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The New Federal Criminal Code: A Sampler

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INTRODUCTION

The Comprehensive Crime Control Act of 1984[1] (Crime Control Act), enacted October 12, 1984, contains twenty-three chapters.[2] This article discusses three of the twenty-three chapters: The Bail Reform Act of 1984; The Sentencing Reform Act of 1984; and The Insanity Defense Reform Act of 1984. The Act made significant changes in federal criminal law; *e.g.*, statutory presumptions may preclude release on bail (now "detention") hearings,[3] and the burden of proving the insanity defense has been shifted to the defendant.[4] Changes in the three chapters discussed in the article are illustrative of the scope of changes made in the other

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1. Comprehensive Crime Control Act of 1984, Pub. L. 98-473, Title II; 18 U.S.C. §§ 1–5042, 18 U.S.C. appendix II §§ 1201–1203, and 21 U.S.C. §§ 801–970.

2. *Id. See* Chapter I, The Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3156; Chapter II, The Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551–3580; Chapter III, The Comprehensive Forfeiture Act of 1984, 18 U.S.C. §§ 1963–1964, 21 U.S.C. §§ 853, 881; 19 U.S.C. §§ 1607, 1613, 1616; Chapter IV, The Insanity Defense Reform Act of 1984, 18 U.S.C. §§ 4241–4247, and 18 U.S.C. § 20; Chapter V, The Controlled Substances Penalties Amendments Act of 1984, 21 U.S.C. §§ 801–970; Chapter VI, Division I, The Judicial Assistance Act of 1984, 42 U.S.C. §§ 3701–3797; Division II, The Juvenile Justice Runaway Youth and Missing Children Act Amendment of 1984, 42 U.S.C. §§ 5601–5777; Chapter VII, Surplus Federal Property Amendment, 40 U.S.C. § 484; Chapter VIII, Labor Racketeering Amendments, 29 U.S.C. § 186; 29 U.S.C. § 401; 29 U.S.C. § 1111; 29 U.S.C. § 504 and 29 U.S.C. § 1136; Chapter IX, Currency and Foreign Transaction Reporting Act Amendment, 31 U.S.C. §§ 5316, 5321, 5322, 5323, and 18 U.S.C. § 1961(1); Chapter X, Miscellaneous Violent Crime Amendment, 18 U.S.C. §§ 16, 1952A, 1952B, 373, 924, 1006, 929, 1201, 115, 111, 1113, 1153, 114, 31, 1365, 1114, 28 U.S.C. § 1826, 18 U.S.C. § 844, 18 U.S.C. § 1961(1); Chapter XI, Serious Non Violent Crime, 18 U.S.C. §§ 2232, 666 (new), 511 (new), 2113(c), 215, 1344 (new), 1791, 1792, 4012 (new), 667, 2316, 2317, 219; Chapter XII [Procedural Amendments] 18 U.S.C. §§ 5032, 5038, 2516, 2518, 3237(a), 3239, 1345 (new), 3731, 3521–3528, 28 U.S.C. § 576, 18 U.S.C. §§ 951, 7, 3505–3507, 3292, 3161; Chapter XIII, The National Narcotics Act of 1984, 21 U.S.C. §§ 1201–1204, 1111; Chapter XIV, The Victims of Crime Act of 1984, 42 U.S.C. §§ 10601–10604; Chapter XV, The Trademark Counterfeiting Act of 1984, 18 U.S.C. §§ 1501, 1502, 2320; Chapter XVI, The Credit Card Fraud Act of 1984, 18 U.S.C. §§ 1001, 1029; Chapter XVII, [Salaries of United States Attorneys], 28 U.S.C. § 548; Chapter XVIII, The Armed Career Criminal Act of 1984, 18 U.S.C. app. §§ 1201–1203; Chapter XIX, The Criminal Justice Act Revision of 1984, 18 U.S.C. § 3006A; Chapter XX, Part A, The Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C. § 1203. Part B, The Aircraft Sabotage Act, 18 U.S.C. §§ 31–32; Chapter XXI, The Counterfeit Access Device and Computer Fraud and Abuse Act of 1984, 18 U.S.C. §§ 1001, 1030; Chapter XXII, 29 U.S.C. § 524a (Statute allowed to legislate regarding labor racketeering); Chapter XXIII, 21 U.S.C. §§ 853, 855 (regarding penalties).

3. 18 *U.S.C.* § 3142(e).

4. *Id.* § 20.

chapters of the Crime Control Act. On October 30, 1984, The Criminal Fine Enforcement Act of 1984 also became law.[5] Like the Crime Control Act, The Criminal Fine Enforcement Act profoundly altered the pre-existing federal criminal law. Hence, both acts should be closely studied by federal criminal law practitioners.

THE BAIL REFORM ACT OF 1984

The Bail Reform Act of 1984[6] establishes new release procedures. The judicial officer (magistrate) must consider whether releasing a defendant will endanger the safety of any other person or the community.[7] The magistrate may be required to hold a "detention hearing" where certain crimes are involved or where there is a serious risk of flight or obstruction of justice.[8] The Act creates a two-pronged test which considers "safety" as well as flight risk.[9]

Numerous changes in bail proceedings reflect a stated congressional concern for community safety[10] and a desire to deal more effectively with dangerous defendants.[11] The Senate Judiciary Committee cited studies from a number of jurisdictions. These studies indicated that approximately 16% of those persons on release pending criminal judicial proceedings were rearrested[12] and almost half of those rearrested were convicted of a new crime.[13] The Judiciary Committee found that this disturbing rate of recidivism among releasees necessitated a new release law permitting consideration of the danger a defendant may pose to others in addition to the likelihood that he may not appear at trial.[14] The studies[15] relied on by the Committee indicated that the presence of certain combinations of offense and offender characteristics facilitated accurate prediction of the likelihood that a defendant would commit a new offense while on release.[16] Accordingly, these "characteristics" were included in the statute.[17] This listing of "characteristics" in the statute also reflects the committee's

5. *Id.* §§ 3621–3623.
6. *Id.* §§ 3141–3156 (1984).
7. *Id.* § 3142(b).
8. *Id.* § 3142(f).
9. *Id.* § 3142(b).
10. S.Rep.No. 225, 98th Cong., 1st Sess., 3, 5, & 6, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3185–3186, 3187–3189.
11. *Id.* at 6–7, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3188–3190.
12. *Id.* at 6 n.14.
13. *Id.*
14. *Id.* at 6.
15. Institute for Law and Social Research, *Pretrial Release and Misconduct in the District of Columbia* 41 (April 1980), as cited in S.Rep.No. 225, *supra* note 10 at 6, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3189 n.15.
16. S.Rep.No. 225, *supra* note 10 at 9, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3191–3192.
17. 18 U.S.C. § 3142(g) (1984).

feeling that judges lack the tools to make honest and appropriate decisions regarding the release of persons posing a danger to the safety of the community.[18]

A. Release Conditions

The Bail Reform Act provides more specific guidance to the magistrate by prescribing an increased number of suggested conditions which can be imposed if a person is released before trial,[19] including enunciation of specific requirements concerning work or school, use of intoxicants, medical or psychiatric treatment, as well as a statutorily mandated condition prohibiting the releasee from committing a crime during his release.[20]

The statutory release conditions of the Bail Reform Act can make pretrial release difficult to obtain. An arrested person is brought before a magistrate who is obliged to enter an order either releasing or detaining him pending judicial proceedings.[21] Pretrial release on personal recognizance or on unsecured bond must be ordered unless the magistrate determines that further conditions[22] should be imposed. In imposing conditions of release the magistrate must satisfy the two-pronged test—assuring the person's appearance and protecting the safety of the community.[23]

In determining whether conditions of release will assure future appearance of the arrested person and that the release will not endanger the safety of another or the community, the magistrate must consider the offense, the weight of the evidence, the history and the character of the defendant, and the nature and seriousness of any danger posed by the defendant's release.[24] On motion of the government, the magistrate must also make inquiry into the source of any property pledged to the court or used as collateral or for paying the premium on an appearance bond being posted in cash or by a surety.[25] Although the magistrate may not impose any *financial* condition which results in the pretrial detention of the defendant,[26] he can decline to accept designated property or collateral which, because of its source, would not reasonably assure the appearance of the person as required.[27]

18. S.Rep.No. 225, *supra* note 10 at 5, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3187–3188.
19. 18 U.S.C. § 3142(C) (1984).
20. *Id.* § 3142(C)(1).
21. *Id.* §§ 3141(a) and 3142.
22. *Id.* §§ 3142(C)(1) and (2).
23. *Id.* § 3142(b).
24. *Id.* § 3142(g).
25. *Id.* § 3142(g)(4). *Compare* D.C. CODE ANN. § 23-1321(c) (Cum. Supp. 1985). *See* U.S. v. Nebbia, 357 F.2d 303 (2d Cir. 1966).
26. 18 U.S.C. § 3142(c)(2) (1984).
27. *Id.* § 3142(g)(4).

B. Detention Hearings

The purpose of a detention hearing is to determine whether the two-pronged test for release is satisfied.[28] At the hearing, the defendant has the right to counsel, the right to testify and call witnesses, the right to offer information by proffer, and the right to cross-examine government witnesses.[29] The rules of evidence do not apply at a detention hearing, but the facts relied upon by the magistrate in determining that no condition will satisfy the safety prong of the test must be supported by clear and convincing evidence.[30] If certain offenses are involved, the government may seek a detention hearing in which the magistrate must decide whether *any* set of conditions will reasonably assure the defendant's appearance and the safety of others and the community.[31] There is a limited statutory rebuttable presumption that *no* set of conditions will reasonably satisfy the safety prong of the release test.[32] This rebuttable presumption arises upon a finding of probable cause to believe that the accused committed certain federal controlled substances offenses which carry a maximum term of imprisonment of ten years or more[33] or a finding that the defendant has used a firearm in connection with the commission of any crime of violence.[34] The rebuttable presumption also arises where the accused has committed certain crimes while on release within a specified prior period of time.[35]

Either the government or the magistrate may move for a detention hearing if there is (a) a serious risk that the defendant will flee or (b) a serious risk of obstruction of justice or interference with a prospective witness or juror.[36] The detention hearing must be held at the first ap-

28. *Id.* § 3142(b).

29. *Id.* § 3142(f). Such testimony, however, might be usable at trial, particularly in cross examination. There is also a risk of waiver of the right against self-incrimination.

30. *Id.* § 3142(f). Since FED. R. EVID. 1101(d)(3) indicates that the rules of evidence do not apply in a release hearing, special precautions may be necessary. In U.S. v. Acevedo-Ramos, 755 F.2d 203 (2d Cir. 1985), the court held that statements made by the government in a detention hearing can be taken as accurate unless the defendant asks the court to test the quality of the government's evidence *in camera*.

31. 18 U.S.C. § 3142(f)(1) (1984).

32. *Id.* § 3142(e).

33. 21 U.S.C. § 841 permits sentences up to 20 years for manufacture, distribution or possession with the intent to distribute 100 grams or more of a "mixture or substance containing a detectable amount of a narcotic drug" from schedule I or schedule II other than substances obtained from coca leaves or chemically identical to such substances. 21 U.S.C. § 841(b)(1)(A)(i). The same penalty applies to a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug, 500 grams of phencyclidine (PCP), or 5 grams of Lysergic acid (LSD). 21 U.S.C. §§ 841(b)(1)(A)(ii), (iii), and (iv) (1984). Sentences of up to 15 years may be imposed for possession of schedule I and II substances not covered elsewhere; and a second offense involving less than 50 kilograms of marijuana, less than 10 kilograms of hashish, or less than one kilogram of hashish oil can lead to imprisonment for up to 10 years. 21 U.S.C. § 841(b)(1)(B) and (C) (1984). This list is not exhaustive.

34. 18 U.S.C. § 3142(e) (1984). *See* 18 U.S.C. § 924(c) (1984).

35. 18 U.S.C. § 3142(e)(1)–(3).

36. *Id.* § 3142(f)(2).

pearance before the magistrate unless a continuance is granted.[37] The maximum length of such a continuance is prescribed, absent a showing of good cause for a longer continuance.[38] The defendant is detained during the period of the continuance.[39] If a defendant *appears* to be a narcotics addict, the government may obtain an order requiring a medical examination to determine whether the defendant is a narcotics addict.[40]

C. Temporary Detention

The code also provides for "temporary detention."[41] The magistrate shall order temporary detention if he finds at the detention hearing that the defendant may flee or pose a danger to any other person or the community[42] and, additionally, that the defendant was (1) on release from a pending felony trial, or (2) on release pending sentencing or appeal from a sentence or conviction, or completion of sentence for any offense, or (3) on probation or parole, or (4) is not a citizen or lawfully admitted resident.[43] In such cases the magistrate directs the government attorney to notify the appropriate agency, such as the supervising probation office, of the detention.[44] Unless the agency acts during the temporary detention period which cannot exceed 10 days, the defendant is treated in accordance with the other sections of the Act;[45] *i.e.*, his release is determined after considering the offense, the weight of the evidence, and the history and characteristics of the accused.[46] Temporary detention allows time for government agencies to act with respect to certain defined persons. Although temporary detention would seem to be limited to persons presently being accused or who have been convicted of felonies, or persons who are not citizens or lawfully admitted residents, its practical impact may be appreciably broader. At a temporary detention hearing, the person being held has the burden of proving his citizenship or immigration

37. *Id.* § 3142(f).

38. *Id.* A continuance granted on the motion of the person may not exceed five days. One granted on motion of the government may not exceed three days.

39. *Id.*

40. *Id.*

41. *Id.* § 3142(d). D.C. CODE ANN. §§ 23–1322(e) (1985) is the progenitor of the temporary detention provision of the new federal code. The federal law allows detention for up to 10 days (D.C. allowed 5 days plus Saturdays, Sundays, and holidays like § 3142(d)). Although U.S. v. Edwards, 430 A.2d 1321 (App. DC 1981), *cert. denied*, 455 U.S. 1022 (1982), *inter alia*, upholds the constitutionality of portions of § 23-1322, it does not touch on § 23-1322(e).

42. 18 U.S.C. § 3142(d)(2) (1984).

43. *Id.* § 3142(d)(1). The federal code added provisions concerning non-citizens which are not in the D.C. code section cited above. The net result is that a non-citizen who is not lawfully admitted for permanent residence who is charged with a federal crime is likely to be temporarily detained for 10 days unless he can convince the judicial officer that he poses no flight risk. Even if he is successful in this, the government can have such a charged non-citizen held if it can convince the judicial officer that the person is a danger to another or to the community.

44. *Id.* § 3142(d).

45. *Id.*

46. *Id.* § 3142(g).

status.[47] Persons unable to prove their citizenship or residency status readily may be temporarily detained when otherwise they would have been released on some set of conditions.

In The Bail Reform Act of 1984, Congress articulated specific considerations to be followed by judicial officers who are setting bail for criminal defendants.[48] Defendants apparently involved in the more serious drug and firearm offenses now have to clear the hurdle of a "rebuttable presumption" before they can be released.[49] Other provisions of the Act—temporary detention,[50] a statutory *Nebbia*-type hearing which considers the source of bond money or collateral,[51] forced examination of persons appearing to be narcotics addicts[52]—undoubtedly will make release more difficult for some individuals. On the other hand, magistrates may no longer impose unnecessarily stringent financial conditions for release.[53] Also, the Act's focus on reduction of crimes committed by releasees may help achieve the community safety objective of the legislation. The changes in the Act are significant. Despite this, most persons who would have been released under the old Act probably will be released under the new Act.

THE SENTENCING REFORM ACT OF 1984

The four announced purposes for imposing sentences in criminal cases enumerated in 18 U.S.C. §3553(a)(2),[54] as factors to be considered in imposing a sentence and summarized by the Judiciary Committee as "deterrence, incapacitation, just punishment, and rehabilitation,"[55] are central to the philosophy underlying the Sentencing Reform Act of 1984. Congress has articulated broad goals in the Sentencing Reform Act of 1984.[56] Sentencing should be consistent, fair, and certain; and the sentencing judge should have a full range of sentencing options available to him.[57] The Senate Judiciary Committee found that the old law met none of these goals.[58] In attempting to attain the goals, Congress created a sentencing commission which will promulgate a sentencing guideline

47. *Id.*
48. *Id.* §3142(g).
49. *Id.* §3142(e).
50. *Id.* §3142(d).
51. *Id.* §3142(g)(4). *See* U.S. v. Nebbia, 357 F.2d 303 (2d Cir. 1966), which permitted inquiry into the source of bail money.
52. 18 U.S.C. §3142(f).
53. *Id.* §3142(c).
54. S.Rep.No. 225, *supra* note 10 at 75–76, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3258–3259.
55. *Id.* at 67, *supra* note 10 at 75–76 reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3250.
56. *Id.* at 39, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3222.
57. *Id.*
58. *Id.* at 39–50, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3222–3233.

system,[59] prospectively abolished the United States Parole Commission,[60] instituted a type of determinate sentencing with statutory vested good time,[61] and provided for the development of pre-release programs for incarcerated persons.[62]

Sentencing guidelines are to be promulgated within 18 months of the Act[63] by the newly created United States Sentencing Commission (Sentencing Commission).[64] A detailed analysis of the legislation creating the Sentencing Commission[65] is beyond the scope of this article.[66] In general, however, the Sentencing Commission is charged[67] with implementing the four purposes of sentencing.[68] The Sentencing Commission is required to "assume that the guidelines will specify a sentence to a substantial term of imprisonment" for certain categories of defendants, including those with prior convictions[69] and to favor the imposition of an "incremental penalty" where multiple offenses are involved.[70] Non-custodial sanctions are suggested for non-violent first offenders in appropriate cases.[71]

Although sentencing guidelines are still in the incubation period, their impact on future sentencings is foreseeable. The sentencing court will be

59. *Id.* at 51, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3234.

60. Crime Control Act, Pub. L. No. 98-473, Title II, §§ 218(a)(5), 235 (1984).

61. S.Rep.No. 225, *supra* note 10 at 56, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3239.

62. *Id.* at 57, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3240.

63. Crime Control Act, Pub. L. No. 98-473, Title II, § 235(a)(1)(B)(i).

64. 28 U.S.C. §§ 991–998 (1984). The United States Sentencing Commission, appointed by the President will be an independent commission within the judicial branch and will consist of 7 voting members and 1 non-voting member (the Attorney General or his designee). At least 3 of the members will be federal judges. As set out in 28 U.S.C. § 991(b), the purposes of the Commission are as follows:

> (1) [To] establish sentencing policies and practices for the federal criminal justice system that—
>
> (A) assure the meeting of the purposes of sentencing as set forth in § 3553(a)(2) of Title 18, United States Code;
>
> (B) provides certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
>
> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and
>
> (2) [To] develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in § 3553(a)(2) of Title 18, United States Code.

65. 28 U.S.C. §§ 991–998 (1984).

66. *See id.* § 994 (Duties) and *id.* U.S.C. § 995 (Powers) for an understanding of the scope and nature of the Sentencing Commission as well as the detailed congressional direction given the Commission by Congress.

67. *Id.* § 991(b)(1)(A); *id.* § 991(b)(2); *id.* § 994(a)(2); and *id.* § 994(g)(m).

68. *See supra* notes 13, 14, 15, 18 and accompanying text.

69. 28 U.S.C. § 994(i) (1984).

70. *Id.* § 994(1).

71. *Id.* § 994(j) and (k).

obliged to impose a sentence within the range established by the sentencing commission guidelines "unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration" in formulating the guidelines "and that should result in a sentence different from that described [in the guidelines]."[72] Each factor listed in 18 U.S.C. §3553(a)—"deterrence, incapacitation, just punishment and rehabilitation"—must be considered in imposing sentence;[73] although, in a particular case one purpose may predominate.[74] The sentencing court is required to make a statement as to the reasons for imposing a particular sentence, and if the sentence imposed is outside of the guidelines, the court is required to state the specific reason for the deviation.[75] If the sentence imposed is greater than that proposed by the guidelines, the defendant can appeal. If it is less, the government can appeal.[76] Appellate review of the sentencing court's application of the guidelines is likely to be common. The court of appeals may set aside the sentence or impose either a greater or lesser sentence or remand to the district court.[77]

It is unlikely that sentencing guidelines will be completed by April of 1986, eighteen months after the law was enacted.[78] The President can be expected to appoint to the Sentencing Commission persons who share his political philosophies regarding the treatment of criminals at that time. It will be interesting to see what emerges in the way of guidelines from the Sentencing Commission to be appointed by President Reagan. Hopefully there will be more consistency, fairness and certainty in sentencing. Once sentencing guidelines are in effect, they will be distributed to all courts of the United States and to the United States probation system.[79] Counsel should use them to effectively represent a client at sentencing.[80]

THE INSANITY DEFENSE REFORM ACT OF 1984

Prior to the enactment of the Comprehensive Crime Control Act of 1984, the so-called "insanity defense" was not uniform throughout the

72. 18 U.S.C. §3553(b) (1984); *See* S.Rep.No. 225, *supra* note 10 at 51–52, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3234–3235.

73. S.Rep.No. 225, *supra* note 10 at 67, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3250.

74. *Id.* at 68 reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3251.

75. 18 U.S.C. §3553(c).

76. *Id.* §3742.

77. *Id.* §3742(e).

78. ANTHONY PARTRIDGE, THE CRIME CONTROL AND FINE ENFORCEMENT ACTS OF 1984: A SYNOPSIS (1985).

79. 28 U.S.C. §994 (1984).

80. *See id.* §994(a)(2). Failure of counsel to use the guidelines could well result in a claim of ineffective assistance of counsel.

federal system.[81] In all federal courts, however, the prosecutor had the burden of proving the nonexistence of legal insanity beyond a reasonable doubt once the defendant produced substantial evidence of legal insanity. The same burden of proof was required in the proposed code drafted by the National Commission on Reform of Federal Criminal Laws in 1971.[82] Under the pre-1984 Rule 704 of the Federal Rules of Evidence, federal courts uniformly allowed a psychiatrist testifying on the issue of insanity to give his opinion as to the ultimate issue, *i.e.*, whether the accused was legally insane at the time of the commission of the offense.[83]

Historically, insanity defenses have been infrequent in federal criminal cases.[84] For a number of years there has been some dissatisfaction with the defense. In 1984, Congress made sweeping changes in the federal insanity defense.[85] The Insanity Defense Reform Act of 1984 reverses the burden of proof of the insanity defense. A defendant raising the insanity defense must prove his defense by clear and convincing evidence.[86] At trial, the expert used by either side cannot testify as to the ultimate issue of the defendant's sanity at the time the alleged crime was committed.[87] These dramatic changes in the insanity defense were preceded by much congressional consideration and one dramatic historical

81. In 1971, in the Second, Sixth, Seventh, Ninth and Tenth Circuits, the insanity defense was available to a person if at the time of his criminal conduct he lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The District of Columbia Circuit was still operating under the "product" of mental disease or defect approach set out in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) further refined by McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962). The Third Circuit emphasized the accused "capacity to conform his conduct to the requirements of the law violated" as set out in United States v. Currens, 290 F.2d 751 (3rd Cir. 1961). *Reform of the Federal Criminal Laws: Hearings on Report of the National Commission on Reform of Federal Criminal Laws Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 92nd Cong., 1st Sess., 194 (1971) (Comment following § 503, Mental Disease or Defect, of the proposed code submitted by the National Commission).

82. *Reform of the Federal Criminal Laws: Hearings on Report of the National Commission on Reform of Federal Criminal Laws Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, supra* note 81 at 195.

83. S.Rep.No. 225, *supra* note 10 at 230–231, reprinted in 1984 U.S. CODE CONG. & AD. NEWS, 3412–3413.

84. In the summer of 1982, Senator Robert Dole stated:

> Although statistics show that the insanity defense is rarely invoked in criminal prosecutions, the violent nature of the acts it is usually associated with demands that its use be governed by the most stringent rules that we can devise which are consistent with enlightened principles of accountability under the law.

Limiting the Insanity Defense: Hearings on S.818, S.1106, S.1558, S.1995, S.2572, S.2658, & S.2669 Before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 84 (1982) (opening statement of Honorable Robert Dole, a U.S. Senator from the State of Kansas).

85. *See supra* notes 78–81.

86. 18 U.S.C. § 20(b) (1984).

87. Comprehensive Crime Control Act § 406 (pp. 231–32, 98 Stat. 2067–68); Amendment to FED. R. EVID. 704.

event. In this instance, clearly "a page of history is worth a volume of logic."[88] The historical "page" can be summarized in two words: John Hinckley.[89]

A. Background

On June 21, 1982, John Hinckley was found not guilty of the attempted assassination of the President by reason of insanity.[90] John Hinckley's legacy to deranged federal defendants can be fully appreciated only against the background of pre-*Hinckley* legislative proposals regarding the insanity defense.

In 1971, the National Commission on Reform of the Federal Criminal Laws (National Commission) proposed a test for legal insanity which closely followed the test set forth by the American Law Institute (ALI) in its Model Penal Code.[91] This test states that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."[92] The ALI Model Penal Code also addressed procedural problems requiring that the insanity defense be raised by the defendant on notice to the prosecution, as well as certain other procedural requirements. The record in later Senate hearings indicated that the ALI standard for the insanity defense as well as the procedure for raising the defense had been generally well received.[93] Neither the ALI Model Penal Code nor the National Commission proposal made insanity an affirmative defense.[94]

88. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

89. Senators Hatch, Thurman, Zorinsky, Pressler, Maddingly, and Dole each referred to the Hinckley verdict of June 21, 1982, and called for revision and reform of the federal insanity rule. 128 CONG. REC. S7241 (daily ed. June 22, 1982); CONG. REC. S7241 (daily ed. June 22, 1982) (statements of Senators Hatch, Thurman, Zorinsky, Pressler, Maddingly, and Dole).

90. *Id.*

91. Congress established the National Commission on Reform of Federal Criminal Law in 1966, Pub. L. No. 89-801. The American Law Institute, created in 1923, is dedicated to improvement of the law. *Proceedings, The American Law Institute,* Vol. 1 (1923). The ALI has published a number of Restatements of the Law. On May 24, 1962, the ALI approved the Model Penal Code. Article 4 of the Model Penal Code deals with the ALI proposed insanity defense.

92. *Reform of the Federal Criminal Laws: Hearings on Report of the National Commission on Reform of Federal Criminal Laws Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, supra* note 81, at 10. Ex-governor Edmund G. Brown of California, chairman of the Commission, commented generally that the proposed revision "codifies common defenses which presently are left to conflicting common law decisions by the Court"; *id.* at 91, Congressman Richard H. Poff, vice chairman of the Commission, made a similar general reference to § 503. *Id.* at 103.

93. *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part II, State Experience,* 92nd Cong., 1st Sess., 542–543 (1971) Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code,* 68 COLUM. L. REV. 1425, 1443–1444 (1968).

94. With the defenses which were made affirmative defenses, the burden of proof was by a preponderance of the evidence. *Reform of the Federal Criminal Laws: Hearings on Report of the National Commission on Reform of Federal Criminal Laws Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, supra* note 81, at 157–158.

In 1973, in the first attempted overall revision of the federal criminal code (Senate Bill 1 or S.1) following the work of the National Commission, the standard for mental illness was substantially identical to that set forth by the National Commission in their proposed reform.[95] President Nixon, on the other hand, suggested that the insanity defense should be effective "only if the defendant did not know what he was doing."[96] The Nixon sponsored bill, which set out the so-called "intent test," stated that "[i]t is a defense to a prosecution under any federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense."[97] Extensive Senate hearings[98] produced no new code.

Several commentators proposed abolishing the insanity defense.[99] Directly and indirectly, the Department of Justice continued to advocate adoption of the provisions sought by President Nixon,[100] and represen-

95. *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary,* 93rd Cong., 1st Sess., 4242, 4763–4764 (1973).

96. *Id.* at 4837. Attorney General John Mitchell also referred to the "criminal intent" test urged by Nixon. *Id.* at 4842.

97. *Id.* at 4889.

98. *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part I,* 92nd Cong., 1st Sess., (1971); *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part II,* 92nd Cong., 1st Sess. (1971); *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part III,* 92nd Cong., 2nd Sess. (1972); *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part V,* 93rd Cong., 1st Sess. (1973); *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part VI,* 93rd Cong., 1st Sess. (1973); *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part VIII,* 93rd Cong., 1st Sess. (1973); *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part IX,* 93rd Cong., 1st Sess. (1973); *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part X,* 93rd Cong., 2nd Sess. (1974); *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part XI,* 94th Cong., 1st Sess. (1974); *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part XII,* 94th Cong., 1st Sess. (1975); *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part XIII,* 95th Cong., 1st Sess. (1977); *Reform of the Federal Criminal Laws: Hearings Before the Senate Committee on the Judiciary, Part XIV,* 96th Cong., 1st Sess. (1979); *Reform of the Federal Criminal Laws: Hearings Before the Senate Committee on the Judiciary, Part XV,* 96th Cong., 1st Sess. (1979); *Reform of the Federal Criminal Laws: Hearings Before the Senate Committee on the Judiciary, Part XVI,* 97th Cong., 1st Sess. (1981).

99. *See* Monahan, *Abolish the Insanity Defense?—Not Yet,* 26 RUTGERS L. REV. 719 (1973); Goldstein & Katz, *Abolish the Insanity Defense?—Why Not?,* 72 YALE L.J. 853 (1963); Brady, *Abolish the Insanity Defense—No!,* 8 HOUST. L. REV. 629 (1971).

100. *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary,* Part IX, *supra,* note 98 at 6479–6488 (statement of Richard A. Givens, former Assistant U.S. Attorney, New York, New York); *Reform*

tatives of professional psychiatric associations protested that those provisions were retrogressive.[101]

In 1977 and in 1979, new criminal codes were considered but not passed by Congress. The proposed definition of legal insanity as a criminal defense seemed to vary with the party in power.[102] By late 1981, Senate hearings on Reform of the Federal Criminal Laws had compiled a written record of well over 12,000 pages. No comprehensive revision of the federal criminal code, however, had been enacted. More specifically, no federal law regarding the insanity defense had been enacted.

B. The Hinckley Verdict

On June 21, 1982, after a jury trial, John Hinckley was found not guilty of attempting to assassinate President Ronald Reagan by reason of being legally insane at the time of the offense. The next day Senator Orin Hatch called for enactment of major reforms in the federal insanity defense.[103] Senator Hatch sought to limit the insanity defense to the intent test, *i.e.*, a determination of whether the defendant possessed the requisite state of mind for the charged offense.[104] The acquittal of John Hinckley brought the insanity defense into sharp focus and resulted in an almost immediate Senate reaction.[105] After years of considering various proposals, Congress had the impetus to act.

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of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part X, *supra*, note 98 at 6805–6807 (statement of Ronald L. Gainer, Department of Justice); *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, Part X, *supra*, note 98 at 6808–6822 (statement of Prof. David Robinson, consultant to the Department of Justice).

101. *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, Part X, *supra*, note 98 at 7004–7017 (statement of Dr. Stanley L. Portnow, M.D., Chairman, Committee on Psychiatry and the Law, American Psychiatric Association); *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, Part X, *supra*, note 98 at 7023–7042 (statement of Seymour Pollack, M.D., President, American Academy of Psychiatry and the Law).

102. In 1973, § 502 of S.1400, the Nixon administration bill defined insanity as lacking the requisite state of mind for the offense charged. *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, Part V, *supra*, note 98 at 4889. In 1975, in S.1, the same approach was used. *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part XII, supra*, note 98 at 218–219. Later, in 1977, insanity was defined in S.1437 as "a mental disease or defect of a nature constituting a defense to a federal criminal prosecution." 9733. In 1979, in S.1723, the insanity defense proposed was very close to the ALI version proposed in 1971 by the National Commission. *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part XV, supra*, note 98 at 11,499. In 1981, in S.1636, the Reagan administration bill, insanity was defined as "mental disease or defect as a result of which a person lacked the state of mind required as an element of the offense charged." *Reform of the Federal Criminal Laws: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, Part XVI, supra*, note 98 at 12,726.

103. 128 CONG. REC. S7241 (daily ed. June 22, 1982) (statement of Sen. Hatch).

104. *Id.*

105. *Id.* at 7241–43.

Three days after the Hinckley verdict, the Senate Judiciary Committee commenced hearings for the purpose of limiting the insanity defense.[106] The Judiciary Committee acknowledged that the hearings had been called because "of the public concern engendered by the acquittal of Mr. Hinckley."[107] The Senate was extremely agitated by the Hinckley verdict.[108] Five of the Hinckley jurors appeared before a Senate committee, and the testimony of Hinckley's trial judge was unsuccessfully sought.[109] Certain witnesses argued for retaining the insanity defense as it was in the federal system. Other views predominated.[110]

Eight bills addressing the federal insanity defense were introduced at the outset of the hearings.[111] Obviously, the Hinckley acquittal had been anticipated by certain senators. Several of the proposed bills put the insanity defense burden of proof on the defendant.[112] None of the proposed bills, however, imposed any burden of proof higher than a preponderance of the evidence.[113]

Senate Report 98-225 is helpful in its succinct explanation of the revised insanity defense contained in the Insanity Defense Reform Act of 1984.[114] In summary, the definition of insanity is substantially narrowed. The defendant has the burden of proving the insanity defense by clear and convincing evidence. Expert testimony on the ultimate legal issue of

106. *Limiting the Insanity Defense: Hearings Before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate*, 97th Cong., 2nd Sess. (1982) at 1.

107. *Id.*

108. *See id.* at 34–36, 82.

109. *Id.* at 1–2, 155–169, 219–220.

110. Twenty individuals, including several senators, the Attorney General of the United States, judges, professors, and attorneys on both sides, testified at the hearings before the Senate Judiciary Committee in the summer of 1982. *Id.* at 111. Attorney Frank Maloney, *id.*, at 115–155, spoke on behalf of the National Association of Criminal Defense Lawyers, and Richard J. Bonnie, *id.*, at 267–282, Professor of Law and Director, Institute of Law, Psychiatric and Public Policy, University of Virginia, sought to retain the insanity defense as it was in the federal system. Most of the testimony was opposed to this view.

111. *Limiting the Insanity Defense: Hearings Before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate*, note 106 *supra* at 1; *The Insanity Defense: Hearings Before the Committee on the Judiciary, United States Senate (Bills to Amend Title 18 to Limit the Insanity Defense)*, note 12 *infra* at 527 (S.2672), 534 (S.2678), and 547 (S.2780). These bills were S.818, S.1106, S.1558, S.2669, S.2672, S.2678, S.2745, and S.2780. They all addressed the insanity defense in terms of a mental disease or defect resulting in the defendant lacking the state of mind required as an element of the offense charged. Senate Bill 2678 provided a defense to criminal prosecution if the defendant "as a result of mental disease or defect, lacked (1) the ability to understand the nature and quality of the act, or (2) the ability to distinguish right and wrong in respect to the act. Mental condition was not a defense to any charge of criminal conduct under S.2745. Senate Bill 2745 also contained a provision for confining people who have been found not guilty but who were insane. The possibility for abuse of such a law seems obvious. The provisions of S.2780 regarding the insanity defense were similar to the provisions contained in S.2678.

112. *The Insanity Defense: Hearings Before the Committee on the Judiciary, United States Senate (Bills to Amend Title 18 to Limit the Insanity Defense)*, 97th Cong., 2nd Sess., at 527 (S.2672), 534 (S.2678), and 547 (S.2780) (1982).

113. *Id.* at 527 (S.2672) & 547 (S.2780).

114. S.Rep.No. 225, *supra* note 10 at 222–254, *reprinted* in 1984 U.S. CODE CONG. & AD. NEWS, 3404–3436.

whether the defendant was insane is prohibited.[115] The new law may represent a victory for the Department of Justice.[116] For the deranged accused and his defense counsel, the message is much grimmer.

CONCLUSION

Changes made in other portions of the Federal Criminal Code are at least as dramatic as the changes mentioned above. The Comprehensive Crime Control Act of 1984 is a benchmark in changing governmental attitudes and responses toward persons accused and convicted of federal crimes. The message seems clear: Congress has a much tougher attitude toward persons who violate federal criminal statutes, and Congress is articulating this attitude in more specific directions to the federal courts.

115. *See supra* notes 78–81.

116. *See* S.Rep.No. 225, *supra* note 10, at 222–223, *reprinted* in 1984 U.S. CODE CONG. & AD. NEWS, 3404–3405.