serious offenses, for which the guideline sentence presently may exceed one-half the statutory maximum. A better solution to this problem exists in the sentencing guidelines, which provide a substantial sentence enhancement when the defendant has targeted a "vulnerable victim." This enhancement applies to vulnerable older persons, mentally and physically handicapped persons, as well as victims who were particularly susceptible to the criminal conduct for other reasons. Because the enhancement is added to the guideline for the underlying offense, it is proportional to the seriousness of the underlying criminal behavior. It would not apply in situations in which the person who is a victim of a crime just happens to be elderly, such as in the mailbox case above, but would apply to the victim with the walker who was mugged, regardless of the victim's age.

#### RECOMMENDATION

For the reasons stated above, it is recommended that section 1204 be deleted as unnecessary and inconsistent with the guidelines. Alternatively, the Commission could be instructed to review the guidelines applicable to offenses involving elderly victims to ensure that they contain appropriate enhancements based upon the victim's age or other vulnerability. The directive in section 2102 of H.R. 3371 is of a form that is consistent with this alternative approach.

**PRISONS (Title XIV, H.R. 3371)**

**20. Substance Abuse Treatment.**

Existing Law	S. 2305	Conference Bill H.R. 3371
No similar provision.	No similar provision.	<p><b>Section 1404. Substance Abuse Treatment.</b> Establishes time table by which the Bureau of Prisons is to provide residential substance abuse treatment for eligible federal prisoners. Amends 18 U.S.C. § 3621 to provide an "incentive" (up to one year reduction in sentence or changed conditions of confinement) for inmates with a substance abuse problem to complete successfully a drug treatment program.</p>

**DISCUSSION**

While it is undisputed that drug treatment is a worthy goal, the proposed incentive of allowing prison sentences to be reduced by up to one year would, if used by the Bureau of Prisons, reintroduce uncertainty and disproportionality into the federal criminal justice system -- flaws in the prior system that the Sentencing Reform Act of 1984 was enacted to correct. With respect to uncertainty, the provision would run counter to the SRA's "truth in sentencing philosophy" that the sentence imposed by the court, carefully regulated through sentencing guidelines, is to be the sentence served. The SRA's legislative history found that when the authority to determine the length of a sentence is split, as it was in the era of parole and could be under this subsection, the criminal justice system "lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an effective deterrent against crime." S. Rep. No. 225, 98th Cong., 1st Sess. 50 (1983).

The subsection also raises concerns regarding disproportionality and fairness. Because the subsection would authorize sentence reductions of a year regardless of whether the sentence involved was for two years or twenty, the proportional effect of the reduction could vary greatly from offender to offender. Finally, courts that have considered whether post-arrest, substance abuse rehabilitation efforts should provide a basis for sentencing below the guideline range have generally rejected this argument on fairness grounds. As one court put it, allowing sentence reductions for drug treatment efforts "would provide a benefit to defendants with a drug problem that is unavailable to defendants without one." United States v. Martin, 938 F.2d 162 (9th Cir. 1991).

## RECOMMENDATION

In contrast to an incentive that would operate by allowing the Bureau of Prisons to reduce the length of sentence, the other type of incentive apparently contemplated by the subsection, changing the conditions of confinement, would not appear to compromise the goals of the SRA. Accordingly, it is recommended that if the subsection is retained it be amended to eliminate references to sentence reduction.

This can be effected by deleting the words "for . . . and" in paragraph (1) of proposed subsection (d) to 18 U.S.C. § 3621, and by deleting in its entirety paragraph (2) of proposed subsection (d). (An apparent additional technical problem is that 18 U.S.C. § 3621 already has a subsection (d). Thus, the newly proposed subsection (d) probably should be subsection (e) instead.)

21. Boot Camps.

Existing Law	S. 2305	Conference Bill H.R. 3371
No similar provision.	No similar provision.	<p><b>Section 1406. Boot Camps.</b>            Requires establishment of federally operated military-style boot camps for federal and state inmates. Amends 18 U.S.C. § 3582 to provide that a sentencing court may designate a federal offender eligible for boot camp placement if the offender is (1) under age 25, (2) has not been incarcerated more than 10 days on any prior conviction, (3) either has been convicted of an instant offense involving drugs or has tested positive for drug use, and (4) has a guideline offense level of 15 or less. Any remainder of the offender's prison sentence following assignment to the boot camp is deemed satisfied by successful completion of the program.</p>

DISCUSSION

The Sentencing Reform Act contemplates that the Sentencing Commission will promulgate "guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case . . ." 18 U.S.C. § 994(a)(1). The legislative history is explicit that this approach -- court-determined sentences guided by Commission-issued guidelines -- was expected to apply to non-prison sentencing alternatives. See, e.g., S. Rep. No. 225, 98th Cong., 1st Sess. 51, 169 ("The sentencing guidelines will recommend to the sentencing judge an appropriate *kind* and range of sentence . . .;" the Commission should issue "guidelines addressing this broad range of sentencing alternatives -- rather than just the length of terms of imprisonment . . .") (emphasis added). The Commission has issued guidelines governing non-prison sentencing alternatives, see U.S.S.G. Ch. 5, Pts. C and F, and has sent to Congress amendments to these guidelines providing expanded availability of sentencing alternatives.

The approach of section 1406(c) of the bill does not take into account the Commission's congressionally mandated role nor its actual work in this area. As a consequence, a fundamental legislative premise for the Commission's existence, that it would develop sound sentencing policies for the federal courts by comprehensively examining and coordinating the vast array of possible sentences for federal offenses, may be hampered. This potential is particularly apparent with respect to the requirement in section 1406 that any portion of an imposed guideline prison sentence that would remain

following completion of the boot camp program would be excused. Because offenders meeting the eligibility criteria established under the bill could receive guideline prison sentences of up to thirty months,<sup>2</sup> and because boot camp programs now being operated by the Bureau of Prisons last approximately six months, the decision to send an offender to boot camp could result in a very significant sentence reduction for some offenders. How the length of a prison sentence should be reduced for time spent in a boot camp, and how to avoid the kind of disproportionate results among offenders that seem possible under the bill's approach are issues in need of careful study.

Finally, it should be noted that Congress established a boot camp program in last year's crime bill. This program, codified at 18 U.S.C. § 4501, has eligibility criteria that are somewhat different from those called for in the pending legislation.

### RECOMMENDATION

Given the recent enactment of 18 U.S.C. § 4501, it is recommended that Congress await an evaluation of the intensive confinement programs established by the Bureau of Prisons before proceeding with this new initiative.

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<sup>2</sup>While legislative history for the provision suggests that application of the program would be limited to offenders sentenced to 24 months or less, the correct limit, considering a category of offenders with relatively minor criminal history, appears to be 30 months.

## ADDITIONAL ISSUES

The Commission supports enactment of the following provisions:

### **22. Revocation of Probation and Supervised Release.**

Sections 1241-1244 of S. 2305 and sections 2501-2504 of H.R. 3371 contain Commission recommendations clarifying the statutory provisions pertaining to revocation of probation and supervised release.

### **23. Increase in Maximum Statutory Penalties for Provisions That Inhibit Guideline Operation.**

Sections 1202, 1203, 1205 and 1211 of S. 2305 and sections 3001, 3002, and 3003 of H.R. 3371 implement Commission recommendations growing out of its report to Congress on statutory maximum penalties that are inconsistent with the grading of offense severity under the guidelines.

### **24. Extended Service of Sentencing Commissioners.**

Section 1250 of S. 2305 contains Commission legislation to permit continued service of a Sentencing Commissioner whose term has expired until a successor is qualified.

### **25. Miscellaneous Sentencing Provisions.**

Sections 1245-1248 of S. 2305 and sections 2601-2603 of H.R. 3371 contain miscellaneous sentencing provisions recommended by the Department of Justice that the Commission supports. Section 1248 of S. 2305, pertaining to the availability of supervised release for juvenile offenders, is especially needed.

# SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points)					
		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11,12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
Zone D	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-265	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

**Key**

A - Probation available (see §5B1.1(a)(1))

B - Probation with conditions of confinement available (see §5B1.1(a)(2))

C - New "split sentence" available (see §§5C1.1(c)(3),(d)(2))

D - None of the above alternatives to imprisonment available (see §5C1.1(f))