

IMPORTATION OF CERTAIN DRUG PARAPHERNALIA INTO THE UNITED STATES

Report to the Committee on
Finance, United States Senate,
on Investigation No. 332-277
Under Section 332 of the
Tariff Act of 1930



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UNITED STATES INTERNATIONAL TRADE COMMISSION

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PREFACE

The U.S. International Trade Commission (Commission) instituted the present investigation, Importation of Certain Drug Paraphernalia into the United States, Investigation No. 332-277, on June 21, 1989, following receipt of a letter from the Senate Committee on Finance¹. In the letter the chairman of the committee requested that the Commission institute a study, under section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g)), to investigate the scope of illicit drug paraphernalia imports; to evaluate the effectiveness of the Mail Order Drug Control Act in restricting such imports; to determine how the Harmonized Tariff Schedule of the United States (HTS) might be amended to better identify drug paraphernalia in particular; and to make any other recommendations it deems appropriate in this regard.

Public notice of the investigation was given by posting copies of the notice at the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of July 6, 1989 (54 F.R. 28518).² The information contained in this report was obtained from fieldwork by the Commission's staff, from the Commission's files, from other Government agencies, and from other sources.

¹ The request from the Committee on Finance is reproduced in app. A.

² The *Federal Register* notice of the institution of the Commission's Investigation No. 332-277 is reproduced in app. B.

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EXECUTIVE SUMMARY

Illicit drug use and the existence of drug paraphernalia have always paralleled one another. However, it was not until drug use escalated dramatically in the 1960s that a commercial-scale drug paraphernalia industry came into being in the United States. During the 1970s that industry grew to an estimated 15,000-30,000 business establishments, some exclusively dedicated to the sale of drug paraphernalia and drug-culture related items. Estimates of annual sales ranged anywhere from \$50 million to \$3 billion. As the 1970s drew to a close, public sentiment against drugs and drug paraphernalia grew to the point that ordinances outlawing the sale of drug paraphernalia began to appear in local statutes nationwide. Drug paraphernalia retailers responded by organizing and successfully challenging the constitutionality of many such ordinances in the courts.

In May 1979, the White House requested that the U.S. Department of Justice's Drug Enforcement Administration (DEA) draft effective and constitutionally sound legislation that individual States could enact to combat the sale and distribution of illicit drug paraphernalia. The result was the Model Drug Paraphernalia Act, which has been enacted by 38 States and the District of Columbia.

In October 1986 the Congress enacted the Mail Order Drug Paraphernalia Control Act as part of the wider ranging Anti-Drug Abuse Act of 1986. Whereas the Model Drug Paraphernalia Act was developed to combat intrastate distribution of paraphernalia, the Mail Order Act provides for the seizure of such paraphernalia that has been imported, that has entered interstate commerce, or that is intended for export to other countries from the United States. There is currently pending before the Congress a bill that directs the Attorney General to enforce the Mail Order Act in intrastate commerce through the use of "task forces consisting of appropriate Federal, State, and local personnel."

On the basis of information gathered in the course of the investigation, it is difficult to gauge the effectiveness of the Mail Order Act. The act has inherent weaknesses that seem to hamper the enforcement of its provisions. These weaknesses include the lack of designation of a responsible Federal agency and an ambiguous definition of what constitutes "drug paraphernalia". Under a program called Operation Pipe, the U.S. Customs Service (Customs) has made a number of seizures of alleged paraphernalia, with an estimated value of \$14 million, since early 1987. Unfortunately, there are no available domestic or import trade data against which to compare this figure. Nevertheless, it is believed that, at least partly because of the act, distribution of paraphernalia for which there are no known alternative uses has been significantly curtailed. In addition, distributors of "dual purpose" (i.e., having drug uses and legitimate uses) paraphernalia have been forced to change their marketing strategies and methods of distribution. The act has not been tested fully in the courts to date and could be aggressively challenged in the future.

The scope of U.S. imports is equally difficult to gauge, for two reasons. First, even when the drug paraphernalia industry was operating in the open, its very existence was controversial, and vendors were reluctant to be forthcoming with domestic and international trade data. Now that drug paraphernalia distribution is effectively banned, such statistics are even more difficult to obtain. Second, the nebulous definition of drug paraphernalia mixes legitimate products having only fugitive use as drug paraphernalia with "hardcore" paraphernalia that are specifically designed for illicit drug use.

The Commission identifies three areas that could improve the effectiveness and enforceability of the Mail Order Act—

- The law could be amended to specifically designate the Federal agency or agencies responsible for implementing the act.
- The definition of drug paraphernalia could be revised to provide a list of articles that are per se violative of the act, thereby alleviating current difficulties in demonstrating that a particular article is drug paraphernalia.

- The Harmonized Tariff Schedule of the United States (HTS) and the export statistical schedule (Schedule B) could be amended to highlight and further isolate drug paraphernalia imports and exports.

The Commission suggests several options for amending the HTS to aid in the Government's efforts to interdict illicit drug paraphernalia. The first option is to establish a requirement that importers certify that specific goods capable of being and likely to be used as drug paraphernalia are not being imported with that intent or design. This option would, of course, require legislative action. A second option is to provide for new statistical annotations to highlight potential drug paraphernalia and provide Customs with a better defined starting point in tracking the imports of drug paraphernalia. This option could be accomplished administratively through the Committee for Statistical Annotation of the Tariff Schedule (484(e) Committee). The final option would be simply to footnote existing tariff provisions, again to highlight potential drug paraphernalia.

Background

Drugs and Drug Laws

Drug abuse in the United States is not a recent phenomenon. It has always been with us, although in the first 60 years of this century, the average American's personal exposure to it was limited to newspaper accounts of drunk drivers involved in fatal automobile accidents and the occasional Hollywood depiction of skid row bums and inner-city junkies.

Nonalcoholic drug¹ use is known to have existed among the Native Americans who inhabited this continent before the Mayflower dropped anchor at Plymouth Rock, though the concept of "illicit" probably did not apply then. During the 19th century and even into the 20th century, opium, cocaine, and other addictive drugs were commonly employed for medical treatment. Indeed, before the turn of the century, "recreational" use of these drugs was neither illegal nor uncommon, at least in certain parts of our society.

Temperance movements, too, are not new in our history, but rather date back to our Puritan roots. Religious revivalism in the early 1800s spawned the likes of Carry Nation and her notorious hatchet, the Anti-Saloon League, the Womens' Christian Temperance Union, and even a political party, the Prohibition Party, to combat alcoholism in America. These efforts eventually culminated in the January 1919 passage and subsequent ratification of the 18th Amendment to the U.S. Constitution (the National Prohibition Act), which prohibited the manufacture, sale, transportation, importation, and exportation of alcoholic beverages in the United States. Although the 18th Amendment was repealed by the 21st Amendment in December 1933, the sale and consumption of alcoholic beverages continued to be taxed and regulated at both the State and Federal level.

Use or abuse of nonalcoholic drugs in the early 20th century was not noteworthy enough to legislate against, presumably because such abuse was perceived as limited in scope, i.e., to "the bottom of society and among certain rebellious intelligentsia."² However, some effort was made to restrict the sale and distribution of such drugs. In 1909, the importation of "opium and preparations and derivatives thereof, *other than smoking opium or opium prepared for smoking*" and other than that for medicinal uses, was prohibited (em-

¹ Although it is recognized that nicotine and caffeine can be considered to be non-alcoholic drugs, they are not treated as such for the purposes of this report.

² Katkin, Hunt, and Bullington, "Drug Paraphernalia in Perspective: The Constitution and the Spirit of Temperance," *Criminal Law Bulletin*, July-August 1985, p.296.

phasis added).³ Five years later, the distribution of "opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof" for other than medicinal uses was made subject to registration and taxation (\$1 per annum) by the Internal Revenue Service.⁴ The Marihuana Tax Act of 1937⁵ imposed an "occupational excise tax" on certain dealers in marijuana and a "transfer tax on certain dealings" in marijuana. Though further legislation was enacted to curb nonalcoholic drug abuse over the next 30 years, the pattern of abuse did not change radically. Then there was a sudden, explosive change, beginning in the 1960s:

"As the 1960s wore on the incidence of drug use increased astronomically. A revolution in medicine and pharmacology had greatly expanded the number of drugs available. Vitamins appeared in millions of households. Large-scale immunization programs were inaugurated. Tranquilizers were prescribed to millions to alleviate the symptoms of stress and tension. Oral contraceptives prompted a sexual revolution and represented a direct association between pills and pleasure. Other factors, including the [political and social] turbulence of the age, contributed to escalating patterns of drug use."⁶

To combat the escalation and pervasiveness of drug abuse, the Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970,⁷ which combined all existing U.S. drug laws into one. The Crime Control Act of 1973⁸ was passed to provide \$1 billion in increased funding for law enforcement agencies over the following 2 years.

Despite these measures, use of marijuana, cocaine, and other drugs continued to grow during the 1970s. Public attitudes leaned towards acceptance of these drugs as being no more harmful than alcohol. The National Organization for the Reform of Marijuana Laws (NORML) was established in 1970 to lobby the Congress to legalize the possession and use of marijuana. Various scientific studies did little but add fuel to the debate—some, including President Nixon's Commission on Marijuana and Drug Abuse in 1972, concluded that marijuana was harmless (the President immediately rejected that conclusion), while others reached contrary conclusions. In the meantime, the drug paraphernalia industry had taken root and had grown like the ubiquitous "weed" whose consumption justified its economic existence.

³ Public Law 60-221, "An Act to Prohibit the Importation and Use of Opium for Other Than Medicinal Uses," 35 Stat. 614.

⁴ The Harrison Narcotics Act, Public Law 63-223, 38 Stat. 785-790.

⁵ Public Law 75-238, 50 Stat. 551.

⁶ Katkin, Hunt, and Bullington, p. 296.

⁷ Public Law 91-513, 84 Stat. 1236-1296.

⁸ Public Law 98-83, 87 Stat. 197-218.

The Rise of the Drug Paraphernalia Industry

Drug paraphernalia first began to appear in small-scale commercial quantities in the mid-1960s in the form of pipes, water pipes, rolling papers, roach clips, mirrors, and razor blades. These items, accompanied by psychedelic posters, jewelry, beads, incense, tie-dyed clothing, sandals, belt buckles, and other accessories were sold in record stores and small boutiques. As the popularity of drugs burgeoned, so too did the availability of paraphernalia, to the point that businesses selling nothing but paraphernalia (with the sobriquet of "head shops") sprouted in communities throughout the country.

By the late 1970s, the industry had expanded from small, inconspicuous specialty shops to multistore chains located in suburban shopping malls. Estimates of the number of businesses selling paraphernalia varied from 15,000 to 30,000,⁹ with estimated sales ranging anywhere from \$50 million to \$3 billion per year.¹⁰ It is estimated that during that period, mail-order distribution of drug paraphernalia accounted for only 1 percent of the market.¹¹ At least a dozen publications, including trade journals for the paraphernalia industry, came and went during the 1970s, with appropriate names to match—*High Times*, *National Weed*, *Hi-Life* ("the magazine of leisure highs"), *Daily Dope*, and *Dealer*, just to name some.

Throughout most of the 1970s, drug paraphernalia sales were not illegal per se; however, they were controversial in many communities, because they were perceived as encouraging minors to experiment with harmful drugs. Between 1977 and 1979, community groups in Georgia, Florida, California, Maryland, Indiana, North Dakota, and New Jersey were organized to strike out at the industry. These groups claimed that the industry's very existence conflicted with national antidrug policies.¹² Local ordinances were passed hurriedly to outlaw the sale of drug paraphernalia. However, with their economic future at stake, the paraphernalia retailers organized to defend themselves¹³ and managed to nullify many ordinances on the grounds that they were constitutionally vague. Frustrated community groups and the courts sought assistance from the

⁹ Bob Ricks, "Model Drug Laws: Drawing Strength from the Community," *The National Sheriff*, February-March 1984.

¹⁰ U.S. Department of Health, Education, and Welfare, *Community and Legal Responses to Drug Paraphernalia*, National Institute on Drug Abuse Services Research Report, DHEW Pub. No. (ADM)80-963, 1980.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ The Paraphernalia Trade Association and the Mid-Atlantic Accessories Trade Association were formed in 1978 and 1979, respectively.

Federal Government, and in May 1979, the President sought advice from the U.S. Department of Justice's Drug Enforcement Administration (DEA).

The Model Drug Paraphernalia Act

DEA did not have to look far for precedent in proposing a constitutionally acceptable law to control drug paraphernalia. Existing laws already controlled "moonshining" paraphernalia (26 U.S.C. 5685), gambling paraphernalia (18 U.S.C. 1952, 1953), counterfeiting paraphernalia (18 U.S.C. 2512), and similar instruments of crime.¹⁴ All of these laws contained similar language that had proven effective in the courts. DEA also had the benefit of past experience to help in deciding whether to draft Federal legislation or to propose a model law that the individual States could enact:

"Since 1914 [the year of the Harrison Act], the states and the Federal Government had shared the enforcement of the drug laws. The Federal Government organized its limited manpower to attack interstate and international drug traffickers. The states concentrated on local drug dealers. The respective roles were understood. The partnership had worked well for years; why change it."¹⁵

The result was The Model Drug Paraphernalia Act¹⁶ (Model Act), completed in August 1979. As of December 1987, the Model Act, which basically bans the manufacture, advertisement, sale, and possession of drug paraphernalia and provides for their confiscation, had been passed by 38 States and the District of Columbia.¹⁷ Six of the remaining twelve States—Colorado, New York, Ohio, Oregon, Tennessee, and West Virginia—have antiparaphernalia legislation not patterned on the Model Act. The remaining six States—Alaska, Hawaii, Illinois, Iowa, Michigan, and Wisconsin—have no comprehensive State laws against the sale of drug paraphernalia. According to Harry Myers, Associate Chief Counsel for DEA—

"In every one [of the States enacting the Model Act], merchants no longer explain to customers how to use products with drugs. Advertisements no longer openly promote products for use with drugs. Shops that had drug-related names, have been renamed. Merchants have removed all drug-connected posters, displays and promotional materials from their stores. Shop owners have entirely

¹⁴ Bob Ricks, "Model Drug Laws: Drawing Strength from the Community," *The National Sheriff*, February-March 1984.

¹⁵ *Ibid.*

¹⁶ The Model Drug Paraphernalia Act is reproduced in app. C.

¹⁷ U.S. Department of Justice, National Institute of Justice, *State and Local Experience with Drug Paraphernalia Laws*, by Kerry Murphy Healey, February 1988.

stopped using the term 'paraphernalia' In other words, every State with the Model Act has virtually eliminated the Headshop Message. In this regard, DEA's Model Act has been a huge success As to stopping the sale of hardcore drug paraphernalia, the Model Act States have had mixed results."¹⁸

As previously discussed, the Model Act was developed for adoption and enforcement by the individual States. It was not until 1986 that the provisions of the Model Act were extended to the Federal level, to cover interstate and international trade of drug paraphernalia. On October 27, 1986, the Congress passed the Anti-Drug Abuse Act of 1986.¹⁹ Subtitle O of this Act, cited as the "Mail Order Drug Paraphernalia Control Act," is patterned after the Model Act.

The Mail Order Drug Paraphernalia Control Act: Legislative History and Subsequent Events

The Mail Order Drug Paraphernalia Control Act (hereinafter referred to as the act, or when compared with other acts, the Mail Order Act) was introduced on March 20, 1985, by Representative Levine, joined by Representatives Rangel and Gilman.²⁰ In introducing this bill, Representative Levine stated that this legislation—

" . . . would make it illegal for anyone to use the U.S. Postal Service or a private parcel service as part of a scheme to sell drug paraphernalia. Conviction of this offense would result in imprisonment of not more than 3 years and a fine of not more than \$100,000.

I have been seriously concerned with the issue of drug paraphernalia sales since serving as a California legislator. When I was a member of the State assembly, I authored legislation which prohibited the sale of drug paraphernalia to minors. That bill was signed by the Governor into law.

The availability of drug paraphernalia is becoming widespread around the country. Although State model drug paraphernalia laws have been effective in closing "headshops" in 38 States and the District of Columbia, drug paraphernalia sales are now being made through the mails or by private package services, such as UPS.

¹⁸ Letter to Michael Lilly, Attorney General of Hawaii, Nov. 27, 1984.

¹⁹ Public Law 99 570, 100 Stat. 3207.

²⁰ H.R. 1625, 99th Cong., 1st Sess., A bill entitled, the "Mail Order Drug Paraphernalia Control Act," 131 *Congressional Record* 5727 (1985). Ultimately, 70 members joined as cosponsors of this legislation. The text of H.R. 1625, as introduced, is set out in app. D.

The unregulated sale of drug paraphernalia through the mails and in interstate commerce glamorizes the drug culture and encourages drug experimentation by children and adolescents. Drug paraphernalia serves to counter parental guidance as well as educational and community programs to prevent drug abuse."²¹

H.R. 1625 was referred to the House Committee on the Judiciary and, subsequently, to the Committee's Subcommittee on Crime. Although Representative Levine stated his intention that H.R. 1625 prohibit use of "a private parcel service . . . such as UPS," section 102(a)(1) only prohibited use of the Postal Service. H.R. 1625, as introduced, did not contain the language referring to "other interstate conveyance[s]" that appears in the act.

The Subcommittee on Crime held a hearing on H.R. 1625 on May 8, 1986.²² A panel of four witnesses expressed varying degrees of opposition to H.R. 1625 as introduced. L. Page Maccubbin,²³ representing the American Pipe and Accessory League (APAL), stated that he did not disagree with the sponsor's intent, but did have objections to "the language of the law and the way in which similar laws have been enforced in the past around the country."²⁴ He also stated that his Washington, DC, location sent "traditional" pipes and accessories by UPS and by the Postal Service. He further noted that "today, some people feel that smaller bowls are somehow indicative of an illegal intent—nothing could be further from the truth . . . [citing 'Between the Acts' pipes for people who wish to partake of only a short smoke between the acts of a play or concert]."²⁵

APAL was also represented by Lee Huddleston,²⁶ who stated that H.R. 1625 "is not constitutional²⁷ and who believed that the bill created a problem with the criminal law doctrine of "transferred intent . . . [i]f you use the intent of the ultimate user to determine if any item is drug paraphernalia."²⁸

²¹ "Remarks of Representative Levine," 99th Cong., 1st Sess., 131 *Congressional Record* 5932 (1985).

²² *Mail Order Drug Paraphernalia Control Act*, Hearing Before the Subcommittee On Crime of the Committee on the Judiciary, House of Representatives, 99th Cong., 2nd Sess., May 8, 1986 (Serial No. 99). [Hereafter *Hearing*.]

²³ Owner, Page/Bennett Associates, Inc., (advertising agency); Earthworks, Inc., (retail tobacconist); and Lambda Rising, Inc., (retail bookstores). *Hearing*, pp.118-45. "He is also a proponent of a future 'American Pipe Council' in which pipe and pipe tobacco manufacturers and distributors join together to provide generic advertising that promotes pipe smoking in general." *Hearing*, p.129.

²⁴ *Hearing*, p.118.

²⁵ *Hearing*, p.124.

²⁶ Attorney, Bowling Green, KY. *Hearing*, pp.145-59.

²⁷ *Hearing*, p.145.

²⁸ *Hearing*, pp.146-47.

As noted by Representative Levine, the primary focus of this legislation was the sale of drug paraphernalia through the mail or by private delivery services. Members were particularly concerned with mail order catalogs and youth-oriented publications that encouraged drug use by acceptance of advertising material for drug paraphernalia. This concern is set forth in greater detail by Senator Wilson who, on the same day, introduced the companion bill in the Senate—S. 713.²⁹ Senator Wilson stated that his bill would—

“ . . . outlaw the interstate sale and shipment of drug paraphernalia. This legislation will prohibit the mail order and catalog sales of drug paraphernalia, which have grown drastically as a result of local government crackdowns on “head shops” and other entities selling drug paraphernalia.

Catalogs and publications promoting drug use, such as *High Times*, which has a circulation of approximately 4 million, advertise drug paraphernalia-devices which enhance or aid consumption of controlled substances. These products glorify the use of drugs and pander to the drug fantasies of our Nation’s youth.

* * * * *

The legislation I introduce today will combat the mail order drug paraphernalia business. It gives Federal agencies, namely the Department of Justice and the Postal Service, the Federal legislation needed to fight this parasitic industry. For years paraphernalia dealers have studied the local statutes and found ways to violate the spirit, if not the letter, of this country’s laws.

* * * * *

In order to decrease the drug abuse problem in this country, especially among teenagers and young adults, we must outlaw devices primarily designed or intended to enhance or facilitate the ingestion of illegal drugs. By permitting the drug paraphernalia industry to flourish, we are indirectly condoning the abuse of controlled substances.”³⁰

Although there is considerable emphasis on local and interstate distribution of drug paraphernalia through the mail, no reference to “foreign commerce” appears in the statute as enacted,³¹ nor is any reference made to imports or exports

²⁹ S. 713, 99th Cong., 1st Sess., 131 *Congressional Record* 3309, (Mar. 20, 1985). The text of S. 713, as introduced, is set out in app. E.

³⁰ “Remarks of Senator Wilson,” 99th Cong., 1st Sess., 131 *Congressional Record* S-3309 (Mar. 20, 1985).

Additional remarks made by Senator Wilson upon introducing S. 713 are set out in app. F.

³¹ 21 U.S.C. sec. 857(a)(2). Sec. 857 is set out in app. G.

of these materials.³² Another major difference between the act and S. 713 is the substitution of criminal forfeiture proceedings in the act³³ in lieu of the civil forfeiture proceedings in the Levine/Wilson bills.³⁴ The House Committee on Ways and Means reported the “International Drug Traffic and Enforcement Act,” which both contained a prohibition on the importation of drug paraphernalia³⁵ and provided civil forfeiture authority to the U.S. Customs Service to enforce provisions in this act.³⁶

On September 8, 1986, Representative Wright introduced the “Omnibus Drug Enforcement, Education, and Control Act of 1986.”³⁷ H.R. 5484 incorporated Representative Levine’s earlier proposal concerning drug paraphernalia. The act also contained inputs from virtually all of the committees of the House of Representatives and was passed by the House, after several amendments were added, by a large majority on September 11, 1986.

On September 23, 1986, Senator Dole introduced the administration’s “omnibus anti-drug package”—The Drug-Free America Act of 1986.³⁸ Subtitle G of S. 2849 was the administration’s version of the Mail Order Drug Paraphernalia Control Act.³⁹ Although the administration’s proposal expanded the scope of the prohibited commerce to include both interstate and “foreign” commerce,⁴⁰ it did not mention “imports” or “exports” in the context of prohibited transactions.⁴¹ The administration proposal, however, retained the civil forfeiture provision for drug paraphernalia contained in Senator Wilson’s bill.⁴²

During this time the Senate was considering its own version of a drug bill—S. 2878. Much of Senator Wilson’s bill and the administration’s

³² Compare sec. 102(a), H.R. 1625/S. 713 (app. E) with 21 U.S.C. sec. 857 (a)(3).

³³ “... [F]orfeiture upon the conviction of a person for such violation.” 21 U.S.C. sec. 857(c).

³⁴ Sec. 102(c), H.R. 1625/S. 713. And see the comments on the utility of civil versus criminal forfeiture, *Model Drug Paraphernalia Act, Comment [Article III]*, pp. 94-95.

³⁵ H. Rep. No. 99 794 on H.R. 5410, 99th Cong., 2nd Sess., p. 9 (Aug. 15, 1986).

³⁶ *Ibid.*, p. 16. Sec. 123, H.R. 5410, as reported by the Committee on Ways and Means.

³⁷ H.R. 5484, 99th Cong., 2nd Sess., A bill to strengthen Federal efforts to encourage foreign cooperation in eradicating illicit drug crops and in halting international drug traffic, to improve enforcement of Federal drug laws and enhance interdiction of illicit drug shipments, to provide strong Federal leadership in establishing effective drug abuse prevention and education programs, to expand Federal support for drug treatment and rehabilitation efforts, and for other purposes.

³⁸ S. 2849, 99th Cong., 2nd Sess., 132 *Congressional Record* S-13403 (Sept. 23, 1986).

³⁹ Secs. 3301-3303, S. 2849, *ibid.* The administration’s proposals are set out in app. H.

⁴⁰ Sec. 3302(a)(2), S. 2849, *ibid.* (app. H, p. H-2.)

⁴¹ Compare sec. 3302(a) with 21 U.S.C. sec. 857(a)(3) (app. G, p. G-2.)

⁴² Compare sec. 3302(c), S. 2849 (app. H, p. H-2) with sec. 102(c) of the Levine/Wilson bills, above.

proposals on drug paraphernalia were incorporated into S. 2878. This bill was amended in several respects and contained a provision banning the import, export, and interstate shipment of drug paraphernalia based, in part, upon Senator Wilson's and Representative Levine's earlier proposals.⁴³ Negotiations between the Senate and the House resulted in the Anti-Drug Abuse Act of 1986.⁴⁴ The principal changes from the original legislation included specific prohibitions on the import or export of drug paraphernalia⁴⁵ and substituted criminal forfeiture proceedings⁴⁶ for the civil forfeiture proceedings envisioned earlier.

In March 1988, an attempt was made to strike the requirement that forfeiture could occur only "upon the conviction of a person" for violation of the act, i.e., to substitute civil, in lieu of criminal, forfeiture proceedings.⁴⁷ However, all attempts to substitute civil forfeiture proceedings were unavailing, although Congress did enact two amendments to the act in October 1988.⁴⁸ These amendments made a minor "clarification" to 21 U.S.C. 857(d)⁴⁹ and a more substantive change to 21 U.S.C. 857(f)(2) with respect to the exemption for articles used with tobacco products.⁵⁰

Subsection 857(f)(2), as enacted, had exempted from the prohibitions imposed by the act goods "primarily" intended for use with tobacco products. The 1988 amendment appears to "grandfather" goods that have been "traditionally" intended for use with tobacco products, since the former criterion of "primarily intended

⁴³ "Remarks of Senator Wilson," 132 Cong. Rec. S-16489 (Oct. 15, 1986). During floor consideration of the drug bill on Sept. 26, 1986, Senator Wilson remarked that it was not only necessary to interdict the supply of drugs but it was also necessary to attack mail order and catalog sales of drug paraphernalia. Senator Wilson's remarks are set out in app. I.

⁴⁴ H.R. 5484, the Anti-Drug Abuse Act of 1986, became law (Public Law No. 99-570) on Oct. 27, 1986. The Wilson/Levine proposals were enacted as secs. 1821-1823, which constitute subtitle O (Prohibition on the Interstate Sale and Transportation of Drug Paraphernalia) of title I (Anti-Drug Enforcement) of Public Law No. 99-570, 100 Stat. 3207-51, 3207-52).

⁴⁵ Sec. 1822(a)(3); 21 U.S.C. sec. 857(a)(3) (app. G, p. G-2).

⁴⁶ Sec. 1822(c); 21 U.S.C. sec. 857(c) (app. G, p. G-2).

⁴⁷ Sec. 187(a)(2) of the Customs Enforcement Amendments Act of 1988, 134 *Congressional Record* S-2857 (Mar. 23, 1988).

⁴⁸ H.R. 5210, the Anti-Drug Abuse Act of 1988, became law (Public Law No. 100-690, 102 Stat. 4181) on Nov. 18, 1988. Sec. 6485 of the 1988 Drug Act made certain "clarifications" to the drug paraphernalia provisions of the 1986 Drug Act.

⁴⁹ 21 U.S.C. sec. 857(d) was amended by striking out "in violation of the Controlled Substances Act" and inserting "possession of which is unlawful under the Controlled Substances Act" in lieu thereof. 102 Stat. 4181, p. 4384.

⁵⁰ "[P]rimarily intended for use with tobacco products" was replaced by "traditionally intended for use with tobacco products."

for use" could shift with the passage of time as the primary use shifts from permissible to prohibited uses. Thus, the effect of the 1988 amendment may be a slight narrowing of the scope of the prohibitions imposed by the act:

More recently, Representative Rangel introduced the "Drug Paraphernalia Act of 1989."⁵¹ This bill would amend the act by deleting use of interstate conveyances other than the Postal Service from the list of criminal offenses created by section 857(a)(1). Originally, Representative Levine stated that his bill was directed at interstate transportation by the Postal Service or by "private package services, such as UPS."⁵² However, the Levine bill as introduced, the Wilson bill,⁵³ and the administration's 1986 omnibus antidrug package⁵⁴ all contained language identical to that recently proposed by Representative Rangel in H.R. 2974 that would delete the reference to "other interstate conveyance[s]."⁵⁵ Nevertheless, it appears that Representative Levine's inclusion of private delivery services was deliberate, since his stated intent was enacted in 21 U.S.C. 857(a)(1).

The Rangel proposal also would strike "transportation [of drug paraphernalia] in interstate or foreign commerce" as an offense under section 857(a)(2). All proposals previously discussed have included transportation in interstate commerce, and most have also included "foreign commerce" in the prohibition, as well. If section 857(a)(2) is interpreted to require proof that a defendant both offered the drug paraphernalia for sale and transported it in interstate or foreign commerce, then enactment of the Rangel amendment would appear to ease the Government's burden of proof in such cases. However, in combination with the previous amendment concerning private delivery services, the Rangel proposal may allow private carriers to transport drug paraphernalia originating outside the United States in bond for subsequent exportation, since the prohibition on importation (in sec. 857(a)(3)) may be interpreted as reaching only imports for consumption and not imports for transportation and exportation.⁵⁶ The Rangel proposal may also be interpreted to allow such carriers to transport drug paraphernalia in "foreign commerce."

The Rangel bill directs the Attorney General to provide for the enforcement of 21 U.S.C. 857 through the use of "task forces consisting of appropriate Federal, State, and local personnel." The bill would authorize \$5 million to be appropriated for this purpose in each of the next 5 fiscal years. Representative Rangel states that "the overall goal [of this bill] . . . is to ban the

⁵¹ H.R. 2974, 101st Cong., 1st Sess. (July 21, 1989). The text of H.R. 2974 is set out as app. J.

⁵² Letter to Michael Lilly, Attorney General of Hawaii, Nov. 27, 1984.

⁵³ Sec. 102(a)(1), S. 713 (app. E, p. E-2).

⁵⁴ Sec. 3302(a)(1), S. 2849 (app. H, p. H-2).

⁵⁵ Sec. 2, H.R. 2974 (app. J, p. J-2).

⁵⁶ Compare with 19 C.F.R. 18.21(b).

sale of all drug paraphernalia items everywhere in this country . . . whether it involves interstate or intrastate activity."⁵⁷

There have been relatively few reported enforcement actions since enactment of 21 U.S.C. 857. A "test case" that relied upon both section 857 and certain general civil forfeiture authority⁵⁸ granted to the Customs Service in section 3123 of the Anti-Drug Abuse Act of 1986 was upheld by the Sixth Circuit in May 1989.⁵⁹ In addition, the constitutionality of the act was challenged and upheld in both the Nashville litigation and in a memorandum opinion in response to a criminal indictment under 21 U.S.C. 857 in the Eastern District of New York.⁶⁰ More recently, an indictment charging three counts in violation of 21 U.S.C. 857 has been returned in the Western District of New York.⁶¹ An unreported civil decision in the same jurisdiction has upheld seizure of alleged drug paraphernalia "in connection with a criminal investigation . . . rather than in connection with a civil forfeiture."⁶²

Some anecdotal evidence has been obtained which suggests that the Act is not as useful an enforcement tool as originally envisioned.⁶³ There is a definite preference for civil forfeiture proceedings since the Government's burden of proof

is less rigorous.⁶⁴ In the opinion of those who have litigated under the act, there are several clarifications that need to be made to the statutory language. Those involved believe that civil forfeiture would be a highly useful addition to the law.⁶⁵ It is worth noting that the Customs Service civil forfeiture authority under 19 U.S.C. 1595a(c) would not reach exports or interstate commerce.⁶⁶

Drug Paraphernalia: Description and Uses

One of the more difficult aspects of the Mail Order Act is the definition of drug paraphernalia. According to Senator Wilson—

"The most difficult task in drafting this legislation was crafting a definition of drug paraphernalia that was sufficiently definite to outlaw devices which are primarily designed or intended for use with controlled substances, yet not over-inclusive so as to make certain devices illegal that have important, legitimate uses."⁶⁷

According to *Webster's Collegiate Dictionary*, the term "paraphernalia" was originally derived from the Greek "parapherna," which referred to the goods a bride brings to a marriage over and above her dowry. In more recent times, the term has been applied to the ritual trappings of certain fraternal organizations, and more recently to any generic grouping of furnishings or apparatus. Today, of course, the word has taken on a more sinister connotation in connection with various criminal activities, including drug abuse. But even now the question remains: just what are drug paraphernalia? The answer is nebulous at best.

As stated above, the Mail Order Drug Paraphernalia Control Act, as amended, defines "drug paraphernalia" as follows:

" . . . any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act . . . "

⁵⁷ "Remarks of Representative Rangel," 135 *Congressional Record* E-2627 (July 21, 1989). Additional excerpts of these remarks are set out at app. K.

⁵⁸ 19 U.S.C. sec. 1595a(c), as added by sec. 3123 of Public Law No. 99-570, 100 Stat. 3207-87. Although sec. 1595a(c) was added to the Tariff Act of 1930 by the 1986 Drug Act, it is a general forfeiture provision and does not explicitly address forfeitures of drug paraphernalia.

⁵⁹ *United States v. 57,261 Items of Drug Paraphernalia*, 705 F. Supp. 1256 (U.S. District Court, M.D. Tenn. 1988); affirmed Mar. 14, 1989; *Rehearing and Rehearing En Banc Denied* May 10, 1989; 869 F.2d 955 (6th Cir. 1989).

⁶⁰ *United States v. Main Street Distributing Inc.*, 700 F. Supp. 655 (E.D.N.Y. 1988).

⁶¹ See materials submitted by the Assistant United States Attorney, Buffalo, NY, set out in app. L.

⁶² *The Mill v. MacMartin, et al.*, Slip Op. at 13, Civ-89-157T (W.D.N.Y., 1989). The decision is set out in app. L.

⁶³ Telephone conversations with Ralph Whiteside, Port Director, and Bill Crane, Inspector, U.S. Customs Service, Nashville, TN., July 31, 1989 and Aug. 1, 1989. Mr. Whiteside reported that both he and Mr. Crane had been named as defendants in a civil action asking \$85,000 compensatory and \$500,000 punitive damages for their actions in carrying out the seizure. (*Contempo Products, Inc., by and through its president Richard K. Rowland, v. Whiteside*, Civ. No. 3 87 0292, U.S. District Court, M.D. Tenn.) The district court declined to dismiss the suit against the individual defendants, but the Sixth Circuit did dismiss the action. *U.S. v. 57,261 Items of Drug Paraphernalia*. Both Customs Service officials perceive their inclusion in the civil action by *Contempo* as "an attempt at intimidation" and both believe that the "qualified immunity" doctrine (*Anderson v. Creighton*, 483 U.S. 635 (1987)) is insufficient in circumstances such as those surrounding the Nashville litigation.

⁶⁴ Telephone conversations with Harold McDonough, Assistant U.S. Attorney, Nashville, TN., July 31, 1989. Mr. McDonough represented the Government in the proceedings in the district court and before the Sixth Circuit.

⁶⁵ *Ibid.*

⁶⁶ Thus, the seizure in the Buffalo litigation could not be made under 19 U.S.C. 1595a(c), since the Customs Service's jurisdiction in that matter would appear to be limited to the charge of unlawful exportation in violation of 21 U.S.C. sec. 857(a)(3). See materials in app. L.

⁶⁷ "Remarks of Senator Wilson," 99th Cong., 1st Sess. 131 *Congressional Record* S-3309 (Mar. 20, 1985).

This language covers a very wide range of possible goods, many of which may have uses that are predominantly legitimate. Whereas the key phrase "primarily intended or designed for use" does not narrow the list of articles that might be considered drug paraphernalia under the law, it does restrict the impact of the law to the intended illicit use of such articles.

Certain drug paraphernalia are clearly "designed for use" in illicit drug activity. One example given by DEA is the "bong," a smoking pipe having certain design characteristics that allegedly preclude it from traditional use as a tobacco pipe but that enhance its use for smoking marijuana, hashish, or opium. Specifically, according to DEA's reasoning, the bowl of the bong is so small that it is inconvenient for a tobacco smoker, because it would require refilling and relighting too frequently, but is well suited to the marijuana smoker, who needs to smoke only a small amount to achieve the desired "high." The bong's bowl is always made of a nonporous material (glass, metal, plastics, or porcelain), so that resinous residue from burnt marijuana can be easily cleaned out; traditional tobacco pipes, on the other hand, are intentionally of porous woods or minerals, partly because their smokers prefer that the pipe become imbued with the aromatic byproducts of burning tobacco. A bong has a bowl that usually unscrews from the rest of the pipe, so that it can be more easily cleaned with detergent; traditional pipes normally do not. Finally, a bong has a large collection chamber, a wide mouthpiece, and a carburetion hole or tube, to trap all the available marijuana smoke and force it deep into the lungs for more comprehensive inhalation; tobacco pipe smokers normally do not inhale so deeply.

For most drug paraphernalia, however, it is difficult to establish that a particular article is "designed for use" in illicit drug activity. For example, a syringe and needle is indeed designed for use in injecting substances into the body, but the design is not specifically for illicit drug use. Rolling papers were used in legitimate tobacco smoking applications long before they became popular for wrapping marijuana into "joints" for smoking. Razor blades are a common tool for chopping cocaine into a fine powder and lining it up on a smooth surface in preparation for "snorting" it through a straw, but both razor blades and straws have more predominant legitimate uses. However, if it can be shown that any of these legitimate products are "intended for use" in illicit drug activity, then they are considered drug paraphernalia for the purposes of the Mail Order Drug Paraphernalia Control Act.

From the foregoing discussion, one can see that a comprehensive and definitive list of goods that are drug paraphernalia cannot exist. Nevertheless, there are a number of items that have been commonly described as such in the past, and they are discussed in the following paragraphs.⁶⁸ In general, these goods can be divided

into the following functional groupings: goods for storing or transporting illicit drugs; goods for preparing controlled substances for consumption; and goods to aid direct consumption of controlled substances.

Goods for Storing or Transporting Illicit Drugs

Goods for storing and carrying drugs include anything from polyethylene or glassine bags (of various sizes) to elaborately decorated leather pouches and ornately inlaid or painted wooden boxes for storing drugs or rolling papers. Such containers have been called "stashers" in the past. Almost any container that keeps the drugs clean, dry, and is easily concealable will do, but especially prevalent today are small polyethylene and glassine bags, usually smaller than 2 inches on a side, and small plastic vials with closures. These are the containers of choice for buyers and sellers of "rocks" (small lumps) of crack cocaine for smoking, or for measured amounts of cocaine powder, heroin, or hashish for ingestion by various means.

Goods for Preparing Controlled Substances for Consumption

This grouping includes a very wide variety of goods for measuring, concentrating, purifying, diluting, testing, or otherwise preparing controlled substances for consumption. The grouping includes, but is in no way limited to, the following:

- miniature spoons or spatulas, of base or precious metal, of ivory, scrimshaw, or bone, or of plastics, usually with a level capacity of not more than one-tenth of a cubic centimeter, used for measuring individual "hits" or snorts of cocaine;
- screens, strainers, sieves, or separation "gins", of metal or nylon, for removing unwanted seeds or other impurities from the controlled substance;
- "isomerization" devices, which subject marijuana samples to "precise" conditions of heat and pressure, thereby altering the chemical composition to increase potency of the drug;
- marijuana growing kits;
- dessicators, enclosed vessels containing absorbent crystals (e.g., silica gel) for removing moisture from marijuana to improve its smoking characteristics;

⁶⁸ Sources used to compile this listing include the Drug Enforcement Administration; the National Institute on Drug Abuse (U.S. Department of Health, Education, and Welfare), "Community and Legal Responses to Drug Paraphernalia, DHEW Pub. No. (ADM)80-963, 1980; *The Marijuana Catalogue, Comprehensive Guide to Grass for Neophyte and Veteran Smokers Alike*, by Paul Dennis and Carolyn Barry (undated); and *High Times*

- weighing scales (primarily for marijuana and cocaine), pocket, spring weight, counterbalance, and triple beam types, with accessory gram weights and scoops;
- rolling papers, wired or double width, and machines for rolling marijuana "joints" or cigarettes;
- diluents for diluting ("cutting") cocaine or heroin, e.g., procaine, pseudocaine, and polysaccharides such as mannitol (mannite), inositol, or lactose;
- testing kits, for determining purity of the drug;
- razor blades, other cutting blades, or grinders for reducing the particle size of cocaine for purposes of snorting;
- mirrors or slates for aligning narrow rows, or "lines," of cocaine powder for snorting;
- kits, containing combinations of any of the foregoing.

Goods to Aid Direct Consumption of Controlled Substances

The illicit drug use of the goods included here is concentrated mostly in the activities of smoking "crack" cocaine, marijuana, hashish, and opium and its derivatives (including heroin); for injecting heroin and other narcotics; and for snorting cocaine powder. Probably the most ubiquitous and imaginative class of products included here are smoking pipes (other than those traditionally used for smoking tobacco) and their parts.

Drug-use pipes come in all shapes and sizes, and may be manufactured from wood, glass, metal, ceramics, stone, bamboo, and other materials. There are two basic designs: (1) that resembling the traditional tobacco pipe, but having a smaller bowl; and (2) that having the characteristics of a water pipe, in which the smoke is passed through a water chamber before inhalation. In the 1960s and 1970s, marijuana pipes of the first basic design were made to resemble a novel array of common objects, such as baby bottles, fountain pens, tire gauges, animals, and human body parts. But as drug users became more serious about their "highs" they gravitated to more sophisticated water-pipe designs, sometimes with multiple mouthpieces for group "smoke-ins." The bong⁶⁹ was described earlier.

⁶⁹ The origin of the term "bong" is unclear. One possible derivation is from a reportedly Southeast Asian word, "bhong," which connotes a water pipe. Another possible derivation is from the East Indian word "bhang," which refers to the hemp plant, Cannabis, from which marijuana is obtained. The term has also been used to describe the sound in the smoker's head after its use.

Variations on the bong included air-driven pipes, electric pipes, ice pipes (chillers), mask pipes, chamber pipes, and carburetor pipes. Because these were most often used to smoke marijuana, the burning of which creates a sticky, resinous residue that tends to clog pipes, nearly all such pipes were equipped with replaceable, fine-mesh screening to trap such residues.

Roach clips comprise a wide variety of articles that resemble tweezers.⁷⁰ Their only apparent drug-related use is for smoking the tiny "butts" of marijuana cigarettes. When the butt of the cigarette gets so short that the smoker can no longer hold it without burning his or her fingers, it is called a roach. In an effort to avoid wasting even this last bit of the "joint," a smoker can turn to any number of devices to allow him or her to finish off the roach. Examples are alligator clips, surgical hemostats, bobby pins, or simply two pieces of flexible metal connected by a sliding stone or bead that tightens or releases the prongs.

While marijuana use is still widespread, it has been overshadowed in recent years by the preference for cocaine powder for snorting into the nose and "crack" cocaine for smoking. Cocaine powder is snorted either directly from a small spoon (see previous section for description) or through a small straw (or "tooter"). Like the spoons, cocaine straws may be of various materials, depending on the user's preference. "Crack" cocaine is a relative newcomer to the illicit drug scene, but its use has spread rapidly in just 3 years. It is an unusually virulent and addictive form of cocaine. It is smoked in a cocaine pipe (or "stem"), which consists of a glass tube ("stirrer"), approximately one-half inch in diameter and 4 inches in length, fitted with a small screen to support a small lump ("rock") of the "crack."

Syringes and needles are familiar symbols of the drug culture and need no explanation here. Other paraphernalia used to directly assist the consumption of illicit drugs include nasal irrigators (to reduce the incidence of nasal membrane damage from snorting cocaine); ether and small butane torches for volatilizing and inhaling ("freebasing") cocaine; cigarette holders with conical openings to accommodate a hand-rolled marijuana joint; and matches and lighters.

With regard to all three of the categories discussed above, a final important class of paraphernalia is the literature (in the form of magazines, flyers, videotapes, etc.) published and distributed to encourage illicit drug use and provide advice and instructions on the use of drug paraphernalia. Advertising materials would be included here as well.

⁷⁰ On Mar. 29, 1978, the Commission instituted Investigation No. 337-TA-51 to determine whether or not the patent on certain cigarette holders (i.e., roach clips) was being infringed by imported products. The investigation was terminated in March 1979, when no evidence of the importation of such products could be found.

Effectiveness of the Mail Order Drug Paraphernalia Control Act

On the basis of information gathered in the course of this investigation, it is difficult to gauge the true effectiveness of the act. The act itself has inherent weaknesses that seem to hamper the enforcement of its provisions. For example, it does not specify which Federal agency has primary jurisdiction and responsibility for its enforcement. The U.S. Customs Service has taken the initiative in this regard, because it has traditionally investigated the importation into and exportation from the United States of prohibited merchandise of any nature. Although the Drug Enforcement Administration developed the Model Drug Paraphernalia Act for adoption by individual States, that agency has not participated in the enforcement of the Mail Order Act. DEA continues to direct its efforts and resources to the more serious problem of trafficking in illicit drugs. The Office of National Drug Policy, too, has concentrated on drug trafficking and illegal consumption, rather than directly addressing the issue of drug paraphernalia. The U.S. Postal Service reportedly has aided Customs in certain cases. Justice Department attorneys have been pursuing in Federal courts the litigation aspects of Customs' seizures of drug paraphernalia. This approach to the act appears to lack a concerted focus, and perhaps it was foreshadowed in November 1979, when an official of DEA made the following statement before a Congressional panel looking at the broader issue of drug abuse:

"Federal drug investigators and prosecutors have more than they can handle in pursuing large-scale international and interstate traffickers. To shift enforcement personnel into drug paraphernalia activity would . . . be counter-productive. It would diminish our efforts to reduce the supply of illicit substances and focus instead on an offensive, but considerably less important, part of the national drug problem.

A survey of the leading federal narcotics prosecutors . . . has confirmed the view that no federal resources are realistically available to pursue the sale or use of drug paraphernalia."⁷¹

Nevertheless, as will be seen, the Customs Service has shown some positive results in a short time.

In March 1987, Customs made its first major seizure under the act, in Nashville, Tennessee, where alleged paraphernalia with an estimated value of \$85,000 were seized. Customs made at

⁷¹ Irvin B. Nathan, Deputy Assistant U.S. Attorney General, Criminal Division, before the Select Committee on Narcotics and Drug Abuse Control, U.S. House of Representatives, Nov. 1, 1979.

least four other seizures that year.⁷² To date, there have been a total of at least 27 such seizures in at least 12 different States.⁷³

In April 1988, Customs instituted an initiative, called "Operation Pipe," within its Office of Commercial Fraud Enforcement, to organize its efforts in the interdiction of illegal drug paraphernalia imports. That program is still in operation and is expected to continue indefinitely. Because the program is not separately funded and is not the sole function of the office, no estimates are readily available as to the costs of its maintenance and operation. According to John Esau, Acting Director of the Commercial Fraud Enforcement Center, there are the equivalent of 30 to 40 Customs agents involved in Operation Pipe nationwide.⁷⁴ These agents coordinate closely with State and local law enforcement officials in carrying out their investigations and seizures. Mr. Esau estimates the total wholesale value of goods seized since April 15, 1988, at about \$13.6 million.⁷⁵ The goods seized include crack pipe components (glass tubes and metal mesh screens), bongs, water pipes, other pipes with small bowls or containing ceramic or glass components, cigarette holders (including roach clips), small polyethylene and glassine bags, plastics vials, small-capacity spoons, pocket scales, drug-cutting substances (inositol and mannitol), razor blades and cutting slates, and a broad range of other articles. According to Mr. Esau, all such goods were imported goods that had entered the United States under normal Customs entry procedures, as opposed to being smuggled. The sources of the seized imported goods were cited as "the Middle East" and, more significantly, "the Pacific Rim countries." The absolute or relative significance of the \$13.6 million figure is not clear, because the final disposition of the seized goods has not been settled in all cases. Further, there is no way to estimate the value of total U.S. imports of drug paraphernalia for comparison purposes, for two principal reasons. First, even during the 1960s and 1970s, when overt drug paraphernalia sales were legal, the very existence of the industry was controversial and vendors were reluctant to be forthcoming with import or domestic sales data. Now that the distribution of drug paraphernalia has been effectively banned in the United States, such data are even more scarce.

⁷² From information supplied by Mr. Robert Vaughn, an attorney representing the American Pipe and Accessory League, in a posthearing brief; see app. M.

⁷³ Two of those States—Michigan and Wisconsin—do not have State-level sanctions against drug paraphernalia. Three others—Ohio, New York, and Tennessee—have such statutes, but not based on the Model Drug Paraphernalia Act.

⁷⁴ Official transcript of the Commission's hearing held in connection with this investigation on Aug. 10, 1989, p. 28. Hereafter, references to the transcript will be cited as "Transcript, [page no.]."

⁷⁵ Posthearing statement.

Second, the act couches the definition of "drug paraphernalia" in only general physical terms, and tends to rely on the intended use of such products in illicit drug activities. The act appears to be ambiguous in defining what is and what is not drug paraphernalia for the purposes of obtaining search warrants for seizure and successful prosecution. In fact, this seems to be the single most difficult aspect of the act, especially with regard to dual-use paraphernalia—i.e., those having legitimate uses, as well as drug paraphernalia uses. (See "Views of Interest Parties," below, for a discussion of this issue with specific regard to smoking pipes.) Nevertheless, the act does allow for a determination of imported articles as drug paraphernalia on the basis of consideration of a combination of logically relevant factors, as enumerated in paragraph (e) of the act.

Individual States' drug paraphernalia laws no doubt have had a significant impact on the retail distribution of drug paraphernalia. A large number of smaller, "cottage" retail stores have gone out of business in the past decade, whereas the mail-order business has become a lucrative and fairly sophisticated industry, dominated by fewer than 20 mid- to large-size firms.⁷⁶ At least partly because of the Mail Order Act, some of the dealers that remain have shifted their inventories to emphasize the sale of dual-use items, such as pipes or cigarette-rolling papers; others have changed their advertising and marketing strategies to de-emphasize the drug-related nature of their products.

For example, a particular cocaine free-base kit was openly advertised in drug culture periodicals in 1979 as "The Chemist, Free Base System, the Ultimate 'High', in Columbia (sic), the natives call their Snow [cocaine] Vapor-Base. For over 100 years, in every village, it's been the Toke of the Town!"⁷⁷ At present, cocaine paraphernalia are advertised in less incriminating terms, like "snuff kit" or "tea and spice grinder," and their illicit drug use is no longer indicated. Some vendors add disclaimers to announce that their products are not being offered for drug use. The leading drug-culture periodical, *High Times*, reportedly has discontinued mail-order drug paraphernalia advertising, but law enforcement officials suspect that dealers simply advertise directly to potential buyers through mailings and "paraphernalia parties" (similar to those used to sell certain popular plastics kitchenware), offering paraphernalia in the guise of legitimate products for legitimate uses (e.g., tobacco smoking, snuff storage or use, or horticulture). Mail-order catalogs no longer attempt to educate purchasers in the intended use of drug paraphernalia.⁷⁸

⁷⁶ United States Department of Justice, National Institute of Justice, "State and Local Experience With Drug Paraphernalia Laws," by Kerry Murphy Healey, February 1988, p. 50.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, p. 51.

The act provides for forfeiture of seized goods (in addition to other criminal penalties) upon conviction of the violator(s) of its provisions. Although convictions have been obtained under the act, they have been the result of guilty pleas, and as such, the provisions of the act have yet to be tested in the courts.⁷⁹ The act requires that the prosecution establish the alleged violator's guilt "beyond a reasonable doubt."⁸⁰ By contrast, provisions of the existing customs laws (secs. 595-96 of the Tariff Act of 1930, 19 U.S.C. secs. 1595-1595a(c)) provide for civil forfeiture with a lesser evidentiary burden on the government based on a "preponderance of evidence" standard. Customs to date has utilized this civil procedure, rather than the criminal forfeiture procedure of the act, in most of its drug paraphernalia cases.⁸¹ This is not necessarily to say that the act is less effective than the civil procedure. It is likely that the threat of criminal prosecution, with a possible prison sentence of up to 3 years and a fine of up to \$100,000, will in the long run further deter drug paraphernalia trade.

Recommendations

General

After reviewing the current state of implementation and enforcement of the Mail Order Act, the Commission believes that the effectiveness of the Mail Order Act is hampered in a number of areas, each of which is discussed in the following paragraphs.

Designation of responsible Federal agency for enforcement.—The potential for effective enforcement of the act has been restricted by the fact that the act does not designate or otherwise identify the Federal agency or agencies intended to implement the regulatory and enforcement activities envisioned under the act. This omission, as well as the more subtle difficulties with the act brought to the attention of the Commission (see this report, p. 23), can be remedied by the Congress through legislation amending the act.

The definition of drug paraphernalia.—Probably the most frustrating aspect surrounding enforcement activities is the evidentiary difficulty of demonstrating that a particular product is drug paraphernalia. The definition of the term in section 857(d) is, in effect, in two parts. The first part specifies the definition, which requires a finding of primary "intention or design" for illicit use. This is followed by a listing of exemplars. The named exemplars include goods, such as wooden pipes, that have legitimate applications, as well as goods used predominantly, if not exclusively, for illegal applications. Whereas these

⁷⁹ Transcript, p. 35.

⁸⁰ *Ibid.*, p. 42.

⁸¹ *Ibid.*

latter goods seem clearly to be designed for illicit use, the time and expense necessary to prove that fact to the satisfaction of a court of law may be formidable. Under the circumstances, it would be useful to amend the definition to provide that certain named products, of a type predominantly used for drug applications, are per se violative of the act. These articles could include the following:

1. Metal, plastics, and glass smoking pipes;
2. Water pipes;
3. Smoking and carburetion masks;
4. Chamber pipes;
5. Carburetor pipes;
6. Electric pipes;
7. Air-driven pipes;
8. Chillums;
9. Bonges;
10. Ice pipes or chillers;
11. Cocaine freebase kits.

Import-export enforcement.—The present enforcement efforts of the Customs Service to restrict the flow of drug paraphernalia have been hampered to some extent by an exporter's or importer's ability to describe the goods in ambiguous terms, both in commercial documents and Customs forms. By declaring relatively broad or residual tariff provisions as appropriate tariff classifications for entry or export purposes, an importer or exporter, without violating Customs regulations, may mask the true nature of the articles at the time of entry or exportation and may thereby preclude a thorough examination of the goods while they are still in Customs' custody.

It is well known that the Customs Service is highly selective in conducting physical inspections of imported goods because of limited resources, the great volume of cargo entering the country each day, and the need to clear shipments of cargo quickly. This situation only enhances one's ability to transport potential drug paraphernalia undetected at the time of entry or export.

Proposals for Amending the Harmonized Tariff Schedule of the United States

There are several ways in which the Harmonized Tariff Schedule of the United States (HTS) could be amended to more adequately highlight and delineate the tariff descriptions most likely to include potential drug paraphernalia. These options are discussed in the following paragraphs.

Certification provision for drug paraphernalia.—A new subchapter could be added to chapter 99 of the HTS (and a similar provision in Schedule B), which would emphasize the prohibition of imports and exports of drug paraphernalia. The subchapter would require an importer or exporter to certify to the Customs Service that specified imported or exported goods are not primarily intended or designed for use as drug paraphernalia. The entry or export of specified goods that have not been so certified would be prohibited. Such certification undoubtedly would result in a paperwork burden, both for Customs and the importer or exporter; however, a fraudulent certification could be useful in the ultimate prosecution of drug paraphernalia cases.⁸²

Legislative action would be needed to create the new subchapter, and Customs would be required to promulgate the necessary regulation. It is believed that if the specified goods were identified by regulation rather than by legislation, the list could be modified in a timely manner—a useful advantage. Additionally, statistical annotations of this provision could be adopted to provide data delineating the kinds of goods and extent of trade in certified importations. A proposed text of such an annotated subchapter is given in appendix N.

Provision of new statistical annotations.—Additional statistical annotations would serve to monitor trade in and further highlight products that do not necessarily meet the definition of drug paraphernalia but that are usable as drug paraphernalia or parts of drug paraphernalia. The Customs Service is very supportive of this option, because it allows them to “further refine a large universe of articles to allow [the agency] to target and find articles that might meet [the definition of drug paraphernalia].”⁸³

Decisions to adopt statistical lines in the tariff are reached administratively by the Committee for the Statistical Annotation of Tariff Schedules (also called the 484(e) Committee), a tripartite committee consisting of representatives from the Department of Commerce, the Department of the Treasury, and chaired by a representative of the Commission. Some examples of possible annotations are provided in appendix O.

Footnoting the tariff.—The final recommendation is that each HTS and Schedule B heading or subheading that may include goods suitable for use as drug paraphernalia be highlighted with the following footnote:

Importation or exportation of drug paraphernalia is prohibited under the Mail Order Drug Paraphernalia Control Act (21 U.S.C. 857). Such goods may be classifiable in this category.

⁸² John Esau, transcript, p. 23.

⁸³ John Esau, transcript, p. 24.

Footnotes, because they have no legal significance, may be added to or deleted from the HTS without formal administrative action.

Views of Interested Parties

Prehearing briefs were received from all parties who testified in the Commission's hearing held in connection with this investigation on August 10, 1989.⁸⁴ Testifying attendees included Mr. John Esau, representing the U.S. Customs Service, and three representatives of the tobacco pipe and pipe accessories industry—Mr. Richard Rowland, Mr. Robert Vaughn, and Ms. Lorraine Shapiro. Posthearing briefs were received from Mr. Vaughn, Ms. Shapiro, and Mr. Benjamin Rapaport, another representative of the pipe and accessory industry. Most of Mr. Esau's comments and hearing testimony already have been discussed in detail in previous sections of the report, and only pertinent additional information is included here.

Mr. Rowland had inventory seized by Customs upon entry into the United States, and civil forfeiture was obtained by the U.S. Government in 1987.⁸⁵ In March 1989, Mr. Rowland had nearly 1 million dollars' worth of inventory seized by Customs from a warehouse in Nashville but to date has not been charged with criminal violation of the provisions of the Mail Order Act in that case.⁸⁶ Ms. Shapiro has had finished and work-in-process inventory seized from her pipe-manufacturing facility in New York and is currently under criminal indictment in connection with that seizure.⁸⁷ Mr. Vaughn, an attorney, has participated in various hearings and court cases involving the identification of drug paraphernalia with respect to smoking pipes.⁸⁸ Mr. Rapaport is an author, columnist, lecturer, and appraiser of antique tobacco paraphernalia and has been active in a number of U.S., European, and Far Eastern pipe organizations.⁸⁹ Mr. Rapaport served as an expert witness in the civil forfeiture proceedings held in connection with the seizure of Mr. Rowland's retail inventory in 1987. All of these industry representatives are members of the American Pipe and Accessory League, which has been actively following the progress of and participating in hearings leading to Federal and other legislation concerning drug paraphernalia.

Messrs. Rowland, Vaughn, and Rapaport and Ms. Shapiro all opined that the Mail Order Act is confusing and inadequate in delineating the dif-

ference between a traditional smoking pipe and a pipe that is determined to be an article of "drug paraphernalia" for the purposes of seizure and criminal forfeiture under the act. The act does designate "metal, wooden, acrylic, glass, stone, plastic, or ceramic" pipes and "water pipes" as paraphernalia but specifically exempts those "traditionally intended for use with tobacco products."

With respect to water pipes, Mr. Rowland indicated in his prehearing statement that such pipes offer the safest means of smoking tobacco: "a substantial portion of cancer-causing agents in tobacco smoke from cigarettes, pipes or cigars are removed when filtered through water." He added that "many styles and variations of water filtration pipes [have] U.S. patents" and that "water pipes . . . have been used throughout American history, and these historic pipes were never used for drugs."⁹⁰

With regard to more traditional-looking pipes, it has been suggested that one possible way of distinguishing a drug paraphernalia pipe from a "traditional" tobacco pipe is by the size of its bowl. The argument is that a traditional pipe has a larger bowl than a drug pipe, because the drug user needs to smoke less material than does a normal tobacco pipe smoker to get the desired enjoyment. However, Mr. Rowland and Ms. Shapiro both disputed that claim. Mr. Rowland argued that smaller pipe bowls are part of a trend towards lower tobacco consumption for health reasons.⁹¹ Ms. Shapiro produced samples of corn cob pipes that she purchased in a local drug store and pointed out that their bowls were smaller than those of some of the pipes that Customs seized from her company.⁹²

The material from which a pipe is made is also considered a factor in distinguishing a drug pipe from a traditional pipe. For example, the act specifically mentions "metal, wooden, acrylic, glass, stone, plastic, or ceramic" pipes in its definition of drug paraphernalia. This definition, too, was disputed by all parties representing APAL in this investigation. Mr. Rapaport claimed that "'wooden,' 'stone,' and 'ceramic' materials . . . translate to briar, clay, and porcelain, respectively, three very traditional and conventional smoking pipe materials."⁹³ Mr. Rowland stated in the hearing that "[a] \$500 Meerschaum pipe could be used to smoke drugs. Is that pipe drug paraphernalia? How is a manufacturer to know? How is the manufacturer responsible for what the consumer uses the pipe for?"⁹⁴

⁸⁴ The names of witnesses appearing at the hearing are listed in the Calendar of Public Hearing, app. P.

⁸⁵ *United States v. 57,261 Items of Drug Paraphernalia*, 705 F. Supp. 1256 (U.S. District Court, M.D. Tenn. 1988).

⁸⁶ Prehearing brief and transcript, p. 44.

⁸⁷ *Ibid.*, pp. 49-52.

⁸⁸ *Ibid.*, p. 64.

⁸⁹ Letter to the Commission, Aug. 15, 1989.

⁹⁰ Prehearing statement, p. 3.

⁹¹ Prehearing statement and transcript, p. 46. It has also been suggested by the industry that the popularity of pipe smoking is increasing among women, the implication being that more "petite" pipes are desirable.

⁹² Transcript, p. 54.

⁹³ Letter to the Commission, Aug. 15, 1989.

⁹⁴ Transcript, p. 57.

All APAL representatives commenting on this investigation expressed a desire to conform to the Mail Order Act, but said that more specific criteria are necessary to avoid the issues discussed above. Messrs. Rowland and Vaughn and Ms. Shapiro were all asked to make suggestions for such criteria, but none of them did so. Speaking for APAL, Mr. Vaughn stated that some 700 members would have to be polled in order to reach a consensus.⁹⁵

Customs admits that, outside the language of the law, there are no official specific criteria used by the Government for determining the specific use of a smoking pipe, but contends that no matter how innocent or innocuous the pipe itself, if other relevant factors outlined in the law are found to point to drug use, then the pipe can be considered to be drug paraphernalia under the law.⁹⁶

⁹⁵ Ibid., p. 69.

⁹⁶ Transcript, passim.

APPENDIX A
REQUEST FROM THE SENATE COMMITTEE ON FINANCE

Operations

LLOYD BENTSEN TEXAS CHAIRMAN

| | |
|--------------------------------------|-------------------------------|
| SPARK M. MATSUNAGA HAWAII | BOB PACKWOOD OREGON |
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| DONALD W. RIEGLE JR. MICHIGAN | WILLIAM L. ARMSTRONG COLORADO |
| JOHN D. ROCKEFELLER IV WEST VIRGINIA | STEVE SYMMS IDAHO |
| TOM DASCHLE SOUTH DAKOTA | |

United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-8200

VANDA B. MCMURTRY STAFF DIRECTOR AND CHIEF COUNSEL
ED MIALSKI MINORITY CHIEF OF STAFF

08 MAY 19 10:54

May 18, 1989

OFFICE OF THE SECRETARY
DOCKET/USITC

OFFICE OF THE CHAIRMAN

09 MAY 19 10:36

RECEIVED

The Honorable
Anne Brunsdale
Chairman
United States International
Trade Commission
500 "E" Street, S.W.
Washington, D.C. 20436

| |
|--|
| DOCKET NUMBER |
| 1511 |
| Office of the Secretary Int'l Trade Commission |

Dear Madam Chairman:

I am writing on behalf of the Senate Committee on Finance in regard to the importation of drug paraphernalia into the United States, particularly that which is used to package and smoke "crack" cocaine. Subtitle O ("Mail Order Drug Paraphernalia Control Act") of the Anti-Drug Abuse Act of 1986 (Public Law 99-570) prohibits, among other things, importation or exportation of drug paraphernalia. However, drug paraphernalia continues to enter the United States in unacceptable quantities.

Between April 15, 1988 and March 7, 1989, the U.S. Customs Service seized at least \$8 million worth of vials, pipes, spoons, straws, filters, bags, and other drug paraphernalia. The principal sources of the imports of most of these products are believed to be the Pacific Rim countries of Hong Kong, Taiwan, South Korea, Thailand, Malaysia, Japan, and Singapore. Despite these seizures, there seems to be no scarcity of such paraphernalia on our streets.


Many of these products enter the United States under broad "basket" categories in the Harmonized Tariff Schedule of the United States (HTS). For example, vials of plastics appear to be classifiable in HTS subheading 3923.30.0000, which covers "Carboys, bottles, flasks and similar articles." Likewise, small, reclosable plastic bags appear to enter under HTS subheading 3923.21.0000, covering "Sacks and bags (including cones)" of polymers of ethylene. As such, it is difficult for the Customs Service to trace the movement of specific drug paraphernalia into the United States and to distinguish them from products entering legitimately.

The Honorable
Anne Brunsdale
May 18, 1989
Page Two

Consequently, the Commission is requested, pursuant to section 332(g) of the Tariff Act of 1930, to investigate the importation of drug paraphernalia in the United States. Specifically, the Commission should investigate the scope of illicit drug paraphernalia imports, evaluate the effectiveness of the Mail Order Drug Control Act in restricting such imports, determine how the HTS might be amended to better identify drug paraphernalia in particular, and make any other recommendations it deems appropriate in this regard.

The Commission is authorized to hold one or more hearings and is requested to seek the views of the Customs Service, of the Drug Enforcement Administration, and of any private enterprises that might be affected by changes made to the HTS in this regard. These views should be included in the Commission's report, which should be submitted to the Committee as soon as possible, but not later than four months after the Commission's formal initiation of the investigation.

Sincerely,


Lloyd Bentsen
Chairman

APPENDIX B
NOTICE OF INVESTIGATION NO. 332-277 IN THE *FEDERAL REGISTER*

This Notice is published pursuant to these requirements.

1. *Bidding systems to be used.* In the Outer Continental Shelf (OCS) Sale 122, blocks will be offered under the following two bidding systems as authorized by section 8(a)(1) (43 U.S.C. 1337(a)(1)): (a) bonus bidding with a fixed 16½-percent royalty on all unleased blocks in less than 400 meters of water; and (b) bonus bidding with a fixed 12½-percent royalty on all remaining unleased blocks.

a. *Bonus Bidding with a 16½-Percent Royalty.* This system is authorized by section 8(a)(1)(A) of the OCSLA. This system has been used extensively since the passage of the OCSLA in 1953 and imposes greater risks on the lessee than systems with higher contingency payments but may yield more rewards if a commercial field is discovered. The relatively high front-end bonus payments may encourage rapid exploration.

b. *Bonus Bidding with a 12½-Percent Royalty.* This system is authorized by section 8(a)(1)(A) of the OCSLA. It has been chosen for certain deeper water blocks proposed for the Western Gulf of Mexico (Sale 122) because these blocks are expected to require substantially higher exploration, development, and production costs, as well as longer times before initial production, in comparison to shallow water blocks. Department of the Interior analyses indicate that the minimum economically developable discovery on a block in such high-cost areas under a 12½-percent royalty system would be less than for the same blocks under a 16½-percent royalty system. As a result, more blocks may be explored and developed. In addition, the lower royalty rate system is expected to encourage more rapid production and higher economic profits. It is not anticipated, however, that the larger cash bonus bid associated with a lower royalty rate will significantly reduce competition, since the higher costs for exploration and development are the primary constraints to competition.

2. *Designation of Blocks.* The selection of blocks to be offered under the two systems was based on the following factors:

a. Lease terms on adjacent, previously leased blocks were considered to enhance orderly development of each field.

b. Blocks in deep water were selected for the 12½-percent royalty system based on the favorable performance of this system in these high-cost areas as evidenced in our analyses.

The specific blocks to be offered under each system are shown on Map 2 entitled "Western Gulf of Mexico Lease

Sale 122, Bidding Systems and Bidding Units." This map is available from the Minerals Management Service, Gulf of Mexico Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123-2394.

Barry Williamson,
Director, Minerals Management Service.
S. Scott Sewell,
Deputy Assistant Secretary, Land and Minerals Management.
June 28, 1989.

[FR Doc. 89-15810 Filed 7-5-89; 8:45 am]
BILLING CODE 4310-09-0

INTERNATIONAL TRADE COMMISSION

Importation of Certain Drug Paraphernalia into the United States

AGENCY: United States International Trade Commission.

ACTION: Institution of investigation and scheduling of hearing.

EFFECTIVE DATE: June 21, 1989.

FOR FURTHER INFORMATION CONTACT: Eugene A. Resengarden, Director, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission, Washington, DC 20436 (telephone 202-252-1592).

Background and Scope of Investigation: The Commission instituted investigation No. 332-277, Importation of Certain Drug Paraphernalia into the United States, under section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g)), following receipt of a request on May 19, 1989, from the Committee on Finance, United States Senate. As requested, the Commission will investigate the scope of imports of illicit drug paraphernalia, evaluate the effectiveness of the Mail Order Drug Control Act in restricting such imports, determine how the Harmonized Tariff Schedule of the United States (HTS) might be amended to better identify drug paraphernalia in particular, and make any other recommendations it deems appropriate in this regard. The Commission intends to submit its report to the Committee on Finance by September 18, 1989.

Public Hearing: A public hearing in connection with this investigation will be held in the Hearing Room of the U.S. International Trade Commission, 500 E Street, SW, Washington, DC, on August 10, 1989, at 9:30 a.m. All persons shall have the right to appear by counsel or in person, to present information and to be heard. Requests to appear at the public hearing should be filed with the Secretary, U.S. International Trade

Commission, 500 E Street, SW, Washington, DC 20436, not later than noon, August 3, 1989. Written prehearing comments (original and 14 copies) should be filed not later than noon, August 4, 1989. Post-hearing comments may be submitted by no later than August 16, 1989.

Written Submission: Interested parties (including other Federal agencies) are invited to submit written statements concerning the subject of the report. Such statements must be submitted by no later than August 16, 1989, in order to be considered by the Commission. Commercial or financial information that a party desires the Commission to treat as confidential must be submitted on separate sheets of paper, each clearly marked "Confidential Business Information" at the top. All submissions requesting confidential treatment must conform with the requirements of § 201.6 of the Commission's Rules of Practice and Procedure (19 CFR 201.6). All written submission, except for confidential business information, will be made available for inspection by interested persons. All submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street SW., Washington, DC 20436.

Hearing-impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on 202-252-7009.

By order of the Commission.
Kenneth R. Mason,
Secretary.

Issued: June 28, 1989.
[FR Doc. 89-15809 Filed 7-5-89; 8:45 am]
BILLING CODE 7000-02-0

[Investigation No. 337-TA-291]

Certain Insulated Security Chests; Commission Decision Not To Review Initial Determination of the Presiding Official to Add a Respondent

AGENCY: U.S. International Trade Commission.

ACTION: Notice of amendment of complaint and notice of investigation to add a respondent.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the initial determination (ID) issued by the presiding administrative law judge (ALJ) adding EP Industrial Co., Ltd. (EP) as a respondent to this investigation.

ADDRESSES: Copies of the nonconfidential version of the ID and all

APPENDIX C
THE MODEL DRUG PARAPHERNALIA ACT

Model Drug Paraphernalia Act

*Drafted by the
Drug Enforcement Administration
of the
United States
Department of Justice*

MODEL DRUG PARAPHERNALIA ACT

(Drafted by the Drug Enforcement Administration of the U.S. Department of Justice, August 1979, With Prefatory Note and Comments)

PREFATORY NOTE

The Uniformed Controlled Substances Act, drafted by the National Conference of Commissioners on Uniform State Laws, has been enacted by all but a handful of states. The Uniform Act does not control the manufacture, advertisement, sale or use of so-called "Drug Paraphernalia." Other state laws aimed at controlling Drug Paraphernalia are often too vaguely worded and too limited in coverage to withstand constitutional attack or to be very effective. As a result, the availability of Drug Paraphernalia has reached epidemic levels. An entire industry has developed which promotes, even glamorizes, the illegal use of drugs by adults and children alike. Sales of Drug Paraphernalia are reported as high as three billion dollars a year. What was a small phenomenon at the time the Uniform Act was drafted has now mushroomed into an industry so well-entrenched that it has its own trade magazines and associations.

This Model Act was drafted, at the request of state authorities, to enable states and local jurisdictions to cope with the paraphernalia problem. The Act takes the form of suggested amendments to the Uniform Controlled Substances Act. The Uniform Act is extremely well-organized. It contains a definitional section, an offenses and penalties section, a civil forfeiture section, as well as miscellaneous sections on administration and enforcement. Instead of creating separate, independent paraphernalia laws, it seems desirable to control Drug Paraphernalia by amending existing sections of the Uniform Controlled Substances Act.

Article I provides a comprehensive definition of the term "Drug Paraphernalia" and includes particular descriptions of the most common forms of paraphernalia. Article I also outlines the more relevant factors a court or other authority should consider in determining whether an object comes within the definition.

Article II sets out four criminal offenses intended to prohibit the manufacture, advertisement, delivery or use of Drug Paraphernalia. The delivery of paraphernalia to a minor is made a special offense. Article II clearly defines what conduct is prohibited, and it specifies what criminal state of mind must accompany such conduct.

ARTICLE I

(DEFINITIONS)

SECTION (insert designation of definitional section) of the Controlled Substances Act of this State is amended by adding the following after paragraph (insert designation of last definition in section):

"() The term 'Drug Paraphernalia' means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of this Act (meaning the Controlled Substances Act of this State). It includes, but is not limited to:

- (1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;
- (2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;
- (3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;
- (4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;
- (5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;
- (6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;
- (7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;
- (8) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;
- (9) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;
- (10) Containers and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;
- (11) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;
- (12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:
 - (a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
 - (b) Water pipes;
 - (c) Carburetion tubes and devices;
 - (d) Water pipes;
 - (e) Smoking and carburetion masks;
 - (f) Roach clips; meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
 - (g) Miniature cocaine spoons, and cocaine vials;
 - (h) Chamber pipes;
 - (i) Carburetor pipes;
 - (j) Electric pipes;
 - (k) Air-driven pipes;
 - (l) Chillums;
 - (m) Bongs;
 - (n) Ice pipes or chillers;

"In determining whether an object is Drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

- (1) Statements by an owner or by anyone in control of the object concerning its use;
- (2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;
- (3) The proximity of the object, in time and space, to a direct violation of this Act;
- (4) The proximity of the object to controlled substances;
- (5) The existence of any residue of controlled substances on the object;
- (6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this Act shall not prevent a finding that the object is intended for use, or designed for use as Drug paraphernalia;
- (7) Instructions, oral or written, provided with the object concerning its use;
- (8) Descriptive materials accompanying the object which explain or depict its use;
- (9) National and local advertising concerning its use;
- (10) The manner in which the object is displayed for sale;
- (11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
- (12) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;
- (13) The existence and scope of legitimate uses for the object in the community;
- (14) Expert testimony concerning its use."

ARTICLE II

(OFFENSES AND PENALTIES)

Section (designation of offenses and penalties section) of the Controlled Substances Act of this State is amended by adding the following after (designation of last substantive offense):

"SECTION (A) (POSSESSION OF DRUG PARAPHERNALIA)

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than (), fined not more than (), or both."

"SECTION (B) (MANUFACTURE OR DELIVERY OF DRUG PARAPHERNALIA)

It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than (), fined not more than (), or both."

"SECTION (C) (DELIVERY OF DRUG PARAPHERNALIA TO A MINOR)

Any person 18 years of age or over who violates Section (B) by delivering drug paraphernalia to a person under 18 years of age who is at

least 8 years his junior is guilty of a special offense and upon conviction may be imprisoned for not more than (), fined not more than (), or both."

"SECTION (D) (ADVERTISEMENT OF DRUG PARAPHERNALIA)

It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than (), fined not more than (), or both."

ARTICLE III

(CIVIL FORFEITURE)

Section (insert designation of civil forfeiture section) of the Controlled Substances Act of this State is amended to provide for the civil seizure and forfeiture of drug paraphernalia by adding the following after paragraph (insert designation of last category of forfeitable property):

"() all drug paraphernalia as defined by Section () of this Act."

ARTICLE IV

(SEVERABILITY)

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

COMMENT (ARTICLE I)

Drug paraphernalia laws are most often attacked because they are too vaguely worded. They seldom explain what is meant by the term paraphernalia. They do not indicate whether it is the use, or the possession, or the sale of paraphernalia that is prohibited. Moreover, they are usually silent on the criminal state of mind that must accompany the prohibited conduct. This deprives an individual of fair warning as to what the law forbids. It also vests too much discretion in authorities to determine what property and what activities are controlled.

Definition of drug paraphernalia

Article I of the Model Act, in contrast, defines "drug paraphernalia" as equipment, products, and materials used, intended for use, or designed for use, essentially, to produce, package, store, test or use illicit drugs. The words "equipment, products and materials" should be interpreted according to their ordinary or dictionary meanings. They can apply to many forms of movable, tangible property. Real property, conveyances, monies, documents and intangible property are, on the other hand, not meant to be included within these terms.

Although this definition may appear too general in its wording, or too broad in its scope, there are so many forms of drug paraphernalia that any attempt to define the term in more specific language would guarantee major loopholes in the Act's coverage. The courts have repeatedly recognized that there are practical limitations in drafting legislation. Where the subject matter of a statute does not lend itself to exact description, the use of general language does not make the statute unconstitutionally vague. *United States v. Petrillo*, 332 U.S. 1, 87 S.Ct. 1538 (1947). And see *United States v. Ryan*, 284 U.S. 187, 52 S.Ct. 65 (1931).

To insure that innocently possessed objects are not classified as drug paraphernalia, Article I makes the knowledge or criminal intent of the person in control of an object a key element of the definition. Needless to say, inanimate objects are neither "good" nor "bad," neither "lawful" nor "unlawful." Inanimate objects do not commit crimes. But, when an object is controlled by someone who use it illegally, or who intend to use it illegally, or who design or adapt it for illegal use, the object can be subject to control and the people subjected to prosecution.

Article I requires, therefore, that an object be used, intended for use, or designed for use in connection with illicit drugs before it can be controlled as drug paraphernalia.

Linking the definition of drug paraphernalia on a specific intent to violate, or to facilitate a violation of, the drug laws also provides "fair warning" to persons in possession of property potentially subject to this Act. A statute is not unconstitutionally vague, if it embodies a specific intent to violate the law. *Boyer Motor Lines, Inc. v. United States*, 342 U.S. 837, 72 S.Ct. 829 (1962); *Sorens v. United States*, 326 U.S. 91, 65 S.Ct. 1031 (1945).

Consider the application of Article I to a spoon, a hypodermic syringe, and a length of surgical tubing. Each object has legitimate uses in the community. None is specifically designed for illegal use. Thus, when these objects are manufactured, delivered and possessed in lawful commerce, they are not considered paraphernalia. But, if these same objects are assembled and used by an addict to illegally melt heroin and inject it into his body, they become drug paraphernalia. As such they become forfeitable under Article III, and the addict becomes subject to prosecution under Section A of Article II.

Actual use of an object to produce, package, store, test or use illicit drugs need not always be shown. An object is considered to be drug paraphernalia whenever the person in control intends it for use with illicit drugs. This intent may be a generalized one, not necessarily pinpointing a specific time and place of future use. See *Palmer v. State*, 14 Md.App. 159, 268 A.2d 572 (1972). It can be proved directly such as my admissions of the person in control, or indirectly through circumstantial evidence. It should be noted that the person in immediate control of an object need not intend to use it personally in connection with drugs. It is enough if he holds the object with the intent to make it available to persons whom he knows will use it illegally. See *United States v. 2,265 One-Gallon Paraffined Tin Cans*, 280 F.2d 105 (5th Cir. 1958).

Objects whose sole, or at least dominant purpose is to produce, package, store, test or use illicit drugs are considered to be "designed" for such use. A rebuttable presumption exists that these objects are intended for use for the purpose for which they are designed. See *Israel v. United States*, 63 F.2d 345 (3rd Cir. 1933). As such, they are presumed to be drug paraphernalia. Isomerisation devices designed for use in increasing the THC content of marijuana provide a good example.

Common forms of drug paraphernalia

Article I includes a detailed description of common forms of property that can fall within the definition of drug paraphernalia if used, intended for use, or designed for use to violate the drug laws. This list is not intended to be inclusive. Several of these descriptions, such as "chillums" and "bongs," may seem foreign to the lay reader. Nevertheless, these terms are part of the jargon of the drug culture and are understood by both users and merchants of drug paraphernalia. They are not unconstitutionally vague. See *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 45 S.Ct. 141 (1925).

Relevant factors in classifying paraphernalia

In addition to defining drug paraphernalia and describing the common forms, Article I sets out some of the more relevant factors to consider in determining whether an object is paraphernalia. The listing of these factors in the Model Act is not intended to be preemptory; a court or other authority is not obligated to hear evidence on, or to consider, every listed factor. Rather, the factors have been included to guide law enforcement officers, judges, and juries in their determination of what is controlled. Providing guidance on the practical application of the Act minimizes the risk of arbitrary and discriminatory enforcement, sometimes associated with even the most carefully drafted statutes. See *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S.Ct. 1298 (1968).

Conversely, the listing of these factors is not meant to be inclusive. Any logically relevant factor may be considered.

COMMENT [ARTICLE II]

Possession of drug paraphernalia

Section A makes it a crime to: (i) possess an object; (ii) classifiable as drug paraphernalia; (iii) with the intent to use that object, essentially, to produce, package, store, test or use illicit drugs in violation of the Controlled Substances

Act of the State. Section A does not make the mere possession of an object capable of use as drug paraphernalia a crime. Section A does not make the mere intent to violate the drug laws a crime. It is the possession of drug paraphernalia accompanied by an intent to use it to violate the drug laws that Section A forbids. Innocent citizens have nothing to fear from Section A.

Manufacture or delivery of drug paraphernalia

Suppliers who furnish goods or services knowing they will be used to facilitate a crime are not immune from liability. There are no legal obstacles to punishing suppliers who knowingly or recklessly aid their customers to commit crimes. This is true whether the objects or services are restricted, or peculiarly suited for illegal use, such as a still, a gun, morphine or stolen goods. See *Direct Sales Company v. United States*, 319 U.S. 703, 63 S.Ct. 1285 (1943); *Backun v. United States*, 112 F.2d 635 (4th Cir. 1940); *Israel v. United States*, 63 F.2d 345 (3rd Cir. 1933); *Weinstein v. United States*, 293 F. 888 (1 Cir. 1923); and *Commonwealth v. Stout*, 358 Mass. 237, 249 N. E. 2d 12 (1969).

It is also true when the objects or services have widespread legitimate uses in the community, such as sugar, rye, yeast, grapejuice, rubbing alcohol or a telephone answering service. See *United States v. Rogland*, 306 F.2d 782 (4th Cir. 1962); *Chapman v. United States*, 271 F.2d 693 (5th Cir. 1959); *United cigar Whelan Stores Corp. v. United States*, 28 F.2d 686 (9th Cir. 1928); *United States v. Burnett*, 53 F.2d 219 (W.D. Mo. 1931); and *People v. Lowrie*, 251 Cal. App. 2d 471 (1967).

The reasonableness of this rule is clearly expressed in *Backun v. United States*: "To say that the sale of goods is a normally lawful transaction is beside the point. The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between such a case and any other case of a seller who knows that the purchaser intends to use the goods which he is purchasing in the commission of a felony. In any such case, not only does the act of the seller assist in the commission of the felony, but his will assents to its commission, since he could refuse to give the assistance by refusing to make the sale" 112 F.2d 635 (4th Cir. 1940).

There are courts which have hesitated to hold a supplier guilty of conspiracy with, or aiding and abetting a buyer. See *United States v. Falcone*, 311 U.S. 206, 61 S.Ct. 204 (1940); and *United States v. Peoni*, 100 F.2d 401 (2 Cir. 1938). A careful reading of these decisions makes clear that they were based upon the court's unwillingness to hold a supplier equally responsible with a buyer based simply upon the supplier's knowledge that the buyer intended to commit a crime. At common law, the punishment is the same for the co-conspirator and the aider and abettor as it is for the actual perpetrator. Nothing in these cases suggests, however, that a supplier enjoys complete immunity from punishment, or that a state cannot make the conduct of the supplier a separate offense. See Note, *Falcone Revisited: The Criminality of Sales to an Illegal Enterprise*, 64 Columbia Law Rev. 225 (1953).

Section B makes it a crime to: (i) deliver, possess with intent to deliver, or manufacture with intent to deliver an object; (ii) classifiable as drug paraphernalia, (iii) knowing, or under circumstances where one reasonably should know, that it will be used, essentially, to produce, package, store, test or use illicit drugs in violation of the Controlled Substances Act of the State. The term "deliver" has the same basic meaning attributed to it by the Uniform Controlled Substances Act; namely, the actual, constructive, or attempted transfer from one person to another, whether or not there is an agency relationship. The term "manufacture," appearing in the phrase "manufacture with intent to deliver," is used in a general sense to express the entire process by which an object is made ready for sale in open commerce, including designing, fabricating, assembling, packaging and labeling. See *Danovitz v. United States*, 281 U.S. 869, 50 S.Ct. 844 (1930).

The knowledge requirement of Section B is satisfied when a supplier: (i) has actual knowledge an object will be used as drug paraphernalia; (ii) is aware of a high probability an object will be used as drug paraphernalia; or (iii) is aware of facts and circumstances from which he should reasonably conclude there is a high probability an object will be used as drug paraphernalia. Section B requires a supplier of potential paraphernalia to exercise a reasonable amount of care.

He need not undertake an investigation into the intentions of every buyer, but he is not free to ignore the circumstances of a transaction. Suppliers of objects capable of use as paraphernalia may not deliver them indiscriminately. Since each element of Section B must be proven beyond a reasonable doubt, legitimate, prudent suppliers will not be affected by this section.

Advertisement of drug paraphernalia

Section D makes it a crime to: (i) advertise an object; (ii) classifiable as drug paraphernalia; (iii) knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement is to promote the sale of the object for use, essentially, to produce, package, store, test or use illicit drugs.

Only printed advertisements promoting the sale of objects for use as paraphernalia are prohibited. The non-printed media, including radio and television, is not affected. Printed matter criticizing the drug laws, glorifying the drug culture, glamorizing the use of drugs, or providing information or instructions on illicit drugs is not affected. The target of this Section is commercial advertising.

Unlike so-called "printer's ink" statutes, which exempt printers and publishers from their coverage, Section D contains no exemptions. It applies to anyone who prints or publishes paraphernalia advertisements, and to anyone who causes these advertisements to be printed or published. For this reason, it uses the general terms "any person" and "to place."

The knowledge requirement of Section D is satisfied when the person placing the advertisement: (i) has actual knowledge it is promoting the sale of objects for use as drug paraphernalia; (ii) is aware of a high probability it is promoting the sale of objects for use as drug paraphernalia; or (iii) is aware of facts and circumstances from which he should reasonably conclude there is a high probability the advertisement is promoting the sale of objects for use as drug paraphernalia. Whether an advertisement promotes the sale of objects for use as paraphernalia is to be determined from its content. Under Section D, one need not look beyond the face of the advertisement.

Section D does not compromise First Amendment rights. The sale of objects for use as drug paraphernalia is made illegal by Section B, and Section D simply prohibits advertisements promoting these sales. Commercial solicitation of illegal activities is not protected speech. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights*, 413 U.S. 376, 93 S.Ct. 2553 (1973); and see *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 99 S.Ct. 1817 (1976).

COMMENT [ARTICLE III]

Civil forfeiture actions are directed against property and are totally independent of any criminal proceedings against individuals. Section 506 of the Uniform Controlled Substances Act provides for the seizure and civil forfeiture of: (1) illicit drugs; (2) equipment and materials used to make, deliver, import or export illicit drugs; (3) containers used to store illicit drugs; (4) conveyances involved in transporting illicit drugs; and (5) books, records and research connected with illicit drugs. States that have adopted Section 506 can seize these objects without making any compensation to the owners. The legality of civil forfeiture statutes, similar to 506, and their usefulness in helping deter crime, have been repeatedly recognized by virtually every state and federal court, including the Supreme Court of the United States. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 410 U.S. 683, 94 S.Ct. 2080 (1974).

Article III extends the civil forfeiture section of the Uniform Act to include drug paraphernalia. This allows states to keep and destroy drug paraphernalia, rather than returning it after criminal proceedings have ended. It also allows states to keep drug paraphernalia seized during an investigation, in cases where criminal proceedings are not initiated. Finally, since the standard of proof in a civil forfeiture action is simply "probable cause," or "reasonable cause," rather than "proof beyond a reasonable doubt," Article III permits states to seize and forfeit drug paraphernalia in circumstances where an arrest might not seem justified. For example, an officer who encounters a minor in possession of a hypodermic syringe, or in possession of a bong (a device especially designed for smoking marijuana), has reasonable cause to believe these objects are intended for use to introduce illicit drugs into the human body. Subjecting drug paraphernalia to civil forfeiture permits the officer to seize these objects, though he decides not to arrest the minor.

Civil forfeiture can also be an effective deterrent to commercial suppliers. See *Wiley Wholesale Company v. United States*, 308 F.2d 167 (5th Cir. 1962); *United States v. 2265 One-Gallon Paraffined Tin Cans*, 290 F.2d 105 (5th Cir. 1958); *United States v. 1,022 Assorted Firearms, Etc.*, 880 F.Supp. 635 (E.D. Mo. 1971); *United States v. 600 Bags of Southcoast Jumbado Brand Sugar*, 225 F.Supp. 706 (WD La. 1964); *Vinto Products Co. v. Goddard*, 48 F.2d 899 (Minn., 1930); and *United States v. Kottman*, 36 F.2d 86 (ND Ill. 1929).

APPENDIX D
TEXT OF HOUSE BILL H.R. 1625, 99th CONGRESS,
1st SESSION, AS INTRODUCED

99TH CONGRESS
1ST SESSION

H. R. 1625

Entitled the "Mail Order Drug Paraphernalia Control Act".

IN THE HOUSE OF REPRESENTATIVES

MARCH 20, 1985

Mr. LEVINS of California (for himself, Mr. RANGEL, and Mr. GILMAN) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

Entitled the "Mail Order Drug Paraphernalia Control Act".

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 *That this Act may be cited as the "Mail Order Drug Para-*
4 *phernalia Control Act".*

5 SEC. 102. (a) OFFENSE.—It is unlawful for any
6 person—

- 7 (1) to make use of the services of the Postal Serv-
8 ice as part of a scheme to sell any item which consti-
9 tutes drug paraphernalia; or
10 (2) to offer for sale and transportation in interstate
11 commerce any item which constitutes drug parapherna-
12 lia.

1 (b) PENALTY.—Anyone convicted of an offense under
2 subsection (a) of this section shall be imprisoned for not more
3 than three years and fined not more than \$100,000.

4 (c) FORFEITURE.—Any drug paraphernalia involved in
5 any violation of subsection (a) of this section shall be subject
6 to seizure and forfeiture. Any such paraphernalia shall be
7 delivered to the Administrator of General Services, General
8 Services Administration, who may order such paraphernalia
9 destroyed or may authorize its use for law enforcement or
10 educational purposes by Federal, State, or local authorities.

11 (d) DEFINITIONS.—The term "drug paraphernalia"
12 means any equipment, product, or material of any kind which
13 is primarily intended or designed for use in manufacturing,
14 compounding, converting, concealing, producing, processing,
15 preparing, injecting, ingesting, inhaling, or otherwise intro-
16 duced into the human body a controlled substance in violation
17 of the Controlled Substances Act (title II of Public Law 91-
18 513). It includes, but is not limited to, items primarily intend-
19 ed or designed for use in ingesting, inhaling, or otherwise
20 introducing marijuana, cocaine, hashish, hashish oil, PCP, or
21 amphetamines into the human body, such as:

22 (1) metal, wooden, acrylic, glass, stone, plastic, or
23 ceramic pipes with or without screens, permanent
24 screens, hashish heads, or punctured metal bowls;

25 (2) water pipes;

- 1 (3) carburetion tubes and devices;
- 2 (4) smoking and carburetion masks;
- 3 (5) roach clips: meaning objects used to hold burn-
- 4 ing material, such as a marijuana cigarette, that has
- 5 become too small or too short to be held by the hand;
- 6 (6) miniature spoons with level capacities of one-
- 7 tenth cubic centimeter or less;
- 8 (7) chamber pipes;
- 9 (8) carburetor pipes;
- 10 (9) electric pipes;
- 11 (10) air-driven pipes;
- 12 (11) chillums;
- 13 (12) bongos;
- 14 (13) ice pipes or chillers;
- 15 (14) wired cigarette papers; or
- 16 (15) cocaine freebase kits.

17 (e) EVIDENCE.—In determining whether an item consti-
 18 tutes drug paraphernalia, in addition to all other logically rel-
 19 evant factors, the following may be considered:

- 20 (1) instructions, oral or written, provided with the
- 21 item concerning its use;
- 22 (2) descriptive materials accompanying the item
- 23 which explain or depict its use;
- 24 (3) national and local advertising concerning its
- 25 use;

- 1 (4) the manner in which the item is displayed for
- 2 sale;
- 3 (5) whether the owner, or anyone in control of the
- 4 item, is a legitimate supplier of like or related items to
- 5 the community, such as a licensed distributor or dealer
- 6 of tobacco products;
- 7 (6) direct or circumstantial evidence of the ratio of
- 8 sales of the item(s) to the total sales of the business
- 9 enterprise;
- 10 (7) the existence and scope of legitimate uses of
- 11 the item in the community; and
- 12 (8) expert testimony concerning its use.

13 SEC. 103. EFFECTIVE DATE.—This Act shall become
 14 effective ninety days after the date of enactment.



APPENDIX E
TEXT OF SENATE BILL S. 713, 99th CONGRESS,
1st SESSION, AS INTRODUCED

S. 713, 99th Cong., 1st Sess.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Mail Order Drug Paraphernalia Control Act".

SEC. 102. (a) OFFENSE.—It is unlawful for any person—

(1) to make use of the services of the Postal Service as part of a scheme to sell any item which constitutes drug paraphernalia; or

(2) to offer for sale and transportation in interstate commerce any item which constitutes drug paraphernalia.

(b) *PENALTY*.—Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than 3 years and fined not more than \$100,000.

(c) *FORFEITURE*.—Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture. Any such paraphernalia shall be delivered to the Administrator of General Services, General Services Administration, who may order such paraphernalia destroyed or may authorize its use for law enforcement or educational purposes by federal, state, or local authorities.

(d) *DEFINITIONS*.—The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the Controlled Substances Act (Title II of Pub. L. 91-513). It includes, but is not limited to, items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as:

(1) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) Water pipes;

(3) Carburetion tubes and devices;

(4) Smoking and carburetion masks;

(5) Roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;

(7) Chamber pipes;

(8) Carburetor pipes;

(9) Electric pipes;

(10) Air-driven pipes;

(11) Chillums;

(12) Bongs;

(13) Ice pipes or chillers;

(14) Wired cigarette papers; or

(15) Cocaine freebase kits.

(e) *EVIDENCE*.—In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning its use;

(2) Descriptive materials accompanying the item which explain or depict its use;

(3) National and local advertising concerning its use;

(4) The manner in which the item is displayed for sale;

(5) Whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(6) Direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;

(7) The existence and scope of legitimate uses of the item in the community;

(8) Expert testimony concerning its use.

SEC. 103. EFFECTIVE DATE. This Act shall become effective 90 days after the date of enactment.

**APPENDIX F
ADDITIONAL REMARKS BY SENATOR WILSON UPON
INTRODUCING S. 713**

Additional Remarks by Senator Wilson Concerning S. 713

"The mail order paraphernalia problem was brought to my attention by Steven Gersten of Los Angeles, CA. I am proud to say that this legislation is supported by such fine public groups as the National Federation of Parents for Drug-Free Youth, and a California affiliate of that organization, Californians for Drug-Free Youth. Many community and parent groups through the Nation have been active in the fight against drug paraphernalia, of particular note is Families in Action from Atlanta, GA.

First, let me say that drug abuse is one of this Nation's most serious domestic concerns. The use of marijuana in this country has reached startling dimensions. Nearly 65 percent of all young Americans have tried marijuana and 48 percent of these individuals have used the drug more than 10 times. On August 12, 1982, Dr. C. Everett Koop, Surgeon General of the United States, spoke on the prevalence of marijuana use.

In the past 20 years, there has been a 30-fold increase in the drug's use among youth. More than a quarter of the American population has used the drug. The age at which people first use marijuana has been getting consistently lower and is now most often in the junior high school years. Daily use of marijuana is greater than that of alcohol among this age group. More high school seniors smoke marijuana than smoke cigarettes.

The statistics are similarly alarming on use of other controlled substances. For example, almost 15 million Americans, including one out of every seven high school seniors, have used cocaine. The drug paraphernalia industry has a vested interest in encouraging this drug use.

Sales of drug paraphernalia have reached the billions. By 1977, the paraphernalia industry had started a trade organization and a trade journal, and published the first periodical devoted to drug paraphernalia. The drug culture's message is expounded by several drug oriented magazines, which are the primary advertisers of drug paraphernalia. Unfortunately, many readers of these publications-especially High Times, the most widely read drug oriented magazine-are still in high school or younger.

The paraphernalia industry has traditionally glamorized and promoted drug use. In fact, many forms of drug paraphernalia are sold with illustrations or instructions on their use, further increasing the likelihood of drug use. Many paraphernalia devices resemble common toys and send a dangerous message to our Nation's youth, namely that using illegal drugs is fun and games.

For example, the array of items designed for use by teenagers and young adults includes (i) "Space Guns" and toy football "power hitters," which allow marijuana smoke to be inhaled deeply into the lungs, (ii) frisbee's which have a small pipe attached, so that it may be thrown to a partner after smoking, (iii) pens that can be quickly converted into marijuana pipes, designed for inconspicuous smoking in a classroom or a car. In addition, many paraphernalia devices resemble everyday products, such as chapstick holders, which are designed for concealing cocaine and other drugs. Rolling papers used to smoke marijuana now are available in a variety of flavors including cherry, strawberry, banana, and even peanut butter.

In addition to "kiddie paraphernalia," many other forms of paraphernalia are sold through the mail order and catalog method. These items include "bongs," which are long cylindrical devices designed for inhaling marijuana deep into the lungs; various types of pipes (chillums), which are designed solely for marijuana smoking; and roach clips, which allow a marijuana cigarette to be smoked after it has burned close to a smoker's fingers. There are also numerous products for the cocaine user: Cocaine kits, complete with straw, mirror, and razor blade and kits for testing the quality of cocaine. No list of paraphernalia is totally inclusive because the variety of drug paraphernalia expands proportionately to the imagination of the paraphernalia manufacturer.

Not only does paraphernalia encourage drug abuse, drug paraphernalia compounds the health problems associated with drug use. For example, "power hitters" and "bongs" increase the amount of marijuana that can be taken into the lungs and, hence, make the

user more intoxicated. This smoke is taken deep into the lungs and is absorbed by the alveoli, delicate air pockets located in the lungs. This could increase the chance of lung related diseases.

The Drug Enforcement Agency [DEA] is to be commended for its efforts in the fight against the drug paraphernalia industry. Harry Meyers, Associate Chief Counsel of the DEA, is responsible for drafting the Model Drug Paraphernalia Act, which has been adopted by 38 States and hundreds of localities. American business has also joined in the fight against drug paraphernalia. Many chamber of commerce members will not sell drug paraphernalia in their shops. The president of Southland Corp. ordered all 7-Eleven stores to stop selling rolling papers. McDonald's Corp. redesigned its stirring spoons so that they could not be used to snort cocaine. The military has banned drug paraphernalia from its bases and put "head shops" off limits to its personnel.

I am proud to say that religious groups, youth groups, lawyers, and the court system have all teamed up to fight drug paraphernalia. However, the war against drug paraphernalia is not over. The paraphernalia industry has continually sought ways to circumvent the clear mandate of the public. By using the mail system to advertise, sell and transport drug paraphernalia, the paraphernalia industry has evaded State and local laws."¹

¹ "Remarks of Senator Wilson," 99th Cong., 1st Sess., 131 *Congressional Record* S-3309 (March 20, 1985).

APPENDIX G
TEXT OF 21 U.S.C. 857

Legislative History. For legislative history and purpose of Pub.L. 99-570, see 1986 U.S. Code Cong. and Adm. News, p. 5393.

Library References
 Drugs and Narcotics ¶69, 73.
 C.J.S. Drugs and Narcotics §§ 165, 173 et seq.

§ 857. Use of Postal Service for sale of drug paraphernalia

(a) Unlawfulness

It is unlawful for any person—

- (1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;
- (2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or
- (3) to import or export drug paraphernalia.

(b) Penalties

Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined not more than \$100,000.

(c) Seizure and forfeiture

Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture upon the conviction of a person for such violation. Any such paraphernalia shall be delivered to the Administrator of General Services, General Services Administration, who may order such paraphernalia destroyed or may authorize its use for law enforcement or educational purposes by Federal, State, or local authorities.

(d) Definition of "drug paraphernalia"

The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act (title II of Public Law 91-513). [21 U.S.C.A. § 801 et seq.] It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as—

- (1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
- (2) water pipes;
- (3) carburetion tubes and devices;
- (4) smoking and carburetion masks;
- (5) roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
- (6) miniature spoons with level capacities of one-tenth cubic centimeter or less;
- (7) chamber pipes;
- (8) carburetor pipes;
- (9) electric pipes;
- (10) air-driven pipes;
- (11) chillums;
- (12) bongs;
- (13) ice pipes or chillers;
- (14) wired cigarette papers; or
- (15) cocaine freebase kits.

(e) Matters considered in determination of what constitutes drug paraphernalia

In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

- (1) instructions, oral or written, provided with the item concerning its use;

- (2) descriptive materials accompanying the item which explain or depict its use;
- (3) national and local advertising concerning its use;
- (4) the manner in which the item is displayed for sale;
- (5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
- (6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;
- (7) the existence and scope of legitimate uses of the item in the community; and
- (8) expert testimony concerning its use.

(f) Exemptions

This section shall not apply to—

- (1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or
- (2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

(Pub.L. 99-570, Title I, § 1822, Oct. 27, 1986, 100 Stat. 3207-51; Pub.L. 100-690, Title VI, § 6485, Nov. 18, 1988, 102 Stat. 4384.)

References in Text. The Controlled Substances Act, referred to in subsec. (d), in provisions preceding par. (1), is Title II of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables volume.

Codification. Section was not enacted as part of The Controlled Substances Act, Pub.L. 91-513, Title II, which comprises this subchapter.

Effective Date. Section 1823 of Pub.L. 99-570 provided that: "This subtitle [enacting this sec-

tion] shall become effective 90 days after the date of enactment of this Act [Oct. 27, 1986]."

Legislative History. For legislative history and purpose of Pub.L. 99-570 see 1986 U.S. Code Cong. and Adm. News, p. 5393. See, also, Pub.L. 100-690, 1988 U.S. Code Cong. and Adm. News, p. 5937.

Library References

Drugs and Narcotics \Rightarrow 69.

C.J.S. Drugs and Narcotics § 165.

§ 858. Endangering human life while illegally manufacturing a controlled substance

Whoever, while manufacturing a controlled substance in violation of this subchapter, or attempting to do so, or transporting or causing to be transported materials, including chemicals, to do so, creates a substantial risk of harm to human life shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.

(Pub.L. 100-690, Title VI, § 6301(a), Nov. 18, 1988, 102 Stat. 4370.)

References in Text. This subchapter, referred to in text, was in the original "this title" which is Title II of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242, and is popularly known as the "Controlled Substances Act". For complete classification of

Title II to the Code, see Short Title note set out under section 801 of this title and Tables volume.

Legislative History. For legislative history and purpose of Pub.L. 100-690, see 1988 U.S. Code Cong. and Adm. News, p. 5937.

§ 872. Education and research programs of Attorney General

[See main volume for text of (a) to (e)]

(f) Program to curtail diversion of precursor and essential chemicals

The Attorney General shall maintain an active program, both domestic and international, to curtail the diversion of precursor chemicals and essential chemicals used in the illicit manufacture of controlled substances.

(As amended Pub.L. 100-690 Title VI, § 6060, Nov. 18, 1988, 102 Stat. 4320.)

APPENDIX H
EXCERPTS FROM S. 2849, 99th CONGRESS, 2nd SESSION

Excerpts from S. 2849, 99th Congress, 2nd Session

Subtitle G-Prohibition on the Interstate Sale and Transportation of Drug Paraphernalia

SEC. 3301. SHORT TITLE.

This subtitle may be cited as the "Mail Order Drug Paraphernalia Control Act".

SEC. 3302. OFFENSE.

(a) It is unlawful for any person—

(1) to make use of the services of the Postal Service as part of a scheme to sell any item which constitutes drug paraphernalia; or

(2) to offer for sale and transportation in interstate or foreign commerce any item which constitutes drug paraphernalia.

(b) Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined not more than \$100,000.

(c) Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture. Any such paraphernalia shall be delivered to the Administrator of General Services, General Services Administration, who may order such paraphernalia destroyed or may authorize its use for law enforcement or educational purposes by Federal, State, or local authorities.

(d) The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the Controlled Substances Act (title II of Public Law 91-513). It includes, but is not limited to, items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as:

- (1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
- (2) water pipes;
- (3) carburetion tubes and devices;
- (4) smoking and carburetion masks;
- (5) roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
- (6) miniature spoons with level capacities of one-tenth cubic centimeter or less;
- (7) chamber pipes;
- (8) carburetor pipes;
- (9) electric pipes;
- (10) air-driven pipes;
- (11) chillums;
- (12) bongs;
- (13) ice pipes or chillers;
- (14) wired cigarette papers; or
- (15) cocaine freebase kits.

(e) In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

- (1) instructions, oral or written, provided with the item concerning its use;
- (2) descriptive materials accompanying the item which explain or depict its use;
- (3) national and local advertising concerning its use;
- (4) the manner in which the item is displayed for sale;
- (5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
- (6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;
- (7) the existence and scope of legitimate uses of the item in the community; and
- (8) expert testimony concerning its use.

(f) This subtitle shall not apply to—

- (1) manufacturers, wholesalers, jobbers, licensed medical technicians, technologists, nurses, hospitals, research teaching institutions, clinical laboratories, medical doctors, osteopathic physicians, dentists, chiropodists, veterinarians, pharmacists, or embalmers in the normal lawful course of their respective businesses or professions and common carriers or warehousemen or their employees engaged in the lawful transportation of such items;
- (2) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; and
- (3) any person or entity that, in the normal lawful course of business, imports, exports, transports, or sells through the mail or by any other means any pipe, paper, or accessory primarily intended or designed for use with tobacco products.

For purposes of clause (3), any pipe with a bowl depth of one-half inch or greater shall be presumed to be intended or designed for use with tobacco products.

SEC. 3303. EFFECTIVE DATE.

This subtitle shall become effective ninety days after the date of enactment of this subtitle.

APPENDIX I
REMARKS OF SENATOR WILSON DURING SENATE
CONSIDERATION OF S. 2878

Remarks of Senator Wilson During Senate Consideration of S. 2878

"To the extent that we are unsuccessful in interdicting the supply of drugs, we have to make the distribution and the sale of them as difficult as possible and one of the gaping holes in existing law is that, ironically, as local ordinances have succeeded in shutting down 'head shops'—that is, those stores in which drug paraphernalia is sold—it has remained possible for those who wish to maintain their profit in the sale of these items to do so by shipping their products interstate, even using the mails to do so. This legislation contains as one of its important points the fact that it was very closely adapted to the model act adopted by the Drug Enforcement Administration, a mail order Drug Paraphernalia Control act, which will outlaw the sale and shipment of drug paraphernalia, those items which will enhance or aid in the use of dangerous controlled substances.

This legislation will prohibit the mail order and catalog sales of drug paraphernalia, which have grown dramatically as a result of these successful local government crackdowns on 'head shops' and other entities selling drug paraphernalia. Catalogs and other publications now promote drug use. One such publication has circulation of some 4 million people, most of whom are high school age or younger. They seek to make a great adventure of drug abuse. These publications glamorize drugs, glorify its use and pander to the drug fantasies of America's youth.

How successful have they been? Sales of drug paraphernalia have reached billions of dollars. By 1977, the drug paraphernalia industry had even started a trade organization and trade journal and published the first periodical devoted to drug paraphernalia. The drug culture is now expounded by several drug-oriented magazines which are the primary advertisers of drug paraphernalia. Again, readers of these magazines, these publications, are children.

Mr. President, I shall not take more time. I will say that this good beginning is late in coming. Those who have said that we need to take the action required to enact these provisions before we leave and close down the 99th session of Congress are absolutely right. There is no greater imperative. If late, let us not be a dollar short. Let us make clear the commitment, now that we have begun this war, to prosecute it to a vigorous and successful conclusion."¹

¹ 132 *Congressional Record* pp. 26450-26451 (1986).

APPENDIX J
TEXT OF H.R. 2974, 101st CONGRESS, 1st SESSION

To amend section 1822 of the Anti-Drug Abuse Act of 1986 with respect to drug paraphernalia, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

July 21, 1989

Mr. Rangel introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend section 1822 of the Anti-Drug Abuse Act of 1986 with respect to drug paraphernalia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "The Drug Paraphernalia Act of 1989".

SEC. 2. AMENDMENT TO ANTI-DRUG ABUSE ACT OF 1986.

Subsection (a) of section 1822 of the Anti-Drug Abuse Act of 1986 (21 U.S.C. 857) is amended to read as follows:

"(a) It is unlawful for any person--

"(1) to make use of the services of the Postal Service as part of a scheme to sell drug paraphernalia;

"(2) to offer for sale or sell drug paraphernalia; or

"(3) to import or export drug paraphernalia."

SEC. 3. USE OF LOCAL LAW ENFORCEMENT.

(a) Use of Existing Authority.--The Attorney General shall use the authority provided under section 508 of the Controlled Substances Act to provide for the enforcement of section 1822 of the Anti-Drug Abuse Act of 1986 (21 U.S.C. 857) as amended by this Act through the use of task forces consisting of appropriate Federal, State, and local personnel.

(b) Authorization of Appropriations.--There are authorized to be appropriated, in addition to any other authorization by other law, \$5,000,000 for each of fiscal years 1990 through 1994 to carry out this section.

APPENDIX K
ADDITIONAL REMARKS BY REPRESENTATIVE RANGEL
CONCERNING H.R. 2974

Additional Remarks by Representative Rangel Concerning H.R. 2974

As it stands now, the import and export, use of the mails, and the interstate transport and sale of drug paraphernalia items is banned under the 1986 Anti-Drug Abuse Act. My bill extends the reach of existing law and targets all drug paraphernalia sales. My objective is to have all drug paraphernalia disappear from the shelves totally. Whether it involves interstate or intrastate activity really will not matter at all. It will be a national ban. Pure and simple.

To assist the ability of our Federal enforcement agencies to enforce this law, the bill authorizes the appropriation of \$5 million to the Attorney General for the establishment of task forces with State and local agencies to enforce this act.

* * * * *

In places like Chicago, New York, and here in the Nation's Capital, our young people are giving their lives over wholesale to the illusory success and pleasure of drugs and the drug trade. The future and national security of America is threatened. The ready availability of drug paraphernalia contributes to the overall perpetuation of the illicit drug problem.

We said in 1986 when we passed the first drug bill that it was not the be-all and the end-all of the legislative address to this national crisis. We said in 1988, when we passed the second antidrug bill into law, that the work still remained undone. This bill is just another piece in the puzzle that we are still working to solve, Mr. Speaker, and I hope that all of my colleagues will join me in sponsoring this bill."¹

¹ 135 *Congressional Record* E-2627 (July 21, 1989).

APPENDIX L
INFORMATION SUBMITTED BY THE ASSISTANT UNITED STATES ATTORNEY,
BUFFALO, NEW YORK

U.S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

1 6/27/89

In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-vs-

RYERS CREEK CORPORATION D/B/A
"THE MILL", GRAHAM HOWARD,
LORRAINE M. SHAPIRO AND LARRY
D. SHAPIRO,

May 1989 Session
(Impanelled 5/10/89)

Term

No. CR 89-107 T

Viol Title 18, United
States Code,
Section 2
Title 21, United
States Code,
Sections 857(a)(1),
857(a)(2) and
857(a)(3)

COUNT I

The Grand Jury Charges:

Between on or about January 25, 1987 and on or about April 26, 1989, at Corning, New York in the Western District of New York, the defendants, RYERS CREEK CORPORATION D/B/A "THE MILL", GRAHAM HOWARD, LORRAINE M. SHAPIRO AND LARRY D. SHAPIRO, did knowingly, intentionally and unlawfully make use of the U. S. Postal Service or other interstate conveyances to wit: United Parcel Service, as part of a scheme to sell drug paraphernalia, as defined in Title 21, United States Code, Section 857(d); all in violation of Title 21, United States Code, Section 857(a)(1) and Title 18, United States Code, Section 2.

COUNT II

The Grand Jury Further Charges:

Between on or about January 25, 1987 and on or about April 26, 1989, at Corning, New York in the Western District of New York, the defendants, RYERS CREEK CORPORATION D/B/A "THE MILL", GRAHAM HOWARD, LORRAINE M. SHAPIRO AND LARRY D. SHAPIRO, did knowingly, intentionally and unlawfully offer for sale and transportation in interstate or foreign commerce, drug paraphernalia, as defined in Title 21, United States Code, Section 857(d); all in violation of Title 21, United States Code, Section 857(a)(2) and Title 18, United States Code, Section 2.

COUNT III

The Grand Jury Further Charges:

Between on or about January 25, 1987 and on or about April 26, 1989, at Corning, New York in the Western District of New York, the defendants, RYERS CREEK CORPORATION D/B/A "THE MILL", GRAHAM HOWARD, LORRAINE M. SHAPIRO AND LARRY D. SHAPIRO, did knowingly, intentionally and unlawfully export drug paraphernalia, as defined in Title 21, United States Code, Section

857(d); all in violation of Title 21, United States Code, Section 857(a)(3) and Title 18, United States Code, Section 2.


DENNIS C. VACCO
UNITED STATES ATTORNEY

A TRUE BILL:


FOREPERSON



Sumita, the rare white tiger visiting from the Cincinnati Zoo, leans against a brick wall Thursday as she tries out her temporary home in the Buffalo Zoo's 2-year-old Habicat. The 13-year-old, 400-pound female, distinguished by black stripes on a white background, will be formally introduced to her Western

New York public at Friday night's annual Catillion, a black-tie dinner at 7 p.m. Starting Saturday, patrons of the zoo can see her from 11 a.m. to 5:30 p.m. daily, though Sept. 15. The zoo hopes her visit will attract many visitors and help close a \$400,000 budget gap resulting from government funding cuts.

BEN 6/23/89 - Sunrise

3 indicted in drug-paraphernalia case

U.S. weighs seizing all of Corning manufacturer's assets

By DAN HERBECK
News Staff Reporter

A federal grand jury in Buffalo has indicted the three top people in a company that authorities charge is one of the nation's leading manufacturers of pipes used to smoke drugs.

In addition, government prosecutors are considering seizing all the company's assets.

Two of the accused, however, said Thursday the government has no case and is simply harassing the corporation.

As part of a national crackdown on

the sellers of drug paraphernalia, criminal charges were filed against the operators of The Mill, a Corning company that manufactures pipes used to smoke marijuana and hashish. U.S. Attorney Dennis C. Vacco said Thursday.

Vacco said he is considering taking action to seize company property under federal drug forfeiture laws.

"In many ways, the people who sell these things are almost as dangerous as those who sell narcotics," Vacco said. "They have a lot to do with the attitude of society toward drugs. They create the aura that drug use is OK."

Federal agents said the charges

against the three are considered an important strike in a national effort to use toughened narcotics laws to attack those who sell the tools of the drug trade.

Charged with using the postal service for the sale of drug paraphernalia were Larry D. Shapiro, 43; his wife, Lorraine M. Shapiro, 41; and Graham Howard, 43, all of Corning.

Mrs. Shapiro and Howard denied the charges.

So-called "head shops" in Western New York — some of which sell prod-

See Pipes Page B4

Pipes: Owners have filed harassment suit

Continued from Page B1

acts made at The Mill — can expect to be raided soon as the crackdown continues, investigators said.

"It's part of the 'zero tolerance' approach," said Special Agent David A. Wright, chief of investigations for the U.S. Customs Service in Buffalo. "If we're not going to tolerate drugs in any manner, why tolerate drug paraphernalia?"

In telephone interviews, Lorraine Shapiro and Howard said the charges are false. They said the company plans to stay in business and has filed its own federal court lawsuit charging the Customs Service with harassment.

"We sell exotic tobacco pipes and tobacco-related items," Mrs. Shapiro said. "We sell to distributors and retail stores. It's impossible to know what the consumer uses them for."

"This is an extreme blow to us," Howard said. "We are not evil people who operate undercover and try to break the law."

Tougher federal drug laws enacted last year made it easier to pursue drug paraphernalia cases

and spawned "Operation Pipe," a nationwide Customs Service crackdown aimed at manufacturers, importers and sellers of drug-use accessories, Wright said.

"It is illegal to import or transport across state lines any item intended for the administration of narcotics," Wright said.

Customs agents plan to continue legal action with raids and monitoring of about 20 known head shops in Buffalo and Niagara Falls, Wright said. The Mill is the third such manufacturer in the United States to be prosecuted since the "Operation Pipe" crackdown began last year, he added. If convicted, the Howard and the Shapiros each face prison sentences of up to three years and fines up to \$100,000. Shapiro could not be reached to comment Thursday. The attorney for the three, Lawrence J. Andolina, declined to comment.

Established in 1970 and run under the corporate name of the Ryers Creek Corp., The Mill is one of the nation's largest distributors of hashish pipes, marijuana pipes, marijuana "roach clips" and

other related items, said Assistant U.S. Attorney Thomas S. Duszkievicz.

"They supply head shops all over the country and also sell in national drug paraphernalia catalogs," Duszkievicz said. "They claim gross sales of \$500,000 a year."

"They advertise the pipes as wooden tobacco pipes, but that's a crock," he added.

In January, \$70,000 worth of pipes were seized from the Corning business, but U.S. District Judge Michael A. Telesca ordered the pipes returned to The Mill in February. Later, Telesca directed The Mill to return the pipes to the government, but "by that time, they had already sold the pipes," Duszkievicz said.

Duszkievicz, Vacco and Wright said they are convinced the items sold by the company are intended for drug use.

Mrs. Shapiro disagreed.

"Our opinion is that the government is not able to spot drug paraphernalia," she said. "The manufacturer is not responsible for what the product is used for. We've been in business for 19

years. Nobody bothered us for eight-and-a-half."

Mrs. Shapiro said she does not advocate the legalization of drugs.

"I do think that the most abused drug in this county is the only legal one — alcohol. There are more problems from alcohol than any of the others," she said.

Mrs. Shapiro said she is vice president of The Mill. Howard is president and her husband was a founder of the company, but no longer holds an office, she said. She added that she and her husband have two children and are active in service clubs and other community affairs in the Corning area.

"I am proud of our business," she said. "I am proud of what we do."

Duszkievicz said he does not believe the claims that the items manufactured at the Corning plant are intended for tobacco use only.

"They don't market it as a drug product, but these manufacturers play a significant role in the drug problem," he said. "They are part of the supply chain. They help facilitate drug use."

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RYERS CREEK CORP., d/b/a/ THE MILL,

Plaintiff,

- vs -

CIV-89-157T

STEVEN M. MacMARTIN, Individually and
as an Agent of the U.S. CUSTOMS
SERVICE, U.S. TREASURY DEPARTMENT,
U.S. CUSTOMS SERVICE and UNITED STATES
OF AMERICA,

Defendants.

Take notice of an Order, of which the within is
a copy, duly granted in the within entitled action on the
20th day of April, 1989 and entered in the office of
the Clerk of the United States District Court, Western
District of New York, on the 20th day of April, 1989.

Dated: Rochester, New York

April 20, 1989

Clerk
United States District Court
Western District of New York
282 U.S. Courthouse
Rochester, New York 14614

TO: L. Andolina, Esq.
T. Duszkievicz, AUSA

RYERS CREEK CORP., d/b/a THE MILL,
Plaintiff,

v.

CIV-89-157T

STEVEN M. MacMARTIN, Individually and
as an Agent of the U.S. CUSTOMS
SERVICE, U.S. TREASURY DEPARTMENT,
U.S. CUSTOMS SERVICE and UNITED STATES
OF AMERICA,

DECISION
and ORDER

Defendants.

INTRODUCTION

Plaintiff, Ryers Creek Corporation, doing business as The Mill ("the Mill"), is a manufacturer and distributor of wooden smoking pipes. On January 19, 1989, agents of the United States Customs Service, in conjunction with other law enforcement officers, executed a search warrant upon the Mill's principal place of business and manufacturing facility in Corning, New York. Pursuant to the warrant, the agents seized all of the Mill's finished pipes and pipes in progress, as well as business records and some raw materials, as evidence of violation(s) of the Mail Order Drug Paraphernalia Control Act, 19 U.S.C. § 857 (the "Act"), which inter alia, makes unlawful the sale of drug paraphernalia in interstate or foreign commerce.

Neither the Mill nor its principals or employees have been charged with a violation of § 857 subsequent to the search.

The Mill commenced this action February 2, 1989, seeking declaratory and injunctive relief concerning the application of the Act to its manufacture of wooden pipes. In its complaint, and subsequent motion for a temporary restraining order and preliminary injunction, the plaintiff alleges that neither the search and seizure on January 19, 1989 nor any future search of the Mill's premises could be grounded on the Act because the Mill's pipes are traditionally intended for use with tobacco products and such items are expressly exempt from the Act pursuant to § 857(f).

The Court ordered a hearing on the motion for a preliminary injunction. At the close of the first day of testimony,¹ I ordered defendants to turn over all of the seized material to the Mill, basing that determination on the plain language of the seizure and forfeiture provision in the Mail Order Drug Paraphernalia Control Act, 21 U.S.C. § 857(c). Under that provision, seizure and forfeiture of drug paraphernalia is conditioned upon a prior conviction under § 857(a). Since neither the Mill, nor any of its principals or employees, had been so convicted (or even charged), I determined that the seizure of the Mill's property, purportedly pursuant to § 857, was improper, and accordingly ordered the property returned.

The Government subsequently moved for reconsideration of that determination, stating that the search and seizure of the Mill's property had been undertaken pursuant to a validly issued warrant, and in no way implicated the seizure and forfeiture provision in § 857. I thereupon reserved on the Government's

motion for reconsideration pending the conclusion of the evidentiary hearing.

The plaintiff called five witnesses in support of its case in chief, and one rebuttal witness. Defendants called three witnesses, including defendant MacMartin. Samples of every type of item seized from the Mill by the defendants were admitted into evidence, as well as samples of the Mill's own advertisements and advertising brochure and copies of catalogs in which Mill products are advertised by its distributors.

For the reasons discussed below, I find that defendants properly seized the property from the Mill pursuant to warrant. Such finding requires me to deny plaintiff's application for preliminary relief.

DISCUSSION

Pursuant to the Government's motion for reconsideration of my earlier order directing the Government to return to the Mill all of the items seized from the Mill on January 19, 1989, I find that such seizure is not controlled by 21 U.S.C. § 857(c). Accordingly, the lack of a conviction under § 857(a) does not necessarily determine that such seizure was improper. Rather, the Court must determine whether the seizure was proper pursuant to a pre-indictment search warrant.

In opposition to plaintiff's motion for a preliminary injunction, the Government argues that plaintiff's sole remedy lies in a motion for return of its property pursuant to Fed. R. Crim. P. 41(e).

Rule 41(e) expressly provides that an allegedly illegal search and seizure may be challenged by motion. It is within the district court's jurisdiction to entertain such a motion even before an underlying indictment has been filed. DiBella v. U.S., 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed. 2d 614 (1962). This "anomalous" jurisdiction is to be exercised with great restraint and caution, since it rests upon the Court's supervisory powers over the actions of federal law enforcement officials. Fifth Avenue Peace Parade Committee v. Hoover, 327 F. Supp. 238, 242 (S.D.N.Y. 1971), aff'd., 480 F.2d 326, cert. denied, 415 U.S. 948 (1974).

A party aggrieved by an allegedly illegal search and seizure, who is the subject of neither a grand jury investigation nor a criminal action, however, is not limited to seeking relief by way of Rule 41. Whatever may be the "theoretical difficulties" involved in determining how to bring such a grievance before the Court, "if a federal prosecutor unlawfully seizes property for use in a criminal prosecution, then even before an indictment is returned, the party aggrieved has an independent action." Lord v. Kelley, 223 F. Supp. 684, 688 (D. Mass. 1963). Such an action is a civil matter and should be so docketed. U.S. v. Koenig, 290 F.2d 166, 169 (5th Cir. 1961).

Whether the procedure employed to bring the issue before the Court is Rule 41(e) or, as in this case, a suit in equity, the Court must consider three factors in determining whether to grant relief: whether there has been a clear showing of a search and

seizure in callous disregard of the Fourth Amendment or of some statutory provision; whether the movant/plaintiff would suffer irreparable injury if relief is not granted; and whether an adequate remedy at law exists. Pieper v. U.S., 604 F.2d 1131 (8th Cir. 1979); see also Richey v. Smith, 515 F.2d 1239, 1243 (5th Cir. 1975).

In this case, plaintiff has stated that, without the relief sought, it cannot proceed to manufacture its pipes without fear of future searches and seizures and of incurring criminal and/or civil liability. Plaintiff's counsel has informed the Court that, rather than run such risks, plaintiff has shut its doors pending the outcome of this case. This loss of a business itself cannot be characterized merely as a monetary loss, and I find that it constitutes the threat of irreparable harm.

Where, as here, the plaintiff has neither been indicted under § 857(a) nor made the subject of a grand jury investigation, see Standard Drywall, Inc. v. U.S., 668 F.2d 156 (2d Cir. 1982), plaintiff does not have exclusive recourse to Rule 41. Furthermore, the declaratory relief which plaintiff seeks is not available pursuant to Rule 41. Therefore, plaintiff is without an adequate remedy at law.

The remaining determination for the Court is whether the search and seizure of the Mill's property has been shown to be in callous disregard of plaintiff's Fourth Amendment rights or of its rights under any other statutory provision. I find that this determination, in turn, depends on whether the items seized are so

clearly exempt from the strictures of § 857(a) and (d), that the search warrant of the Mill's premises was improperly sought and executed.

In determining whether defendants had probable cause to believe that a search of the Mill's premises would yield evidence of a violation of 21 U.S.C. § 857(a), this Court looks first to the statute itself.

The Mail Order Drug Paraphernalia Control Act (the "Act") is codified at 19 U.S.C. § 857. The Act defines "drug paraphernalia" to mean

Any equipment, product, or material of any kind which is primarily intended or designed for . . . introducing into the human body a controlled substance It includes . . .

(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; . . .

§ 857(d) (emphasis added).

Thus, Congress expressly included smoking pipes in the definition of drug paraphernalia.

The statute provides an express exemption for, inter alia, items traditionally intended for use with tobacco products:

This section shall not apply to --
. . . (2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

§ 857(f).

Plaintiff's experts argue that, if an object is capable of both

burning a combustive and of being smoked, it is a pipe capable of being used with tobacco which is exempt from the statute pursuant to § 857(f)(2). An application of that reasoning to the statutory exemption would effectively vitiate the proscriptive provision found at subsection (d)(1). Thus, I reject it. The statute itself provides the means to harmonize § 857(d) and § 857(f).

Section 857(e) expressly provides that all logically relevant factors should be considered in determining whether an item constitutes drug paraphernalia, and contains a non-exclusive list of eight such factors:

- (1) instructions, oral or written, provided with the item concerning its use;
- (2) descriptive materials accompanying the item which explain or depict its use;
- (3) national and local advertising concerning its use;
- (4) the manner in which the item is displayed for sale;
- (5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
- (6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;
- (7) the existence and scope of legitimate uses of the item in the community; and
- (8) expert testimony concerning its use.

An application of these factors to the Mill's pipes substantiates that probable cause exists to believe that they are drug paraphernalia.

Advertising: There was extensive testimony concerning the Mill's advertising of its products; the Mill itself advertised its products only through Smokeshop Magazines, a periodical aimed at the traditional tobacco market, and its own glossy circulars, copies of which were mailed to, and confiscated at, various head shops in the Rochester area. Furthermore, Mill pipes are advertised in various catalogs which, given the totality of items advertised therein, can only be characterized as catalogs of drug paraphernalia.

Manner of Sale: The Mill's pipes are sold at both traditional tobacco stores and head shops. While the Mill does not hold itself out as a licensed distributor of tobacco products, its principals stated that the Mill is a manufacturer of tobacco-related products which sells its products to dealers of tobacco products. Notwithstanding this assertion, I find that substantial evidence in the record established that many of the Mill's major distributors deal in drug paraphernalia, and not merely in tobacco-related products.

Ratio of Sales: While Ms. Shapiro testified that many of the items confiscated from the Mill are no longer in its manufacturing line, I was not provided any samples of types of pipes manufactured by the Mill which were not confiscated. Consequently, on the record before me, it appears that virtually all of the Mill's sales are in the types of pipes which were confiscated.

Legitimate Uses: Notwithstanding their functional similarities, I find that the Mill's pipes are not like traditional tobacco pipes. To paraphrase current advertising rhetoric, this is not your grandfather's pipe. The pipes seized from the Mill are constructed of different and unusual woods. While they vary in design details (e.g., carved stems, wood inlays), they are generally of the same type: small-bowl (as small as 1/4" diameter), short stem (as short as 1-1/4") pipes; many with metal screens, some with hinged caps; some with carburator holes.

Expert Testimony: The Mill tendered expert testimony from three individuals with strong ties to the tobacco industry: Mr. Benjamin Rapaport, an expert on tobacco use and tobacco smoking devices; J. M. Boswell, the proprietor of a tobacco shop in Chambersburg, Pennsylvania; and L. Page MacCubbin, the proprietor of tobacco shops in Washington, D.C. and Rehoboth, Delaware. Predictably, the Mill attempted to establish through these witnesses that the items seized from the Mill are traditionally intended for use with tobacco and, therefore, exempt from the Mail Order Drug Paraphernalia Control Act.

I found unpersuasive plaintiff's expert testimony to the effect that the Mill pipes are traditionally intended for use with tobacco products. Much of the expert testimony, as given, amounted to mere speculation, including unsubstantiated assertions that more women are smoking pipes and that pipe smokers are driven by time constraints, and that both of these factors have resulted in an

increasing popularity of small tobacco pipes. Plaintiff's experts relied on the premise that there is no standard for the configuration of tobacco pipes and from this assertion reasoned that any pipe which may be used to smoke tobacco is, perforce, a traditional tobacco pipe. As already discussed, however, this reasoning is unacceptable because it conflicts with the plain language of § 857.

The Government relied chiefly on defendant MacMartin for its expert testimony. Mr. MacMartin has served nine years with the United States Customs Service. He spent approximately seven of those years as a Customs Inspector at the U.S.-Canadian border. In the course of his duties as a Customs Inspector, Mr. MacMartin regularly searched for, and confiscated, items of drug paraphernalia. For the past two years, Mr. MacMartin has been a Special Agent for the Customs Service, and in that capacity he has both received formal instruction concerning drug paraphernalia and investigated other cases of suspected violations of Customs law concerning drug paraphernalia. Agent MacMartin's testimony essentially expanded on his affidavit submitted in support of the application for the search warrant, as well as providing details of the actual search.

While MacMartin's testimony suffered from lack of detail -- he stated that he was advised by the Assistant United States Attorney that he need not make a record of the details of his background investigation of the Mill -- I find his testimony

credible: the pipes of choice of drug users differ from pipes traditionally used with tobacco products, and the pipes manufactured by the Mill and seized by Customs agents fall into the former category.²

Thus, an analysis of the pipes seized from the Mill pursuant to the factors outlined in § 857(e) supports the determination that probable cause existed to believe that the pipes constitute drug paraphernalia. This determination is not undercut by the testimony of the principals of the Mill.

I found the testimony of Lorraine Shapiro, who owns a half-interest in the Mill and is active in its management, rife with large and small inconsistencies, marked by a false naivete', and therefore essentially unreliable.³ Ms. Shapiro testified that, in her capacity as a principal of the Mill, she traveled regularly to major trade shows in the tobacco product industry, and that she kept abreast of issues germane to the industry, particularly through Smokeshop Magazine. Given the emergence of anti-drug paraphernalia laws throughout the country in the last 15 years, I find it hardly credible that she could be so uninformed about the distinctions between pipes which are traditional tobacco pipes and pipes which constitute drug paraphernalia. Ms. Shapiro's insistence that the advertisement of Mill pipes in the catalogs introduced into evidence, such as those distributed by Nalpac, Music City, Fine-Line, and Life Style Retailer, in no way implicated Mill pipes as drug paraphernalia, was similarly incredible.

While the pipe smoker may ultimately decide whether a specific pipe will be used for legitimate or illegitimate purposes, the Mail Order Drug Paraphernalia Control Act is not limited in its application merely to end users of drug paraphernalia. It is intended to prevent any use of the mails, or of interstate commerce, in order to profit in any way from the sale of drug paraphernalia. See S. 2878, 99th Cong., 2d Sess., 132 Cong. Rec. S13758 (1986). Thus, § 857 applies to any party on the distribution chain - from manufacturer to end user - who has "knowledge that there is strong probability that [the items will be used illegally.]" U.S. v. 57,261 Items of Drug Paraphernalia, ___ F.2d ___, 1989 ___ WL 200915, at page 5 of 17 (6th Cir. 1989).

Having determined that the search and seizure were executed pursuant to probable cause, I further determine that plaintiff has failed to demonstrate either a likelihood of success on the merits of its underlying claims for declaratory relief and monetary damages or sufficiently serious questions going to the merits to make them a fair ground for litigation. Accordingly, I find that plaintiff is not entitled to preliminary injunctive relief. Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam); Deeper Life Christian Fellowship, Inc. v. Bd. of Education, 852 F.2d 676 (2d Cir. 1988).

WHEREFORE, plaintiff's motion for a preliminary injunction is denied. Plaintiff shall return to defendants the property

seized from the Mill's premises pursuant to search warrant on
January 19, 1989.⁴

SO ORDERED.



MICHAEL A. TELESKA
United States District Judge

DATED: Rochester, New York
April 20, 1989

FOOTNOTES

1. The hearing on plaintiff's motion for a preliminary injunction took place February 24, March 22, 23 and 29. Following the first day of testimony, the matter was adjourned because of the Court's prior trial commitments.
2. The Court confirms its understanding, based on representations of the Government, that the Government seized items from the Mill in connection with a criminal investigation, see, U.S. v. Main Street Distributing, Inc., 700 F.Supp. 655 (E.D.N.Y. 1988) rather than in connection with a civil forfeiture pursuant to 19 U.S.C. § 1595(c), see, U.S. v. 57,261 Items of Drug Paraphernalia, (to be reported at 705 F.Supp. 1256) (M.D.Tenn. 1988), aff'd, ___ F.2d ___, 1989 WL 20195 (6th Cir. 1989), and that, in conformity with its representations at the hearing, the Government will commence timely formal proceedings in this criminal investigation.
3. As an example, a number of items which the Government characterized as "roach clips" were also seized from the Mill. Ms. Shapiro claimed that they were made from scrap pieces of exotic wood connected to metal alligator clips, designed with no particular use in mind other than to prevent the waste of scrap wood. (T. 166)
4. Plaintiff need not return those items which, at hearing, the parties agreed did not constitute drug paraphernalia.

APPENDIX M
PARTIAL CHRONOLOGY OF CUSTOMS SEIZURES OF DRUG PARAPHERNALIA,
FROM POSTHEARING BRIEF SUBMITTED BY ROBERT VAUGHN

January 4, 1987

The Peacock, Inc. - 46 boxes of imported Indian pipes seized at the Pan Am dock in NYC. After negotiations all pipes released due to just enforcement date being January 27, 1987.

March 4, 1987

Comtempo Tobacco Products, Inc. - \$85,000.00 of Japanese hookahs, ceramic pipes and cigarette holders were seized and subsequently forfeited as alleged drug paraphernalia. The civil case was later used to substantiate a search and seizure order.

May 28, 1987

J & M Sales Co. d/b/a Jon Michael's Gifts - According to The St. Louis Post Dispatch, approximately \$250,000.00 in alleged drug paraphernalia was seized by federal agents. To prove the harassing nature of the seizure, the United States returned all seized merchandise on August 23, 1988, thereby effectively dispossessing the retail store of its inventory for 15 months.

July 14, 1987

Garzonyx Imports - Approximately \$429.00 worth of onyx pipes imported from Mexico were seized. Seventeen months later a forfeiture action was finally commenced with no court date set to hear the case. The Milwaukee Journal reported January 1, 1989 that the family import business was destroyed waiting for the court to respond.

December 10, 1987

International Imports - Over 418 boxes of imported pipes and the transporting vehicle were seized. A complaint for forfeiture was filed on September 15, 1987 in an effort to gain more civil information. Subsequently a seventeen count federal criminal indictment has been filed with pending briefing schedules.

February 24, 1988

A Wisconsin importer had \$1,243.00 of imported shipment of miniature novelty pipes on key chains seized. No court date set.

March 2, 1988

Main Street Distributors - Seizure of several hundred thousand dollars of alleged drug paraphernalia. Presently pending under a 25 count federal indictment. This case was preceded by the seizure of other companies including Freedom Imports and Brandies Enterprises.

May 16, 1988

Novelty Imports - Seized 600 novelty pipes made in Hong Kong. The value of goods was cost prohibitive in opposing forfeiture.

June 2, 1988

Uptowns Smoke Shop - Seizure of approximately \$2,000.00 worth of pipes being exported to England. The value of goods was cost prohibitive in opposing forfeiture.

July 25, 1988

El Paso, Texas - Approximately \$3,657.00 worth of native Mexican tobacco pipes were seized. Presently awaiting initial administrative review.

November 3, 1988

Noonies Imports, Louisiana - Total inventory of pipe and tobacco store seized. No further court process reported.

November 28, 1988

Rochester, New York - Four retail stores inventory was seized as predecessor action to the January 19, 1989 seizing of The Mill. All retail actions are pending disposition or administrative review.

January 12, 1989

Seizure at the Canadian border of approximately \$10,000.00 of pipes and snuff accessories which were being returned from a Canadian vendor. The goods had already been shipped to Canada previously without objection.

January 19, 1989

The Mill - U.S. Customs seized \$45,000.00 in wooden pipes from a Corning, NY manufacturer who had been in business for over 15 years.

February 4, 1989

Penguin Feathers, Alexandria, VA - Approximately \$30,000.00 in inventory was seized from six retail stores and one small distribution company. No further action has been taken by the government. It is well to note that the retail store was being operated under a Chapter 11 bankruptcy with full knowledge and cooperation of the federal trustee who was overseeing the operations.

February 13, 1989

A Tallahassee, Florida retailer had all pipes and cigarette rolling papers seized. No further action on the part of the government.

February 24, 1989

Port Charlotte, FL - A retail store's inventory of pipes was seized by U.S. Customs. The value of the goods was cost prohibitive in opposing forfeiture.

March 1, 1989

Detroit, MI An Oak Park distributor had over \$165,000.00 in inventory seized by U.S. Customs. No further activity has been reported on the part of the government.

Nashville, TN - Over \$400,000.00 in inventory was seized after an extensive five day catalogue search and seizure.

March 4, 1989

Philadelphia, PA - A local distributor's inventory valued in excess of \$500,000.00 was seized by U.S. Customs. Customs later seized manufacturing machinery, account records and books. No further activity.

April 19, 1989

The Glass Menagerie - Arrested at her front door, the corporate V.P., the president and six employees were taken to Westchester, NY for booking and bonding. The arrest was superseded (?) with a 9 count Grand Jury indictment on April 28, 1989. The inventory seized was valued in excess of \$50,000.00. Three-fifths of the seized items were subsequently returned in what was apparently an overzealous seizure of goods.

May 2, 1989

New York City - Over \$100,000.00 in plastic, resealable bags along with non-smoking items were seized by U.S. Customs from this New York Distributor. The affidavit upon which the warrants were issued was based on the product line of a predecessor corporation as presented in a thirteen year old catalogue. Discussion as to procedure continues with threats of federal criminal indictment.

May 15, 1989

Six Cleveland/Akron Ohio retail stores had various items of inventory seized by U.S. Customs.

May 17, 1989

A small Rochester, New York distributor had inventory seized with notice immediately filed by U.S. Customs to determine administrative or federal civil forfeiture proceedings under form "AF."

May 19, 1989

Modern Fragrances - This New York City distributor had a complete inventory seizure conducted by U.S. Customs with five individuals arrested. A sixth individual, a customer at the counter, was also arrested even though actions indicated no federal violations.

June 7, 1989

The same Rochester distributor (see May 17) had his retail store's inventory seized by U.S. Customs as violative of 21 U.S.C. Section 857. Request for procedure submitted to the accused.

June 14, 1989

San Francisco, CA - A mail order distributor with a local San Francisco retail store had their inventory seized by U.S. Customs. Although the U.S. Attorneys Office has threatened criminal prosecution, no indictments to date.

July 18, 1989

New Orleans, LA - A New Orleans retailer and a small distributing company had all tobacco inventory seized. No further information.

APPENDIX N
PROPOSED NEW SUBCHAPTER TO CHAPTER 99

SUBCHAPTER VI

ADDITIONAL IMPORT REQUIREMENTS ESTABLISHED PURSUANT TO MAIL ORDER DRUG PARAPHERNALIA LEGISLATION

U.S. Notes

1. This subchapter provides for a certification requirement for the enforcement of drug paraphernalia legislation. The importation or exportation of goods subject to the provisions of this subchapter is, in the absence of such certification, prohibited.

2. The Secretary of the Treasury is authorized and directed, in issuing rules and regulations governing the certification requirement provided in heading 9906.00.00, to promulgate and amend from time to time, as he deems necessary to enforce the Mail Order Drug Paraphernalia Control Act, as amended, a listing of articles suitable for use as drug paraphernalia.

Statistical Note

1. For statistical reporting of goods under heading 9906.00.00:

(a) Report the 8-digit number found in this subchapter in addition to the 10-digit number appearing in chapters 1-97 which would be applicable but for the provisions of this subchapter; and

(b) The quantities reported should be in the units provided in chapters 1-97.

See general statistical note 1(a)(x) regarding the reporting of check digits on entry summary and withdrawal forms.

9906.00.00 Goods described, enumerated or otherwise included in regulations promulgated by the Secretary of the Treasury as being suitable for use as drug paraphernalia, certified at the time of entry by the importer of record or ultimate consignee, or at the time of exportation by the exporter, as not primarily intended designed for use as drug paraphernalia.....[No change to column 1 or column 2 rates of duty]

APPENDIX O
PROPOSED NEW STATISTICAL ANNOTATION LINES FOR IDENTIFYING
POTENTIAL DRUG PARAPHERNALIA

Proposed New Statistical Annotations in **Bold Text**

| | | | |
|------------|---|----------|--|
| 3917.29.00 | Tubes, pipes and hoses, rigid: | | |
| | Of other plastics | | |
| xx | Less than 200 mm in length | No. | |
| xx | Other | X | |
| 3923.21.00 | Sacks and bags (including cones): | | |
| | Of polymers of ethylene | | |
| | Reclosable, with integral extruded closure: | | |
| xx | With no single side exceeding 75 mm in length | thousand | |
| xx | Other | thousand | |
| | Other: | | |
| xx | With no single side exceeding 75 mm in length | thousand | |
| xx | Other | thousand | |
| 3923.30.00 | Carboys, bottles, flasks and similar articles | | |
| xx | Of a capacity not exceeding 50 ml . | thousand | |
| xx | Other | X | |
| 7002.39.00 | [Glass]Tubes: | | |
| | Other | | |
| xx | Of a length not exceeding 200 mm . | No. | |
| xx | Other | kg | |
| 8212.20.00 | Safety razor blades, including razor blade blanks in strips | | |
| xx | Single edge razor blades | No. | |
| xx | Other | No. | |
| 8423.10.00 | Personal weighing machines, including baby scales; | | |
| | household scales | | |
| 10 | Digital electronic type | | |
| | Other: | | |
| xx | Pocket scales | No. | |
| xx | Other | No. | |
| 9614.20 | Pipes and pipe bowls: | | |
| 9614.20.80 | Other | | |
| xx | Of glass | No. | |
| xx | Of plastics | No. | |
| xx | Other | No. | |
| | Other [parts of pipes]: | | |
| 9614.90.80 | Other [than metal] | | |
| xx | Of glass | No. | |
| xx | Other | No. | |

APPENDIX P
CALENDAR OF PUBLIC HEARING

CALENDAR OF PUBLIC HEARING

Those listed below appeared as witnesses at the United States International Trade Commission's hearing:

Subject: Importation of Certain Drug
Paraphernalia into the United States

Inv. No.: 332-277

Date and Time: August 10, 1989 - 9:30 a.m.

Sessions were held in connection with the investigation in the Main Hearing Room 101 of the United States International Trade Commission, 500 E Street, S.W., in Washington.

GOVERNMENT APPEARANCE:

Department of the Treasury, U.S. Customs Service

John Esau, Director, Commercial Fraud Enforcement Center

Francis R. Crowe, Import Specialist

Leonard Cianciotto, Customs Inspector

WITNESS AND ORGANIZATION:

TIME
CONSTRAINTS

Chawt/Weigend Associates
Washington, D.C.
on behalf of

10 Minutes

The American Pipe and Accessory League (APAL)

Richard K. Rowland, Owner, Uptown Pipe and
Tobacco, Nashville, Tennessee

Lorraine Shapiro, Officer, The Mill,
Corning, New York

Robert Vaughn, Attorney at Law,
Nashville, Tennessee

Robert E. Weigend—REPRESENTING
(Government & Public Relations)

- end -